

## THE MAN ON THE FLYING TRAPEZE

REVIEW ESSAY: JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT, 2010

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It now has been seventy-five years since President Franklin Roosevelt's confrontation with the Supreme Court of the United States reached its crisis. Throughout his first term, the President had looked on with increasing frustration as the Court invalidated one after another of the central elements of his New Deal. The National Industrial Recovery Act ("NIRA"), the Agricultural Adjustment Act ("AAA"), farm debt relief legislation, railway pension legislation, and key components of the Administration's energy policy had been declared unconstitutional by aging justices whom Roosevelt regarded as reactionary and out of touch. To Roosevelt and several of his advisors, the prospects that such important Second New Deal measures as the National Labor Relations Act ("NLRA") and the Social Security Act ("SSA") could successfully run this judicial gauntlet seemed dim. Yet during the first four years of his presidency, Roosevelt was stymied by the lack of any opportunities to make his own appointments to the Court and thereby to influence the course of American constitutional law.

In 1936, however, Roosevelt won a resounding landslide reelection victory, earning the electoral votes of every state other than Maine and Vermont. Emboldened by this remarkable showing of public support, on February 5, 1937, the President urged Congress to enact legislation that would have authorized him to appoint to the Court a new justice for every sitting justice who had not retired within six months of reaching his seventieth birthday. Because there were at the time six sitting justices answering that description, the bill would have enabled Roosevelt to appoint half a dozen new justices to the

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Court immediately, thereby enlarging its membership to fifteen. The bill would meet with stiff resistance in Congress, and ultimately it would not pass. But that spring the Court did hand down decisions upholding a state minimum wage law for women, the NLRA, and the SSA.

The story of the Court-packing fight and the associated “switch-in-time that saved the Nine” has been told many times, but it continues to fascinate lawyers, historians, and political scientists, and is retold each year in countless high school, college, and law school courses. Jeff Shesol, a former speechwriter for President Clinton who earned a Master’s degree in history at Oxford, where he studied as a Rhodes Scholar, tenders a substantial contribution to that body of literature with his recent book, *Supreme Power*. Though the book is written so as to be accessible to a general audience, and has been marketed accordingly, Mr. Shesol does engage with much of the academic literature on the subject, and seeks to position himself within that scholarly corpus.

Any history of the Court-packing controversy sets out to answer three principal questions. The first is how best to tell what I will call the political story: how to understand the political trajectory of the Plan from its initial conceptualization to its ultimate failure. The second is how best to tell what I will call the legal story: how to understand the constitutional landscape that confronted New Deal reformers, how they negotiated it, and how and in what respects the Supreme Court transformed that body of constitutional law during the Great Depression. The third is how to specify the relationship between these two stories. What effect, if any, did the events recounted in the political story have on the legal story?<sup>1</sup> Each of the three Parts of this Article offers an evaluation of Mr. Shesol’s efforts to address each of these questions. Part I discusses Mr. Shesol’s treatment of the political story; Part II takes up his account of the legal story; and Part III explores his analysis of the relationship between the two. I conclude that while Mr. Shesol does a very nice job with the first question, his efforts to answer the second and the third are not nearly so successful.

## I. THE POLITICAL STORY

Mr. Shesol’s presentation of the political story is the strongest part of the book. His research is industrious and extensive; his prose

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<sup>1</sup> Of course, the converse also is important. See *infra* pp.193–98.

composition is exceptionally skillful; and he has an admirable talent for spinning a yarn and moving a story along. In the course of relating that story, he succeeds in identifying a number of its features that, taken together, cast doubt on the prospects for the Plan's ultimate enactment, even in the very early days of the struggle. "[F]rom its very first days," Mr. Shesol reports, the fight "did not unfold as Roosevelt had expected. The actors in this national drama stubbornly refused to get on script." (p. 307).

First, Mr. Shesol underscores the lack of public backing for Roosevelt's proposal. It was "far from clear," he reports, that "the American people supported Roosevelt on the issue of the Supreme Court." (p. 245). Numerous state legislatures passed resolutions condemning the bill. (p. 351). A contemporary Gallup poll showed that

[t]hough nearly 60 percent of the public wanted the Court to take a 'more liberal' view of the New Deal, this did not equal a desire to curb the Court: only 41 percent favored limits on judicial review . . . . And when Americans were asked to name the nation's most pressing issue, neither the Court nor the Constitution even made the list.<sup>2</sup>

(p. 246). Mr. Shesol regards this as "the cost of avoiding the issue in 1936." (p. 246). Roosevelt had refrained from making the Court an issue in the campaign in order to deny "ammunition to his opponents," but at the same time had "also denied himself a valuable chance to educate the public—to prepare it for what he might do and enlist it in what many believed would be a difficult fight." (p. 246)

The print media quickly came out against the bill en masse. As Mr. Shesol relates:

A survey taken at the time showed that more than two thirds of the newspapers that had backed Roosevelt's re-election in 1936 now opposed him on the Court bill, and more than half of these did so "vigorously." More ominously, while pro-administration papers supporting the plan had a

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<sup>2</sup> Curiously, however, in the book's concluding chapter Mr. Shesol insists that there was a "wave of popular discontentment with the Supreme Court" that "crested in 1936, with an outpouring of elite commentary, popular songs, pamphlets, and proposals in Congress to curb the Court"; that "[b]y the time of Roosevelt's second inauguration, there was a growing national consensus that something had to be done about the Court—that either Congress or, more likely, the president would have to act to end the impasse"; and that only "[a]n embattled minority disputed this." JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 508–09 (2010). This would not appear to be supported by the polls referenced in the text, nor by many other polls taken by Gallup and Elmo Roper during this period. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 67–74 (2002) [hereinafter Cushman, *Mr. Dooley and Mr. Gallup*]. As will become clear in Parts II and III, such inconsistencies plague other portions of Mr. Shesol's account as well.

combined circulation of 3.1 million, pro-administration papers opposing it reached an audience that was four times larger.

(p. 301). The “prevailing opinion” on the nation’s editorial pages was that “Roosevelt had hidden his plans” during the 1936 election, that he had “‘been disingenuous with the people,’” and that he had “‘double-crossed the country.’” (pp. 301–02). Somewhere between 60% and 80% of newspapers had opposed FDR’s re-election in 1936, but “they were now nearly unanimous in condemning his Court plan. The White House, in its ongoing survey of press reactions, did not even bother to track arguments in favor of the plan, because they were so few in number.” (p. 305).

Mr. Shesol explains that people were not persuaded by Roosevelt’s initial attempt to explain the bill as necessary to enable the Court to hear more cases than the aging justices could presently handle. (p. 302). They were put off by the plan’s “‘cleverness’” and its “whiff of ‘political trickery.’” They saw it as an attempt to make the Court a “‘rubber stamp,’” and denounced it as a “con” and a “putsch,” a “dishonest” power grab, a “‘bloodless coup d’etat,’” an effort to create a “dictatorship” like those of Hitler, Mussolini, and Stalin. It didn’t help that the Plan was actually cheered by Il Duce and the Nazi press. (pp. 302–03).

Congressional offices quickly found themselves overwhelmed, not only by the volume of correspondence (Henry Ashurst received a thousand telegrams in a single day) but by the intensity of public opposition to the plan. Only the merest handful of telegrams urged Congress to pass the bill. Meanwhile, at the White House, the wires were distressingly quiet. . . . When the newspapers hit the stands on the morning of February 6, forecasting the bill’s fast track to passage, the prediction already felt out of date. Clearly, now, there was going to be a fight. Not a feeble, pro forma protest as the bill became law—as had often been the case since 1933—but a genuine fight . . . .

(pp. 305–06).

It was also “far from clear,” in Mr. Shesol’s view, that Congress would support Roosevelt’s proposal. The President “had made no attempt to assess congressional attitudes toward any specific approach, or even toward court reform generally.” (pp. 245–46). In fact, he had kept congressional leaders in the dark about his plan, and he was “a bit startled” by the hostile reaction that the Plan’s announcement provoked in many of them. He had “failed to anticipate the rage, hurt, humiliation, and betrayal that his Court-packing plan would unleash among his faithful—if often resentful—lieutenants,” many of whom had been naively proposing “their own pet solutions to the Court problem” in various public fora while Roosevelt was hatching his Plan behind their backs. (pp. 307–08). “By 1937, FDR and the

Democratic leadership were like an old, unhappily married couple, nursing innumerable grievances but unwilling, or unable, to separate.” (p. 309). Within a week many of these disaffected Senate Democrats had joined with every Senate Republican to form a body of opposition to the Plan under the leadership of liberal Montana Democrat Burton K. Wheeler. (pp. 323–24).

The bill was introduced in the Senate, Mr. Shesol explains, principally because Hatton Sumners, the Chairman of the House Judiciary Committee,

... had persuaded a majority of the Judiciary Committee to join him in opposing the Court bill. Forecasts of a wide margin of support in the House would mean nothing if Sumners were able to block the bill in Committee. The White House, in that event, would have two alternatives: abandon the bill or dislodge it by force, suspending the rules and forcing its way to the floor. Speaker Bankhead and Sam Rayburn, the majority leader, pleaded with the president not to divide the House in this way; the acrimony, they said, would be so extreme that it would doom Court reform and a whole lot else.

(pp. 344–45). Shortly after the plan was announced, Sumners “called a press conference and denounced the Court-packing plan as ‘infamous.’ Steve Early reported to Roosevelt that Sumners had been ‘savagely in attack’ and gave the proposal ‘hell, specifically and generally.’” (pp. 343–44). James Roosevelt responded that Sumners “‘needs to be straightened out,’” and on the morning of February 10, “FDR met with Sumners in an attempt to do just that. ‘Didn’t make an awful lot of headway,’ James observed afterward.” (p. 344). Before James met with Sumners, White House advisors were divided over whether to “steamroll” the House Judiciary Committee Chairman—the course favored by Keenan and Corcoran—or to “forgo standard procedure” and instead introduce the bill in the Senate rather than the House—the course preferred by Charlie West and House leaders. James Roosevelt emerged from the meeting “inclined to avoid Sumners altogether.” (p. 345).

Meanwhile, Sumners attempted “to weaken, modify, or possibly supplant” the bill by pressing for enactment of his own bill permitting justices to retire at full pay. (p. 342). The justices had been made anxious by the Economy Bill of 1932, which had slashed Oliver Wendell Holmes’ pension in half; but for this concern, as Mr. Shesol points out, “both Van Devanter and Sutherland would almost certainly have retired at the start of FDR’s presidency—and spared the nation the struggle that followed between its branches of government.” (p. 342). Sumners had introduced such a judicial retirement bill in 1935 but the House perversely had rejected it. He reintroduced the bill in January of 1937, “seeing it as an incentive for justices to retire

and thereby end the crisis.” (p. 343). Within days of Roosevelt’s announcement of his plan, members of Congress would seize on Sumners’ retirement bill “as an alternative to Court-packing and a way out of the whole mess.” (p. 343). By February 10 the retirement bill had passed the House by a vote of 315-75, and the Justices were immediately notified of the House passage of the bill even as they were hearing argument in the Wagner Act cases. Sumners immediately went to James Roosevelt and proposed that the retirement bill be rushed to passage through the Senate, and that FDR then give him six weeks to persuade at least two justices—presumably Van Devanter and Sutherland—to retire. (pp. 343-44).

But throughout the Court fight, as Mr. Shesol so ably documents, Roosevelt stubbornly refused to compromise with the opposition. In mid-February, as FDR was approached with proposals for compromise, many observers were predicting that the bill would pass. (p. 329). The President remained optimistic that support for the plan would grow as people came to understand it better. Congressmen were now receiving more mail in support of the plan; internal polling in the House revealed a solid majority in favor; the Senate was equally divided, and of the third of Senators yet to commit one way or the other, nearly all were Democrats. “Little wonder, then, that when congressional leaders approached the president about seeking a compromise, they found him unyielding.” (p. 331).

But Mr. Shesol insists that these early predictions that the bill would pass were “all a bit premature.” Polls of the public showed that the opposition had “a slight advantage.” (p. 330). By February 15, Roosevelt’s Treasury Secretary Henry Morgenthau gave the bill at best a 50-50 chance of passage.<sup>3</sup> Accordingly, many in Congress were engaged in a “frantic search” for some middle ground. (p. 345). “Nearly every faction—the bill’s reluctant supporters, its nervous opponents, and those too afraid to take a stand either way—was eager to avert an all-out fight.” (p. 345). Perhaps the Sumners bill would solve the problem; if not, perhaps some form of constitutional amendment might do the trick. But FDR “showed no interest in making concessions to Sumners, or anyone else, for that matter.” (p. 345). James Roosevelt doubted that Sumners could deliver the promised retirements, and thought it better political strategy in any event “to have the President put through his own plan.” And FDR was “un-

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<sup>3</sup> Henry S. Morgenthau, Jr., *Diaries* (microfilm), The Franklin D. Roosevelt Library, Hyde Park, New York, Book 55, p. 95, quoted in LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 47 (1967).

impressed by any of the alternatives being discussed in Congress.” (p. 345). He “had already considered—and rejected—all these possibilities. . . . Having spent two years examining almost every conceivable amendment to the Constitution, Roosevelt was well-armed (and inclined) to shoot down each proposal.” (pp. 345–46).<sup>4</sup>

For example, Mr. Shesol reports that Roosevelt’s “friend Charles C. Burlingham, the reform-minded grand old man of the New York bar,” had been “outspoken” in favor of a constitutional amendment. (p. 347). “On February 19, dismayed by the Court plan, Burlingham wrote and urged the president to change course.” “Dear Franklin,” he wrote,

I haven’t bothered you for quite a spell.

You can’t feel more strongly than I about the majority opinions, especially AAA, Minimum Wage and Roberts J.’s silly talk about railroad pensions. *BUT* I don’t like your method. I suppose you are in a hurry and this is *your* Congress. It’s all very well to refer to previous changes in the size of the Court . . . the appointment of Bradley and Strong by President Grant . . . [but] the episode . . . has always been regarded as more or less scandalous and discreditable to Grant.

Let me give you a plan that would work:

1. Pass the retirement bill so that no justice can be treated as scurvily as Holmes was.

2. Pass a joint resolution . . . for an Amendment making retirement at 75 compulsory. This, however, should not apply to the present sitting justices. I am confident that if such a joint resolution is passed, all the justices over 75—Brandeis, Hughes, Van Devanter and McReynolds—

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<sup>4</sup> FDR also faced resistance from several of the most liberal members of his party, some of whom thought that his plan did not get at the root of the problem. “When Roosevelt launched his Court plan, he had expected liberals to see it as moderate, practical, achievable—and preferable, therefore, to amending the Constitution. Many did view it that way. But two weeks into the fight, the president could see that the plan left some liberals cold, whether because they were concerned about the possible threat it posed to the system of checks and balances, or because they believed that the real problem was not this particular group of justices but judicial power per se. Hence the continuing appeal, on the left, of a constitutional amendment. . . . [S]ome on the left—inclined, as a general matter, toward moral or political absolutes—insisted on “an amendment or nothing.” In their view the time had come, after decades of judicial arrogance, for a storming of the citadel. To “the more ardent New Dealers,” as the *New Republic* explained, Roosevelt’s plan was “deeply disappointing.” They “had dug in their heels for a great constitutional tug-of-war”—a “glorious” struggle to subdue the Court permanently by limiting or perhaps eliminating judicial review. They had no patience for an approach that they saw as a mere expedient and, worse, as a substitute for real reform. “They are opposing the President’s plan,” complained Robert H. Jackson, “because they want to get an amendment that will end judicial power.” Though they constituted no more than a small minority, even among liberals, their numbers were great enough—and their volume high enough—to provide cover for conservatives whose real agenda was to defeat any kind of judicial reform.” SHESOL, *supra* note 2, at 346.

would retire without waiting for the adoption of the Amendment itself. . . . It would not be decent for them to hang on after Congress had adopted such a resolution.

(p. 347). But Roosevelt resisted the Amendment proposal on the ground that it would be difficult to get agreement on the language, it would be next to impossible to get the requisite two-thirds majorities in both houses of Congress, and it would be equally challenging to secure ratification by the requisite number of states—a point he made both to Burlingham and to Senators pressing for an amendment strategy. (p. 348). The bottom line was that there would be “no deals, no compromises.” (p. 345).

Instead, Mr. Shesol informs us, FDR hoped to use the levers of patronage to sway wavering or opposing Senators. (pp. 353–54). But this strategy proved unsuccessful. For example, Republican Senator Gerald Nye of North Dakota gave a speech condemning the plan even after FDR called him to the White House and made veiled threats to withhold federal funds. (p. 354). There were several reasons for the ineffectiveness of this strategy. First, many Senators harbored hopes of becoming judges eventually, and were therefore protective of the judiciary.

Few wished to serve on a neutered court; and few doubted that this would be the effect of the Court bill. For this and other reasons—among them, Roosevelt’s wish for a balanced budget, which would necessarily curtail the number of government projects—the lure of patronage and federal largess was neither as strong nor as enticing as it once had been. “The [Supreme Court] issue was too big,” noted Alsop and Catledge; “the senators were too much excited by it to be affected by the petty political bullying and legal bribery which are ordinarily so useful to all administrations.”

And Roosevelt was not an especially good bully. Though willing to play the patronage game, there were limits to how far he would go. Veiled threats were one thing; following through another. When Tom Corcoran urged him to “play rough” with Henry Ashurst—the Judiciary Committee chairman whose support for the bill, despite his public statements, was in doubt—Roosevelt refused. Like Nye’s North Dakota, Ashurst’s home state of Arizona was at that time essentially a piece of federal property; its economy was highly dependent on government subsidies. Tom Corcoran advised Roosevelt to shut off the spigots. “I never quite understood how the President failed . . . to use his power in this instance,” Corcoran said later. But Roosevelt had little taste for this brand of politics. He knew that when the Court fight was over, he would need to rely on Ashurst again. “I don’t devour them in the end,” Roosevelt told a close Senate ally.

(pp. 354–55).

Meanwhile, as Mr. Shesol makes clear, the Senate opposition was not playing beanbag.



Every day, in a hidden corner of the Capitol, the opposition forces met to compare notes, make adjustments in strategy, and get their latest orders from Wheeler. Roosevelt might have the powers of the presidency, but Wheeler and his men had experience, ability, and the significant advantage of fighting a battle on their own terrain. With ruthless, remorseless efficiency, they waged a campaign of what Wheeler called “intensive lobbying.” What this meant was that each member of the “steering committee” was assigned to the uncommitted senators he knew best and then stalked them like quarry—in the Capitol, the cloakroom, the Senate Office Building, at cocktail parties, at stag dinners. Committee members made the usual arguments about the Court and the Constitution but also—perhaps with greater force—stoked their colleagues’ fears of dominance by an all-powerful president and of the next wave of New Deal legislation, more radical than the last, and unchecked by the Court.

(p. 355).

It was not clear, by contrast, that the Senate leaders supporting the plan really had their hearts in the fight. As Mr. Shesol reports, “the best intelligence” that Wheeler and his colleagues obtained “came from the other side. Leslie Biffle, an assistant to Joe Robinson, called Wheeler every night to share his knowledge of which senator was leaning which way.” Wheeler “‘never knew for certain’” why Biffle would have done this, but speculated that Robinson “‘himself had been behind it—perhaps in an attempt to strengthen the opposition and force Roosevelt to compromise. ‘Robinson,’ said Wheeler, ‘had no more stomach for the Court-packing fight than we did.’” (p. 356). But as Mr. Shesol points out, “Wheeler, of course, had plenty of stomach for the fight.” (p. 356).

Mr. Shesol observes that supporters were also burdened by the weakness of the case for the plan set out in Roosevelt’s initial message. (p. 367). In a February 22 message to the President, Robert Jackson warned that public support for the proposal was declining in part due to the manner in which it had been framed. He urged Roosevelt to make the argument in favor of the bill in simpler and more candid terms. Roosevelt agreed with this critique in a meeting a few days later, but he had taken “three weeks to admit this mistake—three crucial, costly weeks—ample time for his credibility to be battered, enemies emboldened, and goals put at risk.” (p. 368). By early March, little progress had been made. As “Democrats slashed at Democrats” in this “family quarrel,” there was “stalemate, reflecting the frustration and futility of ‘trench warfare.’” (p. 371). A March 1 Gallup poll showed sentiment against the plan running 48-41. “But mail to members of Congress seemed to point in the other direction. Neither side, in short, had much to show for a month’s worth of making speeches.” (pp. 371-72).

A few days after the President had unveiled his proposal, Raymond Clapper had “typed a note to himself on Scripps-Howard letterhead: ‘If Rvt does go to country on this, will know he really worried.’” (p. 307) Now, a month into the fight, Roosevelt took his revised case to the public with renewed vigor. At a March 4 Democratic Victory Dinner, Roosevelt criticized the Court for invalidating numerous New Deal measures and indulging its “‘personal economic predilections’ . . . that we live in a nation where there is no legal power anywhere to deal with its most difficult practical problems—a No Man’s Land of final futility.” (p. 375). The President concluded by calling on his feuding fellow Democrats to take the steps necessary to “‘make democracy succeed . . . now!’” (p. 376). Mr. Shesol reports that the Plan’s supporters were “overjoyed” by this “fighting speech,” but most editorial reaction “was negative, and harshly so.” And Democratic opponents of the plan were alienated by FDR’s insistence on party loyalty and his implication that they were “essentially one and the same with the Republicans, Liberty Leaguers, economic royalists, and ‘defeatist lawyers’ who had aligned against him in 1936. Outraged, these Democrats resolved to work even harder to expose the ‘innate wickedness’ of packing the Court. If the president kept fighting for his plan, they said, they might well bolt the party.” (pp. 376–77).

The President followed this performance with a Fireside Chat broadcast five days later, in which he forcefully argued that the Court had been “‘acting not as a judicial body, but as a policy-making body. . . —a super-legislature.’” (p. 380). The present Court was suffering from “hardening of the judicial arteries.” It was necessary, he insisted, to “‘take action to save the Constitution from the Court and the Court from itself.’” (p. 380). He rejected proposals for a constitutional amendment giving Congress greater regulatory power, Mr. Shesol notes, because of “the difficulties of drafting an amendment, building consensus for it, ratifying it, and getting it to survive the justices’ scrutiny.” (pp. 381–82). Enactment of the Court-packing bill was the only viable solution.

In the immediate wake of these two speeches, Mr. Shesol maintains,

[S]upport for the plan had begun to climb—only marginally, but for the White House, the trend was encouraging. Senators’ mail, too, showed the shift. . . .

The Senate opposition was getting nervous. . . . Hiram Johnson wrote his son that “they are picking off occasional men from the opposition,” enough, he believed, to pass the bill by a comfortable margin.

(p. 386). “Momentum was building; events were conspiring to help pass the bill. Even a growing domestic crisis—the gathering storm of labor unrest” manifested in a wave of sit-down strikes at factories around the country—“appeared to strengthen the case for Court-packing.” (p. 387). “Roosevelt’s opponents, despite steadily lengthening odds, kept fighting.” (p. 388). But the Administration was increasingly optimistic, believing that the tide had turned and that the opposition was breaking down and losing ground. (p. 390).<sup>5</sup>

This optimism led the Administration to conclude its testimony in the hearings on the bill being held before the Senate Judiciary Committee on March 20, after only two weeks. Mr. Shesol relates that “Corcoran and Keenan had come to a strongly held view that opposition senators were, in effect, filibustering—asking long-winded, elliptical questions, repeating themselves and one another (even more than usual), on and on, day after day.” (p. 391). The Administration therefore rejected the opposition’s offer to allow them to put on more witnesses, viewing it as an effort to trick the bill’s proponents into assisting the opposition in drawing out the hearings. But Judiciary Committee chairman Henry Ashurst, who was privately opposed to the bill, was perfectly content to allow the opposition to put on as many witnesses as it cared to (pp. 383–84), and this enabled opposition forces to dominate the headlines for the following month.<sup>6</sup>

The first witness to testify for the opposition was its leader, Senator Burton Wheeler. Over the preceding weekend, Wheeler had induced Chief Justice Hughes to prepare a letter, approved by Justices Van Devanter and Brandeis, which rebutted point by point each of the arguments Roosevelt had made in support of the bill in his initial message.<sup>7</sup> After some preliminary niceties, as Mr. Shesol recounts, Wheeler dramatically removed the document from his suit pocket and began to read from it. (pp. 393–97). “There is no congestion of cases upon our calendar,” wrote Hughes. “This gratifying condition has obtained for several years.”<sup>8</sup> To Roosevelt’s claim that the Court

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5 *Contra* MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 356 (2002) (“There was little indication that the two March addresses changed anything. Robert Jackson later claimed that none of the speeches during the court fight did much to convince people to change their minds about the proposal. . . . Instead of making decisive gains, the administration was losing the battle for public opinion and majorities in Congress.”).

6 JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS*, at 124 (1938).

7 ALSOP & CATLEDGE, *supra* note 6, at 124–26; BAKER, *supra* note 3, at 153–56.

8 *Reorganization of the Federal Judiciary: Hearings before the S. Comm. on the Judiciary on S. 1392*, 75th Cong. 488 (1937) (statement of Sen. Burton K. Wheeler).

had been denying certiorari in too many cases, Hughes replied that the Court had instead been too liberal in its grants. Most of the petitions that the Court had denied, Hughes maintained, were so utterly without merit that they never should have been presented for review. The addition of new justices, Hughes concluded,

[A]part from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.

To some, this critique of Roosevelt's attack on the Court's efficiency was not unfamiliar. Mr. Shesol reminds us that Hughes had given much of the information his letter contained to *Washington Post* columnist Franklyn Waltman in an off-the-record interview on February 5, the day that Roosevelt had unveiled the Plan. (p. 394). "Keeping his source confidential, Waltman turned this research into a devastating series of front-page articles debunking the central claim of FDR's message." (pp. 395). Justice Stone also "had sent factual material to journalists to help them puncture the notion that the justices were overburdened." (p. 399). Yet editorial comment in the next morning's newspapers saw the Hughes letter as dealing the Administration a stunning, perhaps devastating blow. (p. 397). "When Wheeler finally rose from the witness chair, committee members who supported the Court plan furiously scribbled rebuttals, while opponents, for the first time in two weeks of hearings, smiled beatifically." (p. 394). Vice-President Garner reportedly telephoned FDR at Warm Springs, Georgia, and told him, "[w]e're licked."<sup>10</sup>

Hughes himself later wrote that his letter "appears to have had a devastating effect." (p. 400). Others have shared this view. Brandeis biographer Melvin Urofsky maintains that "[t]he reading of [Hughes's] letter marked the end of the court-packing bill . . ."<sup>11</sup> And contemporary observers later expressed their concurrence with Hughes's assessment. As Mr. Shesol reports: "Rex Tugwell believed that the letter 'so conclusively refuted the arguments Franklin had made in his message . . . that it ended any chance for passage the bill might have had.'" (p. 400). Similarly, "Robert Jackson judged that

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<sup>9</sup> *Id.* at 488–91 (1937) (statement of Sen. Burton K. Wheeler).

<sup>10</sup> BAKER, *supra* note 3, at 159–60; BURTON K. WHEELER & PAUL F. HEALY, *YANKEE FROM THE WEST* 333 (1962).

<sup>11</sup> MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 166 (Oscar Handlin ed., 1981).

the letter ‘pretty much turned the tide.’” (p. 400). But Mr. Shesol is inclined to discount those appraisals as coming “long after the fact.” (p. 400). In what may have been some brave talk, Jackson wrote that even after Wheeler’s testimony there was “no question that the President’s plan will go through’—as well he might,” adds Mr. Shesol.

As Ickes had seen, the Hughes letter had laid waste to an abandoned fortress. It left untouched and perhaps even reinforced the argument Roosevelt was now making with increasing force: that the Supreme Court was a political body, and willing to cross the bounds of precedent and propriety to oppose him at any cost. That point, Hughes had made persuasively.

(p. 401).<sup>12</sup>

If Wheeler’s March 22 testimony dampened the Plan’s prospects, the effect of the Court’s March 29 decision in *West Coast Hotel v. Parrish*<sup>13</sup> was arguably even more substantial. “[I]t was obvious,” wrote Leonard Baker, “that the decision upholding the minimum wage would make it more difficult to push FDR’s Court plan through the Senate. . . . Particularly after the Roberts switch, there was no nationwide desire for altering the Court, and, as a result, no great desire in Congress either.”<sup>14</sup> “By April,” concluded James MacGregor Burns, “the chances for the court plan were almost nil.”<sup>15</sup> Yet in its immediate aftermath, some of the participants remained unsure which way the *Parrish* decision cut. As Mr. Shesol reports,

[B]oth sides claimed vindication: to Robinson, the *Parrish* decision showed the importance of having the right men—and more of them—on the bench; to Wheeler, it revealed the Court’s capacity to correct itself. . . . *Parrish* had scrambled the pieces. In the days after the Court’s reversal, no one could tell which side stood to gain politically. The deci-

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12 *Contra* MCKENNA, *supra* note 5, at 376 (“The initial indirection that Hughes exposed may have been tacitly abandoned in the presidential addresses of March 4 and 9, but in the public mind it was still fresh. The effect of the letter was ‘to show up for good and all as utterly hollow the smooth propositions with which the President had offered his bill. The opposition’s gain in the debate was tremendous.’”). As Harold Ickes put it, FDR had “abandoned this ground some time ago, but shrewdly Hughes chose to fight his skirmish where we were the weakest.” *Id.* at 377. The fortress had not been abandoned by Attorney General Homer Cummings, who in his testimony before the Senate Judiciary Committee “relied in the main on his original rationale for the plan as a managerial solution to the Court’s inefficiency. . . . [T]he first impression given the public of [FDR’s] reasons for the plan—the overburdened Court and its congested docket—was hard to erase, particularly when that impression was reinforced by Cummings’ testimony before the Judiciary Committee.” ROBERT SHOGAN, *BACKLASH: THE KILLING OF THE NEW DEAL* 170, 174 (2006).

13 300 U.S. 379 (1937).

14 BAKER, *supra* note 3, at 179, 191.

15 JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 303 (1956).

sion's impact on the Court bill—and vice versa—was a matter of intense debate.

(pp. 409–10).

Cummings took the view that the Court had yielded to the pressure of events, which vindicated FDR's plan.

[T]he *Chicago Daily Tribune* proclaimed that the *Parrish* ruling "Wrecks Argument for Packing Supreme Court." Both contentions were plausible. It was certainly possible, as some claimed, that in the span of a single week, the Hughes letter and the Hughes opinion had blunted FDR's momentum. Unless they fueled it by reinforcing the argument that the Court was a political body. As William Borah wrote to an associate on March 30, "the situation here is difficult to diagnose. . . . We do not know 'where we are at.'"

(p. 410).

It would not take long, however, to see which way the wind was blowing. Shortly after the delivery of the *Parrish* opinion, the polls began to reveal a precipitous decline in the Plan's already troubled popular reception.<sup>16</sup> And as for the situation in the Senate, there was a telling event at the Gridiron Dinner held on April 10, two days before the announcement of the Court's decisions upholding the National Labor Relations Act. "Late in the evening, just before the salad course," Mr. Shesol reports,

[A] chorus of journalists assembled on stage. They pointed in unison to Chief Justice Hughes, who sat, smiling broadly, at the high table. Then, in unison, they sang "Happy Birthday to You." The next day, Hughes would turn seventy-five. When the song was through, the Gridiron Dinner guests—among them Wheeler, Connally, Ashurst, and Sumners—rose in a standing ovation that lasted a very long time. Long enough to make its point clear.

(p. 428).

Meanwhile, at the hearings, the leisurely Chairman Ashurst continued to preside

. . . with relish over a variety performance of labor leaders and farm union officials,<sup>17</sup> law school deans, columnists, historians, stockbrokers,

<sup>16</sup> See Cushman, *Mr. Dooley and Mr. Gallup*, *supra* note 2, at 67–70.

<sup>17</sup> At page 329, Mr. Shesol argues that labor and farm groups lined up solidly behind the plan, but this is inconsistent with the reports of other scholars, who have noted that not only the Grange, but also the Farmers' Union, the National Cooperative Council, and the Farm Bureau all came out against the Plan. SHESOL, *supra* note 2, at 329; see also ALSOP & CATLEDGE, *supra* note 6, at 59, 115–17, 164–76, 181; BAKER, *supra* note 3, at 86–88; MCKENNA, *supra* note 5, at 381–83; 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 753 (1951) [hereinafter PUSEY, CHARLES EVANS HUGHES]. Indeed, Mr. Shesol later notes that Roosevelt's acquiescence in the sit-down strikes "earned him little tangible support for his plan. Unions generally—not just the CIO—were making all the right noises and endorsing the bill, but their actions, to date, had been paltry." SHESOL, *supra* note 2, at 424.

presidents of patriotic societies, theologians, bishops, and rabbis—united only by their abhorrence of the Court-packing plan. Roosevelt’s decision to cede the stage to this motley collection of antagonists had proven a mistake. Opposition senators turned out to be shrewd in their selection and skillful in their coaching of witnesses—who provided, week after week, an earnest, instructive, and often entertaining filibuster against the president’s plan. Ashurst, despite his pledge to support the bill, showed no inclination to hurry things along.

(p. 417).

Corcoran—who more than anyone had pressed for an early end to the administration’s testimony—still talked big about “breaking” the opposition, but as the weeks passed, the hearings, along with his other responsibilities, took a toll on his confidence and his health. His weight shot up twenty-five pounds. He grew exasperated with Ashurst. The chairman, in his view, “was deliberately extending the hearings until such time as the public could be whipped up to think of Roosevelt as a dictator.” Or, more likely, until an event of some kind—a Court decision, a retirement—tipped the balance in favor of the opposition. Three times, Roosevelt’s supporters on the committee tried—and failed—to shut down the hearings. After the first attempt, at the end of March, opponents responded by scheduling fifty more witnesses.

(p. 421). The President, however, “appeared untroubled. He wrote Frankfurter on April 5 that . . . ‘[i]t is quite clear that the utter confusion of our opponents among themselves means success for us even though it may be deferred until June or July.’” (p. 421).

This “overconfidence” (p. 417) left Roosevelt unwilling to compromise even after the Court had upheld the NLRA on April 12. Opposition leaders now pronounced the Court bill “dead”—there was now, they argued, no reason for the president to seek additional justices. In Mr. Shesol’s view,

The moment was ripe for a compromise on the Court plan. Supporters did not know if they had the votes to pass the bill, opponents were unsure whether they had the numbers to kill it,<sup>18</sup> and both sides were exhausted by their two-month-long siege. Both were also anxious about the political consequences (of either crossing the president or standing by him) and eager to move on to other, pressing business, of which there was no shortage. The Court fight had created a terrible bottleneck of urgently needed legislation. . . . The 75th Congress was farther behind in the appropriations process than any Congress in a generation: only one of eleven spending bills had been passed.

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18 *But see* MCKENNA, *supra* note 5, at 430 (“The Wagner Act rulings . . . dealt a crushing blow to the court bill.”). At about that time, “an informal poll of senators disclosed that a majority would vote against the court bill.” *Id.* at 420. “After the Wagner Act decisions, even FDR’s close White House aides began losing confidence in the bill’s chances for passage and counseled retreat.” *Id.* at 441.

(p. 435). But such “leaders of the revolt” as Wheeler, Edward Burke, and William Borah “fiercely regarded adding even ‘two [justices] as bad in principle as six’”; and though Senate Majority Leader Joe Robinson and others urged FDR to seize the opportunity for compromise, the President refused to do so. (pp. 435–36).

At this point, Mr. Shesol relates, “Roosevelt could see that in the Senate, the margin for the plan was narrow. He had begun to worry that Robinson would agree to a compromise without consulting him.” (p. 439). Support continued to deteriorate throughout the month of April.<sup>19</sup> By April 23, when the Judiciary Committee concluded its hearings, it was clear that a majority of its members opposed the bill and was preparing to write a critical report.<sup>20</sup> Roosevelt summoned Ashurst to the White House to try to persuade him to report the bill “without recommendation.” Ashurst and Robinson looked into the matter, and determined that it was “not feasible.”<sup>21</sup> By the beginning of May, the opposition’s steering committee had concluded that they commanded an absolute majority in the Senate.<sup>22</sup> And the most recent Gallup poll “showed declining support for the plan.” (p. 441).

But while the President responded by adjourning to the Gulf of Mexico for a fishing vacation, Mr. Shesol places Tommy Corcoran “back in Washington, having a case of nerves. Since February, he had been swaggering around town, boasting that ‘the thing is in the bag.’ In reality, the steady drone of the hearings and the drumbeat of gloom from Senate leaders had sapped his confidence.” (pp. 441–42).

[Corcoran] huddled with Ben Cohen and Robert Jackson to devise a new strategy. The three men agreed that Roosevelt should drop the bill for now and take it up next session, by which time he could line up sufficient support. To save face, the White House could say that the Court’s switch had deferred—but not eliminated—the need for “new blood.” Joseph Keenan and Charlie West, the two members of the strategy board in closest contact with congressional leaders, both agreed that this was best.

(p. 442).

On May 3, before the *Social Security Cases*<sup>23</sup> even had been argued,

19 ALSOP & CATLEDGE, *supra* note 6, at 163; William E. Leuchtenburg, *Franklin D. Roosevelt’s Supreme Court ‘Packing’ Plan*, in WILMON H. DROZE, GEORGE WOLFSKILL & WILLIAM E. LEUCHTENBURG, *ESSAYS ON THE NEW DEAL* 97 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

20 BAKER, *supra* note 3, at 193; *Court Bill Faces a Committee Veto, Ashurst Concedes*, N.Y. TIMES, Apr. 24, 1937, at 1.

21 HENRY FOUNTAIN ASHURST, *A MANY-COLORED TOGA: THE DIARY OF HENRY FOUNTAIN ASHURST* 374 (George Sparks ed., 1962).

22 ALSOP & CATLEDGE, *supra* note 6, at 201.

23 *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).



James Roosevelt found himself cornered by Joe Robinson, Alben Barkley, and Pat Harrison in a Capitol hideaway office. The senators told him in no uncertain terms that the president had lost the fight for six additional justices, and that, by refusing to face the truth, he was tearing apart the Democratic Party. “Mr. Roosevelt,” said Robinson, “you tell your poppa that he’d better leave this whole thing to us to get what we can out of it. We’ll do our best for him.”

(p. 442). But even against these increasingly formidable odds, FDR still rebuffed all overtures of compromise. (pp. 442–43).

Then, on May 18—nearly a week before the announcement of the Court’s decisions in the *Social Security Cases*—two events conspired to further dim the prospects for passage of a bill that Wheeler had already declared dead more than a month before. The first event, timed to coincide with the second, was Justice Van Devanter’s announcement that he would retire at the end of the term. (pp. 444–48). This timely intervention by the aging justice

. . . had its intended effect. A cartoon in the *Washington Post* pictured a grim-faced Van Devanter, pistol in hand, shooting an anthropomorphized Court bill in the head—to thumbs-up approval from the Senate opposition. In Congress and the press (if not, it appeared, in the country), the calls for FDR either to make major concessions on the bill or give it up altogether reached a high and steady pitch.

(pp. 447–48).

That same day the Senate Judiciary Committee voted against recommending passage of the bill by a vote of 10-8. “The Democrats split evenly, denying Roosevelt even a slight majority of members of his own party.” (p. 446). The Committee’s report was “caustic, contemptuous, and apocalyptic . . . . It laid waste to every premise, provision, and stated purpose of the bill, granting nothing to Roosevelt, not even the good faith of his intentions.” (p. 467). “[W]e would rather have an independent Court,” the report declared,

‘. . . a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. . . . We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle. . . . It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.’

(pp. 468–69).

In the immediate wake of this stern rebuke, Mr. Shesol reports that “the committee

. . . then delivered a second blow to the proposal and Roosevelt’s prestige. Despite Roosevelt’s hard line against compromise, all but one of the bill’s supporters voted for a substitute measure, put forth by Marvel

Logan and backed by Joe Robinson, to allow a temporary increase in the number of justices at the rate of no more than one a year . . . .

(p. 446). Yet even this compromise proposal was defeated by a vote of 10-8, which cast doubt over Joe Robinson's claim a month earlier that he could get the President "a couple of extra justices tomorrow," (p. 436) and indeed over the possibility of any future compromise.

Mr. Shesol recounts that in the days following the committee vote and Justice Van Devanter's retirement announcement, the President's aides came to see that the bill was in deep trouble. (pp. 451-53). But after the Court handed down its decisions upholding the Social Security Act, the hopes for reaching any sort of compromise with the opposition seemed to be slipping away.

Compromise in whatever form had appealed to both sides when it seemed to offer the only way out—that is, the only way short of giving the president exactly what he wanted. But now that the original plan was dead, and goodwill toward Roosevelt was on the wane, the battle for half-measures was distinctly uphill. While public support for FDR's six-judge plan now stood at 40%—the lowest level yet—only 42% favored a two-judge substitute.

(p. 464). This did not incline opposition Senators "to abandon entrenched positions." (p. 464).

Nor, it appears, did Roosevelt's mishandling of the appointment of Van Devanter's successor. (pp. 448-51). It was widely known that during the Hundred Days of 1933, as Joe Robinson "labored to pass programs in which he did not believe," Roosevelt had promised his Senate Majority Leader the first vacant seat on the Supreme Court. (p. 309). On May 18, when news of Van Devanter's announcement reached the Capitol, the popular Senator's colleagues had gathered around him in warm congratulation. Yet to Robinson's great consternation, the White House remained distant and silent on the subject. Roosevelt believed that Robinson would vote as a conservative on the Court, and his appointment therefore would not advance the President's constitutional agenda. Members of Roosevelt's staff even began to circulate rumors that Robinson would not be the nominee. The Administration left the humiliated Robinson dangling for nearly two weeks before calling him to the White House and assuring him that the seat would be his once the Court legislation had been enacted.<sup>24</sup>

Roosevelt's well-known promise to Robinson helps to explain why the President was so reluctant throughout the fight to agree to a compromise involving two or three additional justices, and why in-

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24 ALSOP & CATLEDGE, *supra* note 6, at 209-15.

formed and thoughtful observers would have understood this. To see the point, assume no retirements from among the justices comprising the Court in February of 1937. Under these circumstances, if Robinson returned to his conservative roots once he enjoyed life tenure on the bench, a two-justice deal would offer FDR no net gain. Even with the appointment of a New Dealer to offset Robinson's vote, what had been 5-4 or 6-3 decisions against the New Deal might now be adverse votes of 6-5 or 7-4. Even a three-judge compromise was not without its hazards. "A 6-6 decision might well affirm by an equally divided Court an unfavorable decision of a lower federal or state court; and if Hughes, Roberts, and Robinson all voted with the Four Horsemen,<sup>25</sup> the Administration would be handed defeat by a vote of 7-5."<sup>26</sup> Thus, James Roosevelt was unpersuaded by Hatton Sumners' February alternative plan to enact his judicial pension bill and then convince at least two justices (presumably Van Devanter and Sutherland, both of whom were known to be anxious to leave the bench) to retire. As the junior Roosevelt wrote of Sumners' proposal in his diary, no doubt mindful of the promise to Robinson, "It wouldn't really cure the situation even if he succeeds. . . ." (p. 345) Even after the President had replaced two of the Four Horsemen, the Administration would still be faced with the possibility of an adverse majority comprised by McReynolds, Butler, Hughes, Roberts, and Robinson. As the President remarked, "If I had three vacancies, I might be able to sandwich in Joe Robinson." But it would be necessary that all of those vacancies be created by the retirements of conservative justices in order to assure FDR of a working majority on a nine-member Court.<sup>27</sup>

Indeed, the promise to Robinson is the key to understanding why, until Van Devanter retired in May, Roosevelt felt that he could not settle for fewer than six additional justices. Again, let us take the personnel of the Court as Roosevelt found it in early 1937. In Roosevelt's view, the Court's decisions between 1934 and 1936 must have suggested that Van Devanter, McReynolds, Sutherland, and Butler—the Four Horsemen—were very likely to vote to invalidate New Deal legislation. Decisions from that same period also suggested that both Hughes and Roberts were at best unreliable. Add to their number

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25 The Four Horsemen were Justices Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler. See Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

26 BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 24 (1998) [hereinafter CUSHMAN, *RETHINKING THE NEW DEAL COURT*].

27 MCKENNA, *supra* note 5, at 469-70.

Robinson, to whom FDR had promised his first appointment to the Court, and that made for an unacceptable probability of seven adverse votes. Even if the Administration managed to hold the votes of Brandeis, Stone, and Cardozo—as it had not always done—the President would need an additional five appointments in order to ensure a razor-thin 8-7 majority; and even that would be assured only if none of his other five appointments gave him an unwelcome surprise after being invested with life tenure. Once Van Devanter had announced his retirement, this calculation changed, but only slightly. Now Robinson's appointment meant only six likely hostile justices, which meant that only four additional new appointments would be necessary to secure a 7-6 majority. And so, when Roosevelt finally summoned Robinson to the White House to assure him that Van Devanter's seat would be his once a substitute bill had been enacted, he told the Senator that "if there was to be a bride there must also be bridesmaids—at least four of them."<sup>28</sup>

Roosevelt's shabby treatment of Robinson outraged many of his colleagues in the Senate, contributing to what Arthur Krock called an "era of ill-feeling." (p. 457). "Had Roosevelt declared himself willing to compromise right after the Van Devanter announcement," Mr. Shesol maintains, "the Senate, grateful for the president's good sense, might well have granted him a face-saving solution. But the two-week period in which he had let Robinson dangle had cost FDR dearly." (p. 463). As Mr. Shesol reports, "Roosevelt's relationship with Congress was worse than it had ever been; his standing on Capitol Hill was at its lowest ebb." (p. 457). Congressmen saw the President as "imperious," refusing to listen, "laughingly" dismissive of their counsel.

What had begun as a struggle between the president and the Court was now a struggle between the president and Congress. Senators, in significant numbers, were finally prepared to make a stand. "We have retreated from one battle to the other during the last four years," one told a reporter. "But this is Gettysburg."

(pp. 457-58).

It was at this point that Roosevelt invited all of the male Democratic members of Congress to a weekend "harmony meeting" of summer sun and fun at the party's Chesapeake Bay retreat, the Jefferson Island Club. Most attended, and the social occasion "was a success" in mending fences and smoothing over differences with several fellow Democrats. (p. 474). The Jefferson Island retreat, Mr. Shesol main-

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<sup>28</sup> 2 THE SECRET DIARY OF HAROLD L. ICKES: THE INSIDE STRUGGLE, 1936-1939, at 153 (1954).

tains, earned FDR “the benefit of the doubt. Animus no longer flowed so freely in his direction. This was not merely a measure of his charm; it reflected the degree to which he had been chastened.” (pp. 477–78). Roosevelt relinquished “control” over the contents of the bill to Robinson (p. 478), who along with “Democratic moderates on both sides of the contest began to cast about for another solution—some way to settle the matter short of an ugly, intraparty brawl on the nation’s center stage.” (p. 476). “Not all of FDR’s opponents, after all, wanted him humiliated and permanently weakened; many senators were looking for a way to remain in his good graces.” (p. 477).

By late June the *Washington Post* was insisting that opposition voices had been “‘entirely too optimistic in their assumption that the court-packing plan is dead.’ Newspapers reported that fifty-four senators had lined up behind” (p. 474) a compromise bill that left the President with half a loaf, and yet constituted a “retreat” on his part. The substitute bill would have allowed the President to appoint one additional justice for each sitting justice who had reached the age of seventy-five without retiring, with such additional appointments limited to one per calendar year. (p. 477). This estimate of support in the Senate “give or take two or three, matched the confidential tallies produced by each side.” (p. 474). The “substitute Court bill—galling as it would no doubt be to the intransigents—might be enough to end the long impasse.” (p. 477).

Robinson had done it—he had built a majority. There was no guarantee that he could hold it; but for now, at least, he had the votes to win. Wheeler, accordingly, stopped boasting or bluffing that he could beat any compromise. “You know what that means,” Hiram Johnson wrote his son. It meant a filibuster.

(p. 474).

Earlier in the narrative, Mr. Shesol mentions briefly that on April 1, Hugo Black had warned Roosevelt “that the bill’s opponents were planning to use parliamentary tricks to delay a vote as long as possible.” (p. 417). And the opposition clearly was employing tactics of delay in the quasi-filibuster they conducted, with Ashurst’s complicity, in the Judiciary Committee hearings. In fact, however, plans for a filibuster of the Court bill had begun to take shape even before the hearings began, and long before the Jefferson Island retreat and the emergence of a compromise bill supported by the President.<sup>29</sup> Sena-

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<sup>29</sup> BAKER, *supra* note 3, at 68, 151–52, 233; JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933–1939, at 94–95 (1967); WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 59 (1962).

tor William Borah of Idaho “made plans to filibuster the Court bill to death if enough Democrats did not defect from Roosevelt. He would talk about constitutional law and history for a month if necessary. One of his associates declared many years later that Borah had planned to fight the Court bill with his voice until he fainted with exhaustion!” Journalists encountered Borah at his Senate desk preparing a filibuster speech as early as March 4.<sup>30</sup> On March 8, a prominent Republican wrote to William Allen White, “unless there is a change of attitude caused by the tremendous propaganda of the Administration, there are enough senators pledged to speak against the President’s proposal to prevent a vote upon it.”<sup>31</sup> Senator Arthur Capper confirmed this view when he wrote to White on February 26: “I think the Roosevelt program in its present form is blocked. I feel quite certain we have enough votes to upset him.”<sup>32</sup> Not even in their most optimistic moments did the plan’s proponents believe that they had the sixty-four votes then necessary under the Senate rules to invoke cloture. It was against this backdrop that Roosevelt had elected to take his case to the public in early March.

With the introduction of the compromise bill in the Senate in early July, Mr. Shesol reports, a filibuster “now seemed inevitable. Even before the island retreat, opposition leaders had begun drafting the interminable speeches with which senators held the floor during a filibuster.” (p. 474). “The opposition had also split its forces into ‘quints,’ teams of five senators that were charged with talking for twenty-four hours—to be relieved, if necessary, by a ‘reserve squad’ of experienced filibusterers. ‘I will stand in the Senate until I drop,’ announced Pat McCarran.” (p. 475). “There were other time-worn tactics to blockade a bill. One Senate rule forbade members from speaking more than twice per day on a given piece of legislation; but a senator was free to offer as many amendments to the bill as he wished, and could then speak twice on each new amendment. This created a nearly infinite range of possibilities for mischief.” (p. 475). In early July, Senator Josiah Bailey coached a young team of American Bar Association lawyers in the preparation of amendments to be used in the filibuster. Within a day they had produced 125 amendments—“enough to permit 250 speeches.” (p. 475).

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<sup>30</sup> RONALD FEINMAN, *TWILIGHT OF PROGRESSIVISM: THE WESTERN REPUBLICAN SENATORS AND THE NEW DEAL* 128, 131 (1981).

<sup>31</sup> John Callan O’Laughlin to William Allen White, March 8, 1937, “The Papers of William Allen White,” Library of Congress, Box 186, *quoted in* BAKER, *supra* note 3, at 151.

<sup>32</sup> Senator Arthur Capper to William Allen White, February 26, 1937, “The Papers of William Allen White,” Library of Congress, Box 186, *quoted in* BAKER, *supra* note 3, at 192.

Robinson knew that he was not yet even close to having the votes necessary to impose cloture, and he expressed doubt over how long his support would hold in the face of a filibuster. There were between forty-two and forty-four senators lined up to speak against the measure. “At no time in the history of successful filibusters,” wrote William Leuchtenburg, “could the foes of a piece of legislation count so many Senators in their ranks as were aligned against the Court bill. . . .”<sup>33</sup> About half of these senators had pledged to make two full-dress speeches enduring for up to two days each, not only against the bill itself, but also twice again on each of Bailey’s 125 amendments. Had support for the bill not crumbled so quickly, observed Alsop and Catledge, “[t]he oratory might well have flowed on until the 1938 election.”<sup>34</sup>

Still, no one could be sure that the opposition’s filibuster lines would hold. As Mr. Shesol relates: “Before the Jefferson Island picnic, most of Roosevelt’s Senate supporters had lacked the will to ride out a filibuster. But after their return, infused with new resolve, they readied parliamentary maneuvers to break the rebellion. Robinson and his deputies were confident that as the weeks dragged on and the heat of the Washington summer grew more and more oppressive, the opposition would suffer defections.” (p. 475). “At the moment, according to Gallup,” Mr. Shesol reports, “the American people were just about evenly divided on the question.” (p. 476).

It is important to understand here that the question on which the American people were nearly evenly divided was whether they supported a filibuster of the substitute bill. The July 5 Gallup poll to which Mr. Shesol refers showed 49% of those with opinions favoring a filibuster, with 51% opposed.<sup>35</sup> The American people were not, however, evenly divided on the question of whether they supported the bill. An unpublished Gallup poll taken between June 9 and June 14 asked: “Would you favor a compromise on the plan (to enlarge the Supreme Court) which would permit the President to appoint two new judges instead of six?” 37% said yes, 47% said no, and 16% had no opinion.<sup>36</sup> When asked substantively the same question in early May, 62% of those with opinions had answered No, while 38% had

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<sup>33</sup> William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L. J. 673, 682 (1985); BAKER, *supra* note 3, at 233–34; WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 150–51 (1995); ALSOP & CATLEDGE, *supra* note 6, at 246, 248.

<sup>34</sup> ALSOP & CATLEDGE, *supra* note 6, at 250, 246, 248; BAKER, *supra* note 3, at 233–35, 239, 246–47.

<sup>35</sup> PUBLIC OPINION, 1935–1946, at 150 (Hadley Cantril, ed., 1951).

<sup>36</sup> Cushman, *Mr. Dooley and Mr. Gallup*, *supra* note 2, at 72 n. 342 (2002).

answered Yes.<sup>37</sup> Between July 14 and July 19, Gallup asked respondents: "The Senate is now debating a plan which permits the President to enlarge the Supreme Court by adding one new judge each year. Do you favor this plan?" Only 36% of those questioned answered Yes, while 50% answered No, and 14% expressed no opinion.<sup>38</sup> All of the relevant polls showed strong opposition to any substitute measure that would permit Roosevelt to enlarge the membership of the Court with additional appointments.<sup>39</sup>

Yet Mr. Shesol maintains that "most observers expected that once the blathering began, the balance would shift decisively against a filibuster. Burt Wheeler and Tom Connally were already feeling heat back home for their apparent obsession with the Court issue, and before long, most opposition senators were sure to face popular pressure to attend to other, urgent business. Farmers, for example, were loudly demanding some form of a new AAA, and workers wanted passage of the wages and hours bill. Their patience was not unlimited. . . . By July 3, union members in New York had collected 2,000 signatures on a petition warning Senator Robert Wagner against joining a filibuster. Efforts like this, presumably, were just the beginning." (pp. 476-77). "Hiram Johnson, a veteran of many filibusters during his twenty years in the Senate, feared that Robinson was right. 'I know how men tire,' Johnson wrote his son, 'and though these men,—The Democrats, I mean—have . . . a pertinacity that is admirable. . . , I imagine that one by one they will be broken down.'" (pp. 475-76).

In the end, Johnson was happy to be proved wrong. But even at the time it was clear that, even were the bill's Senate proponents successful in breaking the opposition's filibuster, the bill would still have to negotiate the House. This meant reckoning with the hostile House Judiciary Committee and its chairman, Hatton Sumners, who on July 13 took to the House floor to offer an ominous assessment of the bill's probability of ultimate passage. Sumners "denounced the Court bill as 'a meat ax' that would wreck 'Anglo-Saxon institutions,' and—to the wild applause of his colleagues—pledged that, as chairman of the Judiciary Committee, he would never let it pass the House." (p. 488). "[I]f they bring that bill into this House for consideration," Sumners predicted, "I do not believe they will have

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37 21% expressed no opinion. GEORGE GALLUP & SAUL FORBES RAE, *THE PULSE OF DEMOCRACY: THE PUBLIC-OPINION POLL AND HOW IT WORKS* 304 (1940).

38 Cushman, *Mr. Dooley and Mr. Gallup*, *supra* note 2, at 72.

39 *Id.* at 71-72.



enough hide left on it to bother about.”<sup>40</sup> This confirmed Vice President Garner’s long-held view that the bill could not pass the House. “Sumners would bottle the bill up in his Judiciary Committee, and the House members did not appear very anxious to dislodge the bill from his grasp.”<sup>41</sup> As Lionel Patenaude argued in 1970, “Sumners’ opposition was probably enough to insure [the bill’s] defeat.”<sup>42</sup> James MacGregor Burns similarly concluded,

That the court bill probably never had a chance of passing seems now quite clear. Roosevelt’s original proposal evidently never commanded a majority in the Senate. In the House it would have run up against the unyielding Sumners, and then against a conservative Rules Committee capable of blocking the bill for weeks. From the start Democratic leaders in the House were worried about the bill’s prospects in that chamber. Robinson’s compromise plan might have gone through the Senate if he had lived. More likely, though, it would have failed in the face of a dogged Senate filibuster, or later in the House.<sup>43</sup>

As it would happen, the bill would never make it to the House. Robinson introduced the substitute bill in the Senate on July 2. “The fight was his now,” in Mr. Shesol’s assessment, “and it was a fight that most expected him to win.” (p. 478). The floor debate began on July 6. Fully prepared for a filibuster, “Robinson dared his opponents to try to outlast him.” (p. 482). Wheeler responded that he was “in very good physical condition,” because he had “been training for it.” Wheeler assured his colleagues that he was not threatening a filibuster, though he did think that it would take “considerable time to discuss” the bill. Robinson retorted that he did not intend to interfere with the freedom of debate, “but I think I will know when you turn from a debater into a filibusterer, and then, as the old saying goes, it will be ‘dog eat dog.’” (p. 482).

In fact, as Mr. Shesol observes, Robinson quickly fired a preemptive strike against the anticipated filibuster. The majority leader elected “to invoke a long-ignored rule preventing senators from yielding the floor to one another for statements (as opposed to questions) and limiting each senator to two speeches a day on a given subject.” (p. 483). But now Robinson “defined ‘day’ to mean not a calendar day—which of course lasted twenty-four hours—but a ‘legislative’ day, which could go on indefinitely. During a tariff debate in 1922, one legislative day lasted 105 calendar days. But that was the last time an-

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40 ALSOP & CATLEDGE, *supra* note 6, at 264–65; BAKER, *supra* note 3, at 243.

41 BAKER, *supra* note 3, at 218.

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

43 BURNS, *supra* note 15, at 314.

yone could remember the rules being applied so strictly.” This provoked a “good deal of . . . bitterness” among Robinson’s Senate colleagues. “Robinson, noted *Time*, was breaking ‘the great unwritten rule of the Senate: that its written rules are not rigidly enforced. . . . This was far closer to steamroller tactics than the U.S. Senate usually sees. Many of the elder members . . . fumed with anger at the breach.’ Discussion of the bill nearly came to a stop as senators bickered about the rules. Order collapsed; confusion reigned; the line between a question and a statement was inherently blurry, and over those two days, Pittman had to rebuke his colleagues dozens of times for breaking the rules.” (p. 483).

Perhaps as a result of Robinson’s overreaching, it would not take long for the opposition to turn the tide. “During the first few days of the debate,” Mr. Shesol reports, “the opposition did not send its own speakers to the floor. Preserving their strength for the long siege, they contented themselves at first with mocking, harassing, and relentlessly interrupting supporters of the bill. Then, on Friday, July 9, Burt Wheeler rose—and spoke without cease for the next three hours.” (p. 485). Members of the opposition held the floor Friday, Saturday, and again on Monday. (pp. 485–86). And they “were gaining ground.” (p. 486). Robinson left the floor during Senator Josiah Bailey’s speech and placed a phone call to Joseph Keenan of the White House strategy board. “‘I tell you I’m worried,’ Robinson said. A headcount on July 10 showed some attrition: Roosevelt’s 54-vote majority was now down to 51 or, at best, 52; two days later, it fell to 50.” As Arthur Krock observed, “‘all the morale seems to be on one side.’” (p. 486). On July 13, only a week into the debate, “Robinson ushered about thirty senators into his office. The opposition, he complained, was ‘cutting to pieces the president’s bill.’” (p. 488).

Robinson would be found dead in his apartment the next morning. It is sometimes thought that the substitute bill would have passed the Senate but for the majority leader’s untimely demise. But Mr. Shesol’s astute account casts grave doubt on that assessment. For he notes that it was on the preceding day, July 13, as Robinson was resting at home in bed, that “Key Pittman defied his direct orders and decreed, from the chair, that every new amendment constituted a new subject, allowing each senator to speak twice on it—thus permitting opposition senators to speak without cease.” (p. 488). With Robinson temporarily absent from the chamber, Pittman thus refused to play hardball, capitulated to the pressure to observe customary norms of senatorial civility, and thereby facilitated the conduct of the opposition filibuster. Moreover, Mr. Shesol points out: “Robinson was in bed as his lieutenants wrung their hands and worried that

if they failed to stop the debate, the party would be torn asunder, irreparably so. He was in bed as four senators—three of whom Robinson had counted as likely supporters of the bill—let it be known they would not only vote against it but would go to the White House and urge FDR to abandon the fight.” (p. 488). Support for the bill was already collapsing even before Robinson had passed from this life.<sup>44</sup>

When the majority leader’s body was discovered the following morning, Tommy Corcoran warned FDR’s secretary Missy LeHand “to prepare the president for a battery of calls telling him to drop the Court bill. Indeed, within fifteen minutes, Bernard Baruch, the well-known financier and friend of Robinson, was on the line, urging Roosevelt to quit the fight and avoid killing any more senators.” (p. 489). “[I]nevitably,” Mr. Shesol concludes, “most observers saw Robinson’s death as a final, fitting, damning verdict on Roosevelt’s plan. ‘Had it not been for the Court bill,’ Burt Wheeler charged, Robinson ‘would be alive today. I beseech the President to drop the fight lest he appear to fight against God.’” (p. 490). “Newspapers predicted that Roosevelt would abandon the fight and use this moment of shared grief as an opportunity to heal the breach in his party.” But “FDR’s instinct was exactly the opposite. He resolved to press ahead, harder than before. . . . His entire presidency seemed to hang in the balance.” (p. 490). White House spokesmen “insisted that the president was not backing down.” (p. 491). On the morning of July 15, when four freshman senators visited Roosevelt and “pleaded with him to stop tearing the party apart,” the President was unmoved. “‘Mr. President,’ one of them mustered the courage to say, ‘it’s the hardest thing in the world to tell you something you don’t want to hear.’ With that, the senators reiterated their intention to go against him on the bill, and returned to the Capitol.” That same day, “opposition leaders announced that they had the votes to send back (or, in Senate parlance, ‘recommit’) the bill to the Judiciary Committee, a move that was the legislative equivalent of euthanasia . . .” (p. 491). The rest was denouement. “‘All that remains to be done,’ one senator said, ‘is to call the coroner.’” (p. 496).

Mr. Shesol’s skillful rendering of the political story thus lends support to the view that—though there was of course some uncertainty—contemporary observers, including the justices of the Su-

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<sup>44</sup> See SHOGAN, *supra* note 12, at 215 (“Even had [Robinson] lived, the chances of success for the truncated version of FDR’s play were dubious. Opposition in the Senate showed no sign of melting away. And even if Robinson could prevent a filibuster and gain a majority, a hostile reception awaited the measure in the House, where Hatton Summers [sic] would lead the welcoming committee.”).

preme Court, had good reason to doubt that the President's bill ever would become law. It was apparent throughout the fight that, due in part to his promise to Robinson, the President would cling stubbornly to his own bill rather than seizing on any of a number of possible compromise measures. And it was doubtful that even a compromise measure could survive both a Senate filibuster and the House Judiciary and Rules Committees. It was not unreasonable for the justices to doubt that their immediate, total, and unconditional surrender was necessary in order to avert the threat of Court-packing.

Mr. Shesol attributes Roosevelt's political miscalculations in the Court-packing debacle to "overconfidence" and "hubris." (p. 509). "Without question, Roosevelt acted imperiously, compounding his crucial, initial failure to consult congressional leaders by refusing to heed them for months thereafter, and treating them instead with a loose contempt. 'It took him an unconscionable time to discover his weakness,' Tugwell reflected. 'This must be charged mostly to overconfidence.'" (p. 509). This overconfidence was attributable in turn to the tremendous margin by which the President was returned to office by the voters the preceding November. In 1937 FDR mistakenly persisted in the belief that "the voters are with us today just as they were last fall." (p. 509). "Before the landslide, his self-confidence had usually (if not always) been tempered by his eagerness for consensus and conciliation; by his ability to remain a bit detached from his own decisions, in case he might need to alter or abandon them; and by his willingness to 'force himself,' as Frances Perkins had long observed, 'to face the most dreary and discouraging facts.' These strengths of Roosevelt's—so badly needed in 1937—went into eclipse. Confidence gave way to overconfidence, boldness to recklessness, urgency to impatience, tolerance to vengefulness, persuasion to coercion." (p. 508).

It often has been argued that the Supreme Court's landmark constitutional decisions handed down in the spring of 1937 were influenced significantly by the results of the 1936 election. Mr. Shesol's rich account invites us to consider whether the deeper and more fateful impact of that election may instead have been on the thought of the President himself.

## II. THE LEGAL STORY

### A. *The Historiographical Posture*

I now turn to the second and third questions that any account of the Court-packing struggle must address, namely, how does one best tell the legal story, and how does one best understand the relationship between the political story and the legal story? Scholars have offered a variety of answers to these questions, but they can be roughly grouped into what I will call externalist and internalist accounts. (I should confess here that I would be considered an internalist.) Externalists tend to see a rather sharp break in constitutional doctrine in the spring of 1937, and attribute 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 reelection in 1936. Internalists 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. They 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. Externalists tend to see the constitutional doctrine of the period as more open-textured, and to attribute the selection among available doctrines (and thus case outcomes) to the political, economic, and social preferences or ideological commitments of the justices. Internalists tend to see evidence and patterns of judicial performance that are incompatible with such an account, and instead to see the justices as experiencing constitutional doctrine as an independent constraint on their extra-legal preferences. Externalists tend to see the justices as the moving parts in the story—that the relevant changes are those in their positions. Internalists tend by contrast to emphasize adaptations by Congress and Administration lawyers—made in light of the Court's decisions invalidating portions of the First New Deal—that enabled them to accommodate their regulatory objectives within the Court's evolving body of doctrine. I want to underscore that these are questions of emphasis. Externalists do not deny that legal ideas sometimes operated as constraints on judicial behavior; internalists do not deny that particular facts and developments in the broader world were sometimes relevant to constitutional adjudication. The disputed terrain is over which factors were relevant, how much constraint and how much in-

fluence each of these factors brought to bear on the justices, and the relationships among those factors.

Mr. Shesol's account draws uneasily on both of these types of accounts. At several points he is attentive to the legal, or "internal" dimensions of the story. For instance, he notes that the drafting of statutes with insufficient attention paid to questions of constitutionality "was all too typical of the early New Deal." (p. 43). In a chapter appropriately entitled "Shortcuts," Mr. Shesol recognizes that: "In shaping the recovery program, the Constitution was a concern—but not an overriding one. Far more pressing was the question of how quickly a given bill could be drafted, passed, and made effective. The first phase of the New Deal unfolded not in an orderly procession of new laws but in a rush—a scramble." (p. 42). He reports that Attorney General Homer Cummings admitted that he "went about with my pockets bulging with half-baked proclamations and undigested legislation, all requiring attention, study, and reformulation." (p. 43). But the press of time required "immediate," "rapid-fire opinions," with the result that "I probably made some mistakes." (p. 43). The Agricultural Adjustment Act ("AAA"), which "stood on shaky constitutional ground," (p. 174), was drafted "in haste, without any serious consideration of its constitutionality, despite its novel tax provisions." (p. 43). Similarly, the National Recovery Administration ("NRA") was "in effect, a grand constitutional gamble." (p. 43). NRA administrator Hugh Johnson doubted that the statute was constitutional (pp. 55–56), as did some of the best legal minds in the Administration. As Mr. Shesol points out, the NRA's delegation of authority to the president "was unprecedented. It was also unconstitutional—at least in the view of Charles Wyzanski, a young Labor Department lawyer who had helped draft the bill. Wyzanski wrote his mentor Felix Frankfurter that the president's codemaking authority went 'so far beyond the bounds of constitutionality that it would be useless' to defend it in court. He further feared the Recovery Act exceeded the power of Congress to regulate interstate commerce. Jerome Frank, another Frankfurter man in the administration, found it 'shocking' that not a single constitutional lawyer had been asked to review the codemaking apparatus. The bill, Frank said, could have been squared with well-established constitutional doctrine, but no one had bothered." (p. 44). Frankfurter raised these concerns with FDR, but they were "brushed aside in the hurry to enact the bill." (p. 44).<sup>45</sup>

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<sup>45</sup> Similarly, when currency devaluation legislation was being prepared, "no one asked the Justice Department for an opinion." Cummings offered one anyway, suggesting some re-

Similarly, Mr. Shesol notes that Homer Cummings wrote to FDR in June of 1935 that the Guffey Coal Act was “clearly unconstitutional,” and that the amendments to the AAA “were not in good condition to meet the constitutional test,” and “would have to be strengthened to give them any chance at all.” (p. 153). Indeed, Cummings avoided giving Congress an opinion on the Guffey Coal bill because he believed it was unconstitutional, and FDR had to pry the bill out of subcommittee, asking its members to overcome their constitutional doubts and report the bill out. (p. 166). While lamenting the “sloppiness” associated with the NRA, and the “slapdash affair of the Hundred Days,” Mr. Shesol praises the “increasing care in the drafting of legislation” that characterized the later New Deal. (p. 167).

Mr. Shesol lays a good bit of the blame for this inattention to questions of constitutionality on the President himself, whom Mr. Shesol paints as less than a first-rate lawyer. Roosevelt thought about things in terms of right and wrong rather than legal and illegal, and believed that if an idea were actuated by good motives then it could not be unconstitutional. He was, Mr. Shesol reports, impatient with “legalistic reasoning.” (p. 46). But Mr. Shesol also highlights the weakness of the legal staff in the Justice Department, which became a haven of patronage. (p. 54). One of the principal ways in which that weakness was manifested was in the poor job the Department did in cultivating promising cases through which to test the constitutional validity of various New Deal measures. (pp. 54–55). The impulse to delay testing the NRA before the Supreme Court resulted in the Government’s request in March of 1935 that the appeal of *United States v. Belcher*<sup>46</sup>—a case involving the constitutionality of the NRA’s Lumber Code—be voluntarily dismissed. Mr. Shesol recounts how this decision left the Administration stuck with defending the NRA in the context of the preposterous “Sick Chicken Case” of *United States v. Schechter Poultry Corp.*,<sup>47</sup> (pp. 129–33) which NRA acting general counsel Blackwell Smith regarded as “the weakest possible case.”<sup>48</sup> “[A]s the *Belcher* debacle had shown, the government’s failure to seek the right sort of test cases meant that it had to choose from the cases at

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visions to bring the measure into compliance with existing precedent, but his changes were never made. SHESOL, *supra* note 2, at 43.

46 294 U.S. 736 (1935).

47 295 U.S. 495 (1935).

48 PETER H. IRONS, *THE NEW DEAL LAWYERS* 85 (1982); THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER’S MEMOIR OF THE ROOSEVELT YEARS* 25 (Joan P. Emerson ed., 1991).

hand. Now there was really only one option left. It was in this way that the fate of the NRA came to rest on a kosher poultry plant in Brooklyn.” (p. 131). Mr. Shesol is also critical of what he characterizes as Stanley Reed’s rather weak performance in the argument over the constitutionality of the AAA in *United States v. Butler*.<sup>49</sup> Reed “hedged, contradicted, and ultimately disowned the grander claims” made in the government’s brief. (p. 178). He “was no match for” his adversary, George Wharton Pepper. (p. 178).

Mr. Shesol is also alert to the fact that decisions in 1935 and 1936 invalidating various early New Deal measures did not doom later statutes prepared with greater care. For instance, even after the Court invalidated the Railway Pension Act in *Railroad Retirement Board v. Alton*<sup>50</sup> in the spring of 1935, 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.” (p. 119).<sup>51</sup> He astutely notes that Justice Sutherland’s holding in *Carter v. Carter Coal Co.*<sup>52</sup> that the Guffey Coal Act’s price-fixing provisions were not severable from its unconstitutional labor provisions made it unnecessary to address the constitutionality of the price-fixing provisions directly. “This nimble act of avoidance kept Roberts on board—for it was Roberts who, in *Nebbia*, had upheld the power of Congress to do exactly what it had done in the Guffey Act, that is, to regulate prices.” (p. 213).<sup>53</sup> It was for this reason that even after the decision Homer Cummings “was feeling fine, for he perceived ‘a small crack in the door’: Sutherland’s avoidance of the price-fixing issue. To Cummings this suggested that not only Hughes but also Roberts might join the liberals in sustaining price controls in the future, should Congress revive that

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49 297 U.S. 1 (1936).

50 295 U.S. 330 (1935).

51 It is not clear, however, that Mr. Shesol recognizes that *Alton* left open the possibility of a national railway pension system grounded in the taxing power. See SHESOL, *supra* note 2, at 118 (“Ultimately, the act ran aground on the due process clause of the Fifth Amendment. Had Roberts left it at that—had he disposed of the case on the narrowest terms possible, in keeping with the Court’s unwritten rule of self-restraint—Congress might have been able to comply with the decision by revising the law. Yet Roberts went further, rejecting the very idea of a relationship between retirement security and interstate commerce—in any industry. He had issued, in effect, a preemptive veto of similar legislation.”). In fact, the taxing power alternative was quickly recognized and enacted by Congress. See Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST. 79, 88–91, 104–09 (1998).

52 298 U.S. 238 (1936).

53 The reference is to *Nebbia v. New York*, 291 U.S. 502 (1934), in which Justice Roberts had written the opinion for a 5-4 majority upholding legislative regulation of milk prices.



half of the Guffey Act.” (p. 214). Indeed, Cummings disagreed with the suggestion of FDR aide Stanley High that “the New Deal had been so badly damaged by the Court that in the course of the [1936] campaign, FDR would have to say what he planned to do about it.” Cummings “took a more sanguine view. The only real casualty . . . was the NRA. The AAA was being reenacted by other means; Guffey could be, too; the [Tennessee Valley Authority (“TVA”)] and [the Securities and Exchange Commission (“SEC”)] had, at least for now, survived; the administration had prevailed in the gold clause cases; and the government’s spending power, Cummings added, had gone essentially unchallenged.” (pp. 214–15).

Yet these instances of sensitivity to the internal point of view are diluted, if not negated, by a countervailing insistence on viewing the performance of the Court and its justices through the lenses of the Progressive paradigm and the attitudinal model. Mr. Shesol repeatedly employs political taxonomy in characterizing the justices. In his view the Court was comprised of “two wings,” a liberal one and a conservative one, with Chief Justice Charles Evans Hughes and Justice Owen Roberts in the middle. (pp. 31–32). “[S]talwart conservatives such as George Sutherland,” Willis Van Devanter, James Clark McReynolds, and Pierce Butler “contended that the judge’s role was not to defer to the legislature but to stand ‘as a shield’ for ‘the individual against the unjust demands of society,’ even if that meant ‘disregard[ing] the wishes and sentiments of a majority of the people.’” (p. 31). Oliver Wendell Holmes and Louis Brandeis, and later Harlan Fiske Stone and Benjamin Cardozo, by contrast, are depicted as the liberal heroes who stood up against the conservatives’ abuse of the Due Process Clause to prevent social experimentation by democratic majorities.<sup>54</sup> On this account, majorities to sustain or invalidate legislation challenged before the Court were formed owing to the movement of Hughes and/or Roberts from left to right, from liberalism to conservatism. “Hughes found himself caught in the middle, tacking left and then shifting right, trying to achieve a balance between the Court’s liberals, who largely shared Roosevelt’s idea of a

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<sup>54</sup> Mr. Shesol appears to believe that Justice John Marshall Harlan was of the same mind as Holmes and Brandeis on these issues, based on Harlan’s dissent in *Lochner*, though he is apparently unaware of Harlan’s majority opinion in *Adair v. United States* invalidating the Erdman Act’s protection’s against anti-union discrimination on liberty of contract grounds. SHESOL, *supra* note 2, at 31. To his credit, Mr. Shesol does recognize that Stone didn’t like to be thought of as a New Dealer, and was uncomfortable with liberal praise of his *Butler* dissent. *Id.* at 192.

'living' Constitution, and the Court's conservatives, who staunchly, bitterly rejected it." (p. 5).

The language of movement permeates Mr. Shesol's account, and the moving parts are not increased attention to constitutional detail by legislative draftsmen or the cultivation of promising test cases by government lawyers. The moving parts are the Justices themselves. Hughes and Roberts are repeatedly depicted as moving back and forth between the competing camps, tacking left and then "drift[ing]" or "return[ing] to the right." (pp. 5, 125, 432, 519, 528). Hughes had been liberal in his days as an Associate Justice in the second decade of the twentieth century, but by the time he was nominated to serve as Chief Justice in 1930, "Hughes' liberalism seemed consigned to the distant past." (p. 27). In 1930 and 1931, "liberalism" prevailed on the Court, and then in 1932 the "pendulum swung back" to "conservatism"—this because Hughes and Roberts had been liberal in 1930 and 1931, and then suddenly became conservative in 1932. (p. 32–33). Those who have read Drew Pearson and Robert S. Allen's 1936 bestseller, *The Nine Old Men*, will recognize this portrayal of Hughes. In the chapter on the Chief Justice, Pearson and Allen charged Hughes with swinging back and forth between the liberal and conservative camps in an unpredictable and unprincipled fashion. The title of the chapter was, "The Man on the Flying Trapeze."<sup>55</sup>

Mr. Shesol's assessment of Roberts similarly echoes the charge that the Justice conducted "an ultimately unsuccessful search for a coherent judicial philosophy."<sup>56</sup> Roberts, we are told, "emitted enough mixed signals during his first years on the Court to keep parties guessing which way he really leaned. Then *Nebbia*, as far as most of the press were concerned, settled the matter: Roberts, it was clear, was a liberal." (p. 125). But with Roberts' opinion in *Alton* the following year, it "now seemed beyond dispute" that he had "definitely aligned himself with the conservatives." (p. 125). "Roberts, a former railroad lawyer, sounded at times as if he were arguing the case as counsel for the carriers, not deciding it as an impartial judge." (p. 117). "Owen Roberts, at long last, had revealed himself . . . He had taken off his coat, put on his judicial robes, and was rooting for good, old-fashioned, Anglo-Saxon individualism." (pp. 125–26).

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<sup>55</sup> DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 74–97 (1936).

<sup>56</sup> MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953*, at 15 (1997); see also Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2188 (1999) ("In my heart, I still believe the Roberts of 1937 had undergone a jurisprudential lobotomy . . .").

As this assessment of Roberts suggests, for Mr. Shesol, being a liberal or a conservative justice boiled down to selecting between two competing theories of political economy in the service of two competing sets of interests. The competing theories were those of “laissez-faire and the emerging welfare state,” and the question was whether the Court would embrace “the idea that law could be a tool to remedy, rather than perpetuate, the harshest realities of American life,” or instead show “suspicion” of “economic regulations.” (p. 33). The interests were those of railroads and other large corporations versus everyone else. Mr. Shesol’s account of the rise of substantive due process in the Supreme Court, for example, is a model of unreconstructed Progressive historiography. In contrast with the views articulated in nearly four decades of revisionist work on the topic,<sup>57</sup> Mr.

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<sup>57</sup> 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); WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 8–9* (1991) (exploring ways in which judicial review of labor regulation in the late nineteenth and early twentieth centuries conditioned the strategies of labor movements, and the ways in which the strategies of labor movements, in turn, influenced the judiciary); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10* (1993) (examining the influence of the principle of neutrality on the *Lochner* Court’s Fourteenth Amendment jurisprudence); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 19–31* (1992) (analyzing *Lochner* and pre-*Lochner* police powers decisions in light of the nineteenth century liberal conception of “the neutral state”); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 771–72 (1985) (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 (1997); 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 laissez-faire constitutionalism should be understood, in part, as an effort to protect traditional notions of liberty); 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” as a condition set by the common law); 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); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 252, 278 (1987) (examining the relationship between paternalism—“encouraging and applying some form of protection while excoriating and invalidating others”—and redistribution in the period’s constitutionalism); 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

Shesol argues that at the time the Fourteenth Amendment was adopted in 1868, “the due process clause struck Congress and the Courts as unambiguous. The word ‘process’ made plain its concern with the procedures by which a government acted: how laws were enacted, how fairly they were enforced. . . . It was not long, however, before railroad lawyers, monopolists, and conservative thinkers like Thomas M. Cooley, a prominent Michigan judge and law professor, were arguing—before increasingly receptive state and federal judges—that the guarantee of due process shielded individuals and corporations against the legislative restrictions of property rights. Reflecting this influence and the sympathies of the elites, which were solidly behind the railroads and other new and massive corporations, courts in the 1880s began to scrutinize the substance of legislation, especially in the economic realm.” (p. 30). By “the 1920s, and with increasing vehemence over the latter half of the decade, the Supreme Court had defended the interests of corporations, the rights of property, and ‘liberty of contract’ against encroachments by government . . . . Chief Justice William Howard Taft and his conservative brethren—imbued with a sense that they were saving civilization from Bolsheviks, collectivists, and other sundry radicals—voided state and federal legislation at a record rate. In what the dean of the Harvard Law School called a ‘carnival of unconstitutionality,’ the Court erased more laws from the books between 1921 and 1930 than it had in the first hundred years of its existence.” (p. 24).

Consulting the sources on which Mr. Shesol relies for these claims about the rate of invalidation by the Taft Court reveals them to be potentially misleading. One of those sources, the first edition of David O’Brien’s *Storm Center*, shows that the Taft Court overturned twelve congressional statutes between 1921 and 1930. The White Court had overturned twelve between 1910 and 1921; the Fuller Court had overturned fourteen between 1889 and 1910; the Waite Court had overturned nine between 1874 and 1888; the Chase Court had overturned ten between 1865 and 1873. The Taft Court did overturn more state statutes than any of its predecessors, at 131; but the White Court had invalidated 107 and the Fuller Court had struck down 73. In all the Taft Court invalidated 155 federal, state, and municipal laws; the White Court struck down 137; the Fuller Court struck down 102. It is true that under Taft the Court “erased more

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between privilege and property in the context of reactions to the changing economic environment of the early twentieth century).

laws from the books between 1921 and 1930 than it had in the first hundred years of its existence”; but so had the White Court and Fuller Courts before them.<sup>58</sup>

The valence of Mr. Shesol’s characterizations of these positions and the Justices who held them leaves no doubt which is to be preferred. He repeatedly opines unfavorably on the “stridency” (p. 2) of “conservative” opinions invalidating economic regulations. (The “liberal” justices, by contrast, are never “strident”—not even Stone in his biting *Butler* dissent.) Roberts’ opinion in late 1935 invalidating a federal tax on liquor dealers, for example, was characterized by a “stridency” and “angry insistence” that were “startling.” (p. 178). But his opinion in *Alton*, where his voice was “heavy with sarcasm,” was “his most strident.” (pp. 117–18). His “wanton, almost defiant disregard of the realities faced by railroad workers” was “extreme.” (p. 119) Similarly “extreme,” even “noxious,” was the Court’s 1923 decision invalidating a minimum wage law for women in the District of Columbia. (p. 219). The Court’s “doctrinaire” (p. 432) “conservatives” were so objectionable that even their approval of the gold clause policy and the TVA were only “grudging.” (p. 221).

But one is left wondering why the Justices would have upheld any act they did not really want to, grudgingly or otherwise. For on this account, the Justices did not experience legal doctrine as a constraint on their range of action; instead, legal doctrine was a “tool” or a “weapon” serving ulterior ends. The Due Process Clause was a “weapon” wielded in “internecine wars” among the Justices. (pp. 29–30). “Judges had other tools to safeguard property rights, among them the contracts and commerce clauses of Article I of the Constitution and the takings clause of the Fifth Amendment. . . . The spear was the Constitution’s, but the battle was the Lord’s: as radical and reform movements sprang up to combat the injustices of the industrial era, conservative judges saw themselves as fighting a holy war against what the historian Charles Beard called the ‘oncoming hosts of communism and anarchy.’ The liberties they defended were, in the admiring words of the English jurist Henry Maine, a ‘bulwark of American individualism against democratic impatience and socialistic fantasy.’” (pp. 30–31). So, in the late nineteenth century legal “formalism” was revived, “conjoined with doctrines of more recent vin-

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58 DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 43 (1st ed., 1986). Felix Frankfurter’s 1930 claim that “[s]ince 1920, the Court has invalidated more legislation than in fifty years preceding,” cited in the other source relied upon by Mr. Shesol, namely, ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 70 (1979), therefore appears to be wildly inaccurate.

tage (such as substantive due process) and put to use in nullifying the income tax, overturning a ban on child labor, narrowing the scope of the antitrust laws, and more. The defenders of the Constitution-as-mechanism had, as a rule, a greater stake in the established economic order, and, not coincidentally, in judicial doctrines that perpetuated it. One's choice of metaphor said much about one's politics." (p. 47). And in 1935 and 1936, "the majority's solicitude for states' rights had seemed to depend less on precedent than on which rights, in particular, a state tried to exercise." (p. 219).

This conception of the judicial function suffuses Mr. Shesol's portraits of two of the "conservative brethren," Van Devanter and Sutherland. Van Devanter, we learn, "did little to curb" the impression that he "was beholden to the railroads." (p. 39). "Van Devanter's vote was rarely in doubt: he 'lined up always with the conservatives and voted almost always in favor of big business . . .'" (p. 39). Similarly, Mr. Shesol maintains that Sutherland's dissent in *Blaisdell*,<sup>59</sup> in which a 5-4 majority upheld Minnesota's mortgage moratorium, was inspired by "the enduring influence of Herbert Spencer. . . 'Survival of the fittest' . . . served as a mission statement not only for laissez-faire capitalism and indifferent government, but also for the constitutional doctrines that made America safe for liberty, property, and 'rugged' individualism." (pp. 68-69). Mr. Shesol continues, "Sutherland and the Court's conservatives believed, throughout their long lives, in what Spencer called the 'mercy of severity.' As Spencer wrote in *Social Statics* . . . : 'The forces at work exterminate such sections of mankind as stand in the way, with the same sternness that they exterminate beasts of prey and herds of useless ruminants.' This process of 'purification' could not—and must not—be impeded by the state. 'The ultimate result of shielding men from the effects of folly, Spencer said, 'is to fill the world with fools.' Or, as he elaborated in *Social Statics*,

Pervading all Nature we may see at work a stern discipline, which is a little cruel that it may be very kind. . . . The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shoulderings aside of the weak by the strong, which leave so many "in shallows and miseries," are the decrees of a large, far-seeing benevolence. . . . The process *must* be undergone, and the sufferings *must* be endured. No power on Earth, no cunningly-devised laws of statesmen, no world-rectifying schemes of the humane, no communist panaceas, no reforms that men ever did broach or ever will broach, can diminish them one jot. (p. 69).

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59 Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 448-83 (1934).

“George Sutherland, more than three quarters of a century later, saw the Depression . . . and, it was safe to assume, the entire New Deal—through this same prism.” (p. 69).<sup>60</sup>

It will come as no surprise that, in constructing this grotesque caricature of Sutherland, Mr. Shesol relies heavily and selectively upon two monographs published more than sixty years ago, well before scholarly reassessments of the *Lochner*-Era Court began to revise the work of the Progressive historians: Benjamin Twiss’s *Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court* (1942) and Joel Paschal’s *Mr. Justice Sutherland: A Man Against the State* (1951). The more recent, sympathetic, and accurate treatments of legal scholars such as Samuel Olken are overlooked.<sup>61</sup> The reader of Mr. Shesol’s claims therefore would be shocked to learn that during Sutherland’s pre-judicial career as a state legislator and United States Senator he supported legislation mandating the eight-hour workday, the Employers’ Liability Act, the Pure Food and Drugs Act, the Hepburn Rate Bill, the Children’s Bureau, the Seaman’s Act of 1915, Postal Savings Banks, free coinage of silver, and the 1896 presidential candidacy of populist William Jennings Bryan.<sup>62</sup> The reader would similarly be surprised to learn of the literally hundreds of cases in which Van Devanter and Sutherland voted to uphold various forms of regulation or taxation of a wide variety of businesses, large and small. Moreover, the reader would have no inkling that the reason that Cummings could report in 1936 that the government’s spending power had gone essentially unchallenged was that in 1923 George Sutherland, in an opinion joined by each of the Four Horsemen, had held that federal appropriations from general revenue were not subject to judicial review.<sup>63</sup> Even though Mr. Shesol never comes to grips with this enormous body of decisional law, his account is embarrassed by New Deal cases that he does discuss. The fact that Sutherland and

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<sup>60</sup> Here again, Mr. Shesol’s account of the wellsprings of judicial behavior is confused. He later contends that Hughes “was less willing than some of his brethren to adhere blindly to legal precedent without regard to human welfare,” SHESOL, *supra* note 2, at 521, but his portrayals of the Court’s conservatives would suggest that their decisions were driven less by blind adherence to precedent than by their own attitudes regarding human welfare.

<sup>61</sup> See, e.g., Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639 (2009); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1 (1997).

<sup>62</sup> JOEL FRANCIS PASCHAL, *MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE* 36, 56, 63 (1951).

<sup>63</sup> See Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 561–71, 586–639 (1997). The 1923 opinion referred to in the text is *Frothingham v. Mellon*, 262 U.S. 447 (1923).

Van Devanter (along with Butler) joined the majority rejecting a challenge to the Tennessee Valley Authority is a “surprise.” (p. 210). Similarly embarrassing are the votes of Van Devanter and Sutherland to uphold the old-age pension provision of the Social Security Act in *Helvering v. Davis*.<sup>64</sup> Mr. Shesol attempts to explain this by arguing that Justice Cardozo “rooted his pensions decision so deeply in the reasoning of [Justice Roberts’ opinion invalidating the AAA in *Butler*] that even Sutherland and Van Devanter felt compelled to come aboard.” (p. 454). Mr. Shesol cites no evidence in support of this explanation for why these two Justices voted as they did in *Helvering*, and so far as I am aware, there is none. The claim is bare assertion. He does not attempt to explain why Justices McReynolds and Butler, who also joined Roberts’ opinion in *Butler*, did not similarly feel compelled to join Cardozo’s opinion in *Helvering*. But the claim that these Justices could feel “compelled” to vote in a particular way by a proposition (arguably obiter dictum) articulated in an earlier decision rests uneasily next to an account that frequently portrays Justices as agents freely wielding legal doctrines as “tools” and “weapons” in the service of their own ideological and class ends.<sup>65</sup>

So despite his periodic attention to the internal, legal dimensions of the New Deal’s constitutional saga, Mr. Shesol seems ultimately to be impatient with them, thinking that they mattered rather little, and that a focus on them will hinder rather than aid true understanding. As he puts it in what appears to be an unguarded moment, with the Court’s decision invalidating New York’s minimum wage law in June of 1936, “the issue had finally transcended the New Deal. The question confronting the nation—whether government at any level had any power to address the most vicious inequities of modern life—could no longer be clouded by nonsense about sick chickens . . . ; it could no longer be tangled up in the labyrinthine twists of the ‘stream’ of commerce or obscured by legal language.” (p. 222). The question, on this view, was simply whether the Justices supported laissez-faire or the emerging welfare state—whether the Court would embrace “the idea that law could be a tool to remedy, rather than

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64 301 U.S. 619 (1937).

65 At the same time Mr. Shesol seems to think that Roberts’ vote to uphold the Social Security Act was significantly influenced by the fact that Robert Jackson “stressed the arguments that would appeal to conservatives,” such as “that Social Security promoted thrift and benefited ‘the man who works.’” SHESOL, *supra* note 2, at 453. That argument may hold considerable appeal, but it is not a legal argument, and the claim that it played a significant role in securing Roberts’ approval suggests again that law actually had little to do with the case outcome.



perpetuate, the harshest realities of American life.” (p. 33).<sup>66</sup> But that was not at all the way that the Justices saw the matter.

### B. Troubles With Doctrine

It is perhaps because Mr. Shesol is ultimately uninterested in legal doctrine that he so frequently seems to misunderstand it. These misconceptions are displayed at various levels of generality throughout the book. For example, early in his narrative Mr. Shesol treats the Court’s doctrine as monolithically antagonistic to humane considerations, arguing that:

By 1937, the Court’s majority had made amply clear that the very notion of the New Deal—its use of governmental power to relieve the suffering caused by the Great Depression and to create a new and more just social and economic order—was an affront to the Constitution, whether that power was exercised by the federal government or the states.

(p. 3).<sup>67</sup>

Yet a mere seventeen pages later he reports that in the First Hundred Days “an exhausted Congress had enacted emergency banking legislation; a national relief system; . . . securities regulation; a massive public works program; . . . the Civilian Conservation Corps (“CCC”); [and] abandoned the gold standard” (p. 20), never pausing to recognize that the Court never declared any of these programs unconstitutional, and in fact—sometimes with the support of “conservative” justices—explicitly upheld several of them.<sup>68</sup> The Civilian Conserva-

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<sup>66</sup> I leave to one side here the question of whether initiatives such as the National Industrial Recovery Act and the Agricultural Adjustment Act of 1933 actually improved human welfare. Mr. Shesol himself canvasses some of the reasons to doubt that they did. *See id.*, at 127–29, 174–75. For other reasons, see CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 34–35.

<sup>67</sup> Thus, “Social Security . . . seemed certain to fall, as did the National Labor Relations Act, as did just about everything of significance that Congress had passed or Roosevelt was likely to propose.” SHESOL, *supra* note 2, at 3.

<sup>68</sup> *See* *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935) (upholding abrogation of the gold clause in private contracts by a vote of 5-4); *Perry v. United States*, 294 U.S. 330 (1935) (denying damages in cases involving abrogation of the gold clause in government bonds by a vote of 5-4); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (denying, in a Sutherland opinion joined by McReynolds and Butler, a power company standing to challenge grants and loans made by the Emergency Relief Administration of Public Works to assist in the construction of electrical distribution systems); *Duke Power Co. v. Greenwood Cnty.*, 302 U.S. 485 (1938) (same); *Cal. Water Serv. Co. v. Redding*, 304 U.S. 252 (1938) (per curiam) (relying on *Alabama Power Co.*); *see also* *City of Allegan, Mich. v. Consumers’ Power Co.*, 71 F.2d 477, 480 (6th Cir., 1934), *cert. denied*, 293 U.S. 586 (1934) (holding that power company has no right as either a federal or state taxpayer to question the constitutionality of the Public Works Administration); *Elec. Bond & Share Co. v. Sec. & Exch. Comm’n*, 303 U.S. 419 (1938) (upholding the registration provisions of the Public Utility Holding Company Act of 1935 and, by implication, the Securities Act of

tion Corps was only one of many New Deal spending programs effectively insulated from constitutional attack by Sutherland's 1923 decision holding that appropriations from general revenue were not subject to judicial review. Among the others were the Federal Emergency Relief Act,<sup>69</sup> the Farm Credit Act,<sup>70</sup> the Reconstruction Finance Corporation,<sup>71</sup> the Rural Electrification Act,<sup>72</sup> and the Emergency Relief Appropriation Act.<sup>73</sup> In addition, of course, the claim that the Court's view of the Constitution left no room for "governmental power to relieve the suffering caused by the Great Depression" and to create a "more just social and economic order" also overlooks the Court's decisions upholding commodity price regulation in *Nebbia*, the Minnesota mortgage moratorium in *Home Building & Loan Ass'n v. Blaisdell*,<sup>74</sup> and the Tennessee Valley Authority in *Ashwander*,<sup>75</sup> not to mention unanimous Hughes Court decisions upholding the Railway Labor Act and its 1934 amendments<sup>76</sup> and the revised Frazier-Lemke Farm Debt Relief Act.<sup>77</sup>

Just as Mr. Shesol is mistaken in his more general assessment of the Court's constitutional jurisprudence, so is he misinformed concerning various of its particular features. For example, he argues that in *Schechter*:

Hughes did not invent the doctrine of direct versus indirect effects. Rather, he revived it after four decades of disuse and disrepute. Since the turn of the century, the Court had taken a mostly permissive view of federal regulation of any economic activity that had the potential, however

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1933 and the Securities and Exchange Act of 1934 in an opinion with Butler joining Hughes and Roberts). The Court had refrained from invalidating the 1934 Act in *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1 (1936). Both McReynolds and Butler also joined opinions apparently assuming the constitutionality of the Home Owners' Loan Corporation. See *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 28 (1939); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 492 (1939) (Butler & McReynolds, J.J., dissenting); see also *United States ex rel. Handler v. Hill*, 90 F.2d 573 (3d Cir. 1937), *cert. denied*, 302 U.S. 736, *reh'g. denied*, 302 U.S. 779 (1937) (upholding constitutionality of Home Owners' Loan Corporation).

<sup>69</sup> Federal Emergency Relief Act of 1933, 48 Stat. 55, 56 (1933).

<sup>70</sup> Farm Credit Act of 1933, 48 Stat. 257, 258 (1933).

<sup>71</sup> An Act to Extend the Functions of the Reconstruction Finance Corporation for Two Years, and for Other Purposes, S. 1175, 74th Cong. (1st Sess. 1935).

<sup>72</sup> Rural Electrification Act of 1936, 49 Stat. 1363, 1364 (1936).

<sup>73</sup> Emergency Relief Appropriation Act of 1936, 49 Stat. 1597, 1608 (1936).

<sup>74</sup> 290 U.S. 398 (1934).

<sup>75</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

<sup>76</sup> See *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) and *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937).

<sup>77</sup> See *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937).

indirectly, to impede the flow of interstate commerce. That came to an abrupt, unforeseen, and seemingly decisive end in *Schechter*.

(p. 135).<sup>78</sup> There are at least four things wrong with this statement. First, the distinction between direct and indirect effects did not, after 1895, fall into four decades of disuse and disrepute—at least not as far as the Court was concerned. Over the course of those four decades the Court consistently employed the distinction between direct and indirect effects both in cases raising questions of federal power under the affirmative Commerce Clause and in cases arising under the dormant Commerce Clause. The question in the latter class of cases was whether a particular state or local tax or regulation affected interstate commerce sufficiently “directly” to entrench on regulatory prerogatives the Constitution reserved to Congress. If the effect was “direct,” the measure was invalid; if it was “indirect,” it passed constitutional muster. In the affirmative Commerce Clause context, the question was whether the activity in question affected interstate commerce sufficiently “directly” to fall within Congress’s regulatory jurisdiction. If the effect was “direct,” it was subject to congressional regulation; if the effect was “indirect,” Congress could not reach it.<sup>79</sup>

Second, in major decisions upholding federal regulation under the Commerce Clause between 1895 and 1935, the Court routinely held that the regulated activity affected interstate commerce “directly.”<sup>80</sup> In not a single case did the Court hold that an effect on inter-

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78 Mr. Shesol also reports that *Schechter* repudiated “not just the program but its entire system of minimum wages, maximum hours, and workers’ rights,” SHESOL, *supra* note 2, at 2, though the program’s system of minimum wages, maximum hours, and workers’ rights had no existence apart from the program, and so could not be separately repudiated. To repudiate the program was to repudiate the system.

79 Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1096–1126 (2000).

80 *See, e.g.*, *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 310 (1925) (upholding Sherman Act jurisdiction over labor strife imposing a “direct” rather “indirect” obstruction to interstate commerce); *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 36–40 (1923) (upholding Grain Futures Act of 1922 on the grounds that the activities regulated thereby have a “direct” effect on interstate commerce); *Stafford v. Wallace*, 258 U.S. 495, 521, 525 (1922) (upholding Packers and Stockyards Act of 1921 on grounds that the activities regulated thereby have a “direct” effect on interstate commerce); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66–67 (1911) (upholding Sherman Act jurisdiction on grounds that activities regulated had a “direct” rather than “indirect” effect on interstate commerce); *Swift & Co. v. United States*, 196 U.S. 375, 396–98 (1905) (holding that activities of meatpackers fell within the reach of the Sherman Act because the effect on interstate commerce was “direct” rather than “indirect”); *N. Sec. Co. v. United States*, 193 U.S. 197, 329–31, 347, 349, 354, 357, 361–62 (1904) (upholding Sherman Act prosecution on grounds that activities regulated had a “direct” effect on interstate commerce); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 226, 228–30, 234–35, 238–46 (1899) (upholding Sherman Act prosecution of pooling agreement on grounds that it affected in-

state commerce that was “indirect” could underwrite congressional control of the activity. Third, as it had in 1895, when the Court held that an activity did not fall within congressional jurisdiction under the Sherman Act, it did so because the effect on interstate commerce was “indirect.”<sup>81</sup> Indeed, just two years before *Schechter* was decided, a unanimous bench joined Justice Sutherland’s opinion refusing to enjoin a union’s effort to obtain a closed shop through a strike and boycott of a structural steel manufacturer who shipped his product across state lines. The company contended that the effect of the union’s actions was to destroy its interstate traffic in steel, but Sutherland insisted that this did not bring the union’s behavior within the ambit of the Sherman Act’s prohibitions. Even if “the shipment of steel in interstate commerce was curtailed” by the strike and boycott, Sutherland concluded, “that result was incidental, indirect, and remote . . . .”<sup>82</sup>

Fourth, it’s hard to understand how Mr. Shesol could regard *Schechter*’s Commerce Clause holding as “unforeseen.” As Ronen Shamir reports, even the NIRA’s “staunchest supporters did not believe that it could survive a constitutional test. It was passed with the implicit understanding among the administration’s senior legal advisers that since it would be in effect only two years, judicial review by the Supreme Court might be avoided.”<sup>83</sup> Homer Cummings, Felix Frankfurter, Jerome Frank, Frances Perkins, and Hugh Johnson all doubted that the statute was constitutional.<sup>84</sup> And with specific reference to *Schechter*, Justice Department lawyers doubted from the outset that the Government could prevail on the Commerce Clause issue. A memorandum from Robert Stern outlining the weaknesses of the Government’s case remarked that the relationship between local

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terstate commerce “directly”); *United States v. Joint-Traffic Ass’n*, 171 U.S. 505, 560, 565, 568–69, 577 (1898) (upholding Sherman Act prosecution on grounds that activities regulated had a “direct” effect on interstate commerce); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 313, 342, 371 (1897) (upholding Sherman Act prosecution on grounds that activities regulated had a “direct” effect on interstate commerce).

81 *See, e.g.*, *United Leather Workers Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).

82 *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 107 (1933).

83 RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 15–16 (1995).

84 *See IRONS, supra* note 48, at 23–24; JOSEPH P. LASH, *DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL* 122–23 (1988); ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION* 191 (1976); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL, 1933–1935*, at 108 (1958); 2 ICKES, *supra* note 25, at 101; NATHAN MILLER, *FDR: AN INTIMATE HISTORY* 328–29 (1983); SHAMIR, *supra* note 83, at 32–33.

wages and interstate commerce was so attenuated that the Court would probably consider it “indirect.” Stern therefore recommended against expediting the appeal—as did Felix Frankfurter and Tommy Corcoran—but Donald Richberg persuaded FDR to press on. Solicitor General Stanley Reed tried to prepare Roosevelt for an adverse decision, and the NRA’s acting general counsel Blackwell Smith regarded *Schechter* as “the weakest possible case.”<sup>85</sup> Even Justice Brandeis joined Hughes’s opinion holding that the effect of interstate commerce was “indirect.”<sup>86</sup>

Continuing in this vein, Mr. Shesol reports that “Hughes’s resort to a largely discredited doctrine” prompted Cardozo to write a separate, concurring opinion, in which Stone joined. (pp. 135–36). Yet Cardozo also found the effect in question to be indirect. He could find “no authority” in the Commerce Clause “for the regulation of wages and hours of labor” in the Schechters’ business. “As to this feature of the case,” he wrote, “little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. . . . Activities local in their immediacy do not become interstate and national because of distant repercussions.” “To find immediacy or directness here,” Cardozo concluded, “is to find it almost everywhere.”<sup>87</sup> This invocation of the distinction between direct and indirect effects even by “liberal” members of the Court prompted an exasperated Edward Corwin to grouse that “the conceptualism, the determination to resist the inrush of fact with the besom of formula,

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85 CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 157.

86 Mr. Shesol complains that the Court’s holding on the Commerce Clause issue “was all the more surprising because the Court had not been required to address the question at all. Having overturned the NRA on the grounds of its excessive delegation of power . . . the justices could have left it at that, in keeping with the Court’s tradition of deciding cases on the narrowest ground possible.” SHESOL, *supra* note 2, at 135. This characterization makes the Court’s treatment of the Commerce Clause issue sound gratuitous; but so far as I am aware, there is no “tradition” under which the Court has declined to decide cases on more than one constitutional ground, and one can certainly see the value to legislators of the Court providing guidance with respect to the various issues presented in a particular controversy. Compare, e.g., *Louisville Joint Stock Bank Co. v. Radford*, 295 U.S. 555 (1935) (identifying five constitutional defects in the Frazier-Lemke Farm Debt Relief Act of 1934 in Brandeis’s opinion) with *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937) (unanimously upholding the 1935 version of the Act revised in accordance with the guidance provided by Brandeis’s opinion in *Radford*). Of what value would it have been to Congress to repair the nondelegation problem if the Commerce Clause problem was also fatal?

87 *A. L. A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935).

which pervades the Chief Justice's opinion for the Court, is not altogether absent from Justice Cardozo's opinion . . . ."<sup>88</sup>

Mr. Shesol's uncertain command of doctrine also leads him to misapprehend the constitutional basis of the Guffey Coal Act. He reports that: "Hoping to placate the Court," Congress "rested the authority of the new, National Bituminous Coal Commission on the taxing power—seemingly more secure grounds than the commerce power . . . ." (p. 166). It is true that, under the statute, coal operators who did not comply with the provisions of the Code would not receive a rebate of the excise tax the Act imposed upon all coal producers. And it is true that one-and-a-half pages of the House Ways and Means Committee's Report on the bill did attempt to justify it as an exercise of the taxing power.<sup>89</sup> But this portion of the report was preceded by a seven-page defense of the bill as an exercise of the commerce power.<sup>90</sup> President Roosevelt's famous letter to Representative Samuel B. Hill urging his subcommittee of the Committee on Ways and Means to report the bill out notwithstanding the members' concerns about its constitutionality focused entirely on the Commerce Clause justification.<sup>91</sup> The bill's leading supporters in Congress defended it principally as an exercise of the commerce power.<sup>92</sup> This was because it was widely understood that the "tax" imposed by the statute was not a true tax within the contemplation of the Court's taxing power jurisprudence, but instead, as the Court held in the opening passages of its opinion invalidating the statute,<sup>93</sup> a "penalty" on noncompliance with the Code provisions.<sup>94</sup> Its imposition therefore could not be sustained under the taxing power, but instead would have to be defended under the commerce power. After arguing at length that the bill was supported by Commerce Clause precedents,<sup>95</sup> Chairman Hill concluded:

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88 E.S. Corwin, *The Schechter Case—Landmark, or What?*, 13 N.Y.U. L. Q. REV. 151, 170 (1936).

89 H.R. REP. NO. 74-1800, at 10-12 (1935).

90 *Id.* at 3-10. Indeed, the Senate version of the bill, which also provided for a tax and rebate scheme, was referred to and reported out by the Committee on Interstate Commerce. S. REP. 74-470 (1935).

91 FDR to Samuel B. Hill, July 5, 1935, *reprinted in* 79 CONG. REC. 13449 (1935).

92 *See* R. ALTON LEE, *A HISTORY OF REGULATORY TAXATION* 155-56 (1973); 79 CONG. REC. 13448-54 (remarks of Mr. Vinson) (1935).

93 *Carter v. Carter Coal Co.*, 298 U.S. 238, 288-29 (1936).

94 *See* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); H.R. REP. 74-1800, at 46 (1935) (Views of the Minority); *id.* at 52-54 (Views of Mr. Cooper of Tennessee); 79 CONG. REC. 13436, 13484-85 (remarks of Mr. Treadway); *id.* at 13462-63 (remarks of Mr. Cooper of Tennessee); *id.* at 13467 (remarks of Mr. Church).

95 79 CONG. REC. 13442-66.

If Congress has the right to regulate this industry, then it has the right to regulate by taxation. Even if the tax should be held to be a penalty, yet if Congress has jurisdiction over the subject matter, if it has the power to regulate the industry, it makes no difference whether the tax is for revenue or for penalty or regulation, because in either event it would come under the regulatory power of Congress. That is what we are relying on [with] this bill, that it directly affects and burdens interstate commerce.<sup>96</sup>

When Assistant Attorney General Dickinson was defending the statute before the Court, he admitted at the outset of his argument that: “There is general agreement that the statute rests upon the commerce power. The tax provision stands or falls with the validity of the scheme of regulation under the commerce power.”<sup>97</sup> The statute did not really, as Mr. Shesol claims, seek to “placate the Court” by resting the authority of the Commission on the “more secure grounds” of the taxing power.

### 1. *The Minimum Wage Cases*

These unsuccessful encounters with constitutional doctrine do not inspire confidence in Mr. Shesol’s capacity to evaluate the scope and extent of the constitutional change wrought during Hughes’s tenure as Chief Justice. One’s concerns are to some extent borne out in his treatment of the Court’s decisions in 1937. Consider first his treatment of the minimum wage cases: *Morehead v. New York ex rel. Tipaldo*, where in 1936, a 5-4 majority invalidated New York’s statute,<sup>98</sup> and *West Coast Hotel v. Parrish*,<sup>99</sup> in which a 5-4 majority upheld Washington State’s statute in 1937. Mr. Shesol does not do too badly in his analysis of *Tipaldo*, but he does make the occasional misstep. He recognizes, for example, that in 1934 *Nebbia* “gave states more room to regulate economic activity in the public interest.” (pp. 218–19). He accurately reports that “New York argued that its minimum-wage law could be distinguished from D.C.’s, and was therefore not controlled by *Adkins*,” the 1923 decision in which the Court had invalidated the District’s statute.<sup>100</sup> But he then goes on to maintain that New York “also called for ‘a reconsideration’ of *Adkins*—a polite way of asking the justices to overrule it.” (pp. 219–20). He later contends that the lawyers for New York had “expressly challenged *Adkins*. While New York had undeniably staked its case primarily on the grounds of dis-

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<sup>96</sup> 79 CONG. REC. 13446.

<sup>97</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 255 (1936).

<sup>98</sup> 298 U.S. 587 (1936).

<sup>99</sup> 300 U.S. 379 (1937).

<sup>100</sup> *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

tinguishing the statutes, it also hedged its bets. The state's petition called for 'reconsideration of the *Adkins* decision in the light of the New York act and conditions aimed to be remedied thereby.' New York, it seems clear, was suggesting that *Adkins* be cast aside. The state's attorneys had marked out dual paths to the same result." (p. 414).

It is true that the state called for "reconsideration" of *Adkins*. But the contention that this was a request that the Court overrule *Adkins* rests, in my view, on a misreading of the documents. The petition filed by the state of New York did not explicitly request that *Adkins* be overruled. The overwhelming bulk of the petition was devoted to identifying material legal and factual distinctions between the New York statute and the measure invalidated in *Adkins*. Of all of the "Questions Presented," "Reasons for Allowing this Writ," and "Assignments of Error" raised in the petition, only one might plausibly have been construed to request that *Adkins* be overruled. The sixth of the "Reasons for Allowing this Writ" stated: "the circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in light of the New York act and conditions aimed to be remedied thereby."<sup>101</sup> This was by no means an unequivocal call for a repudiation of *Adkins*. It might more readily have been understood as a restatement of New York's central argument: that material distinctions between the language of the two statutes and the intervention of an economic depression made the New York statute a reasonable exercise of the police power where the District of Columbia statute had not been. Insofar as *Adkins* was the controlling precedent regarding the validity of minimum wage regulation, any case concerning the constitutionality of a minimum wage statute would necessarily involve the construction and consideration of that precedent to determine its scope and meaning.

This appears to have been the way that Chief Justice Hughes construed this language in the petition. In his dissent, in which he contended that *Tipaldo* was not controlled by *Adkins* due to material differences in the two statutes involved and the social conditions to which each was addressed, he wrote that the close divisions of the Court in *Stettler v. O'Hara*<sup>102</sup> and *Adkins* "point to the desirability of fresh consideration when there are material differences in the cases

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<sup>101</sup> Petition for Writ of Certiorari and Motion to Advance at 4-5, 8-9, 12-24; *Tipaldo*, 298 U.S. at 636 (Stone, J., dissenting).

<sup>102</sup> 243 U.S. 629 (1917) (affirming by an equally divided court the judgment of the Oregon Supreme Court upholding that state's minimum wage law for women, with Justice Brandeis not participating).



presented.”<sup>103</sup> Though he purported to undertake such “fresh consideration,” nowhere in his opinion did he consider whether *Adkins* ought to be overruled.

The petition certainly was sufficiently ambiguous that it was not unreasonable for the justices to construe it in light of the arguments advanced in the brief and at oral argument. And neither in the brief nor at the argument did attorneys for the state request or suggest that *Adkins* be overruled. The brief instead offered a detailed explanation of why the New York statute was consistent with and indeed supported by *Adkins*. Similarly, briefs of amici curiae contended that “[t]he New York statute differs radically from that considered by this Court in the *Adkins* case,” and “[t]he New York Minimum Wage Law, passed in the light of the decision in *Adkins v. Children’s Hospital*, 261 U.S. 525, is supported as to constitutionality by the opinion in that case.”<sup>104</sup> Nowhere was it requested that *Adkins* be overruled.<sup>105</sup>

This reading of the documents is supported by Roberts’ later account of the conference following the oral argument in *Tipaldo*. Roberts reported that:

Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that it was unnecessary to overrule the *Adkins* case in order to sustain the position of the State of New York. It was urged that further data and experience and additional facts distinguished the case at bar from the *Adkins* case . . . . The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground.<sup>106</sup>

Justice Butler’s majority opinion similarly maintained that:

The petition for the writ sought review upon the ground that this case is distinguishable from [*Adkins*]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. [citations omitted] Here the review granted was no broader than that sought by the petitioner. [citations omitted] He is not entitled and does not ask to be heard upon the question whether the *Adkins* case

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<sup>103</sup> *Tipaldo*, 298 U.S. at 624 (Hughes, C.J., dissenting).

<sup>104</sup> Appellant’s Brief on the Law, *Tipaldo*, 298 U.S. at 16–49; Brief on Behalf of States of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island, as Amici Curiae Supporting Appellant, *Tipaldo*, 298 U.S. at 15; Motion for Leave to File Brief as Amici Curiae Supporting Appellant, filed by John W. Bricker, Attorney General of Ohio, *Tipaldo*, 298 U.S. at 39.

<sup>105</sup> Accord Erwin N. Griswold, *Owen J. Roberts As A Judge*, 104 U. PA. L. REV. 332, 341 (1955).

<sup>106</sup> Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314 (1955).

should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.<sup>107</sup>

Hughes's dissenting opinion did not challenge the majority's claim that the petition confined the justices to consideration of whether the case was distinguishable from *Adkins*. Indeed, Mr. Shesol himself later concedes that on Hughes's view, *Adkins* "was not at issue in *Tipaldo*, had not been challenged by New York's lawyers, and should therefore remain standing." (p. 405). And though Justice Stone's dissent briefly called attention to the petition's request for a "reconsideration" of *Adkins*, he did not deem it necessary to interpret this as a demand that the decision be overruled. Instead, he insisted that it did not matter. "I know of no rule or practice by which the arguments advance in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer," he wrote:

Here the question which the petition specifically presents is whether the New York statute contravenes that Fourteenth Amendment . . . . Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the *Nebbia* case . . . .<sup>108</sup>

Accordingly, as Mr. Shesol correctly reports, Stone wrote an opinion, joined by Brandeis and Cardozo, calling for *Adkins* to be overruled. But as Mr. Shesol points out, Chief Justice Hughes was not prepared to overrule *Adkins*. "He was prepared to dissent, but only on narrow grounds. More practiced than the others in the art of fine shadings, more inclined to inch away—by often imperceptible degrees—from a troublesome precedent than to overrule it, Hughes was prepared to differentiate and uphold New York's statute . . . and leave *Adkins* standing—irrelevant, apparently unloved, but still standing." (pp. 219–20). Butler had originally circulated a draft opinion confined to the holding that *Adkins* had not been challenged by New York and was therefore controlling authority, but Stone's dissent prompted Butler to enlarge his opinion with "brusque" obiter dicta defending *Adkins* "angrily, and in sweeping terms." (pp. 220). This perplexed Roberts,<sup>109</sup> who later wrote that his "proper course would have been to concur specially on the narrow ground I had taken."<sup>110</sup>

<sup>107</sup> *Tipaldo*, 298 U.S. at 604–05.

<sup>108</sup> *Id.* at 636 (Stone, J., dissenting).

<sup>109</sup> PUSEY, CHARLES EVANS HUGHES, *supra* note 17, at 701 (reporting that the "reactionary tone" of Butler's enlarged opinion "was very distasteful to Roberts").

<sup>110</sup> Frankfurter, *supra* note 106, at 315.

In the margin of Felix Frankfurter's copy of Merlo Pusey's 1951 biography of Hughes, one finds next to the discussion of Roberts' conduct in *Tipaldo* the notation, "He shouldn't have suppressed his own views by silence."<sup>111</sup>

The contention that New York requested that *Adkins* be overruled in *Tipaldo* is therefore at the very least deeply problematic. But so is the opposing contention that New York's failure to make such a request itself adequately explains Roberts' behavior in the minimum wage cases. It is true that in *West Coast Hotel v. Parrish* the Washington Supreme Court, unlike the New York Court of Appeals in *Tipaldo*, had effectively declared that *Adkins* already had been overruled. As Chief Justice Hughes put it: "The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position."<sup>112</sup> It is also true that counsel for the Appellant observed that "the issue before this Court is simply whether the *Adkins* case is to be reconsidered and reversed or whether its authority is to be sustained."<sup>113</sup> And because the Washington statute, unlike the New York measure, was virtually identical to the law struck down in *Adkins*, it is difficult to see how the Court could have upheld the Washington statute without overruling *Adkins*. But it is not clear that it followed that the "ruling of the state court demands on our part a reexamination of the *Adkins* case," as Hughes concluded.<sup>114</sup> For starters, the party defending the statute in *Parrish* was the appellee rather than the appellant, and therefore, unlike the New York attorney general in *Tipaldo*, did not frame the question to be considered on appeal. Moreover, the briefs and arguments of the attorneys for the state of Washington did not request that *Adkins* be overruled. Roberts' later recollection that in *Parrish* "the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it" was not fully accurate. Even though the state court had refused to apply *Adkins*, the justices were certainly at liberty to strike down the Washington statute on the grounds that its controlling authority had not been specifically challenged by the litigants.

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111 PUSEY, CHARLES EVANS HUGHES, *supra* note 17, at 701; Frankfurter's personal copy, microformed on Harvard Frankfurter Papers, at Part II, Reel 39. See also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 265 n.7 (1998).

112 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389 (1937).

113 Appellant's Answer to Brief of Amicus Curiae at 18, *West Coast Hotel*, 300 U.S. at 379.

114 *West Coast Hotel*, 300 U.S. at 389–90.

What, then, explains Roberts' change, which, in a chapter entitled "The Yielding," Mr. Shesol characterizes as a "remarkabl[e]" (p. 406) "surprise" (p. 404)? Mr. Shesol concedes that it could not have been the Court-packing plan, a closely-guarded secret that was announced publicly more than six weeks after Roberts had cast his decisive vote in conference. "[T]he facts, as Roberts later insisted, would seem to establish 'that no action taken by the President . . . had any causal relation to my action in the *Parrish* case.'" (p. 415). Instead, Mr. Shesol flirts with a handful of alternative possibilities. One is "the scale of Roosevelt's reelection" in November of 1936. (p. 415). But it is difficult to understand how this could have been a factor. For in 1936 the Republican platform explicitly endorsed minimum wages for women and children, as did the party's nominee, former Progressive Bull Moose crusader Alf Landon. Even assuming that the justices followed the election returns—which seems doubtful in view of the string of invalidations they handed down in the wake of the Democrats' stunning success in the 1934 midterm elections—the 1936 election could provide them with no additional information concerning popular attitudes toward the minimum wage. It was already abundantly clear that both parties and both candidates were for it.<sup>115</sup> And as Mr. Shesol reports: "Roosevelt did not suppose that his triumph at the polls had in any way chastened the Court; the old maxim that 'the Court follows the election returns' could not possibly apply to an institution that had been flouting, so consistently and flagrantly, the popular will." (p. 3).<sup>116</sup>

A second possible causal factor, Mr. Shesol suggests, was "through 1936, the mounting threat—or certainty—that either FDR or Congress was about to take serious action to curb the Court." (p. 415).

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115 CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 26, at 25–28.

116 At one point Mr. Shesol appears to suggest that the Court more generally responded to the election returns. "Starting in November," he observes, "the Court had issued a series of opinions that indicated it might be yielding to the popular will." Yet in each of the three cases he cites, the vote was either unanimous or near-unanimous. SHESOL, *supra* note 2, at 264–65. The Four Horsemen, who already had voted to dissent in *Parrish*, and would later dissent in cases upholding the National Labor Relations Act and the Social Security Act, surely were not moved by the election returns to join these earlier opinions. If following the election "conservative justices" now seemed to treat "government lawyers with greater respect—or at least with less overt hostility," perhaps that was because the cases they were arguing presented far less contentious issues. *Id.* at 243. Ultimately, Mr. Shesol does not press this claim, remarking instead that "the peace that prevailed in the winter of 1936–37 was not a permanent one . . . . The election results, so resounding that they had seemed to answer every question, now appeared, on reflection, to have settled very little. At the most basic level, it was unclear whether voters wanted to press ahead with further reforms, or simply improve existing New Deal programs." *Id.* at 265–66.

This also is doubtful. After all, if it was virtually certain by December 19, 1936, when Roberts voted to uphold the Washington minimum wage statute, that Roosevelt would introduce a serious Court-curbing proposal, one has to wonder why it came as such a great surprise to Democratic leaders on the Hill and to other observers around the country when he did so more than six weeks later. (pp. 292–306). As Mr. Shesol points out, Roosevelt had deliberately steered clear of any discussion of the Court during the campaign. In 1936 the economy was improving, the opposition was weak, and there was no political upside and considerable political downside to taking on the Court before the election. Indeed, the Court’s decisions in *Schechter* and *Butler* had removed two millstones from around his neck, and his polling numbers were improving as a result. (p. 215). So instead of making the Court a campaign issue, FDR’s platform had pledged the administration to address the nation’s economic and social problems “through legislation within the Constitution” or, if that should prove impracticable, through “a clarifying amendment.” Moreover, hundreds of similar court-curbing proposals had been introduced in Congress in the preceding two sessions, without producing any discernible effect on the Court’s performance.<sup>117</sup>

A third suggestion offered by Mr. Shesol is that the general outpouring of criticism following the announcement of the Court’s decision in *Tipaldo* might have affected Roberts’ performance in *Parrish*. As Mr. Shesol puts it, “a credible case can be made that Roberts and Hughes were influenced by the criticism of *Tipaldo*; or by rising popular exasperation with the Court; or the indignation of the legal journals . . . .” (p. 415). “If any justice could have shrugged off the criticism,” Mr. Shesol maintains, “that justice was not Owen Roberts. He cared greatly—too greatly, some of his friends believed—about his reputation.” (p. 413). “[I]n the view of a reporter who knew him socially, Roberts was ‘too anxious for worldly approval.’ And when, in 1936, he and the rest of the conservative majority became objects of widespread scorn and ridicule—when even Republicans began to hold them at arm’s length—the public lashing may have hurt Roberts more deeply than the others.” (p. 231).<sup>118</sup>

117 CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 26, at 12–14, 27.

118 Mr. Shesol’s discussion of the relationship between *Tipaldo* and the possibility that either Stone or Roberts might receive the Republican nomination for president in 1936 is particularly curious. On the same page he manages to write first that Stone’s dissent in *Tipaldo* put an end to talk of the possibility of his being nominated, and then in the next paragraph to write that Roberts’ vote with the majority in *Tipaldo* put an end to rumors that he might be nominated. SHESOL, *supra* note 2, at 231. This contrast leaves it unclear how any justice participating in *Tipaldo* could have satisfied Republicans in 1936.

Perhaps. Roosevelt suggested such a sensitivity to criticism when he remarked in the wake of the 1936 decision upholding the TVA by a vote of 8-1 that: “It did those babies good to criticize them a bit.” (p. 210). But Mr. Shesol reports that Justice Stone “saw no sign that his conservative colleagues had yielded to external pressure,” and “fretted, privately, that this was ‘the popular impression.’” (pp. 210–11). As Mr. Shesol himself maintains, “the four or five most conservative justices, with every opinion they wrote against the New Deal, seemed almost to invite public outrage, to welcome it.” (p. 3). Insofar as the suggestion would be that Roberts changed his substantive views on the question of the constitutionality of the minimum wage in response to this criticism, one has to wonder why Roberts would have joined or written so many heavily criticized decisions in the first place.<sup>119</sup> For example, as Mr. Shesol points out, in the press reaction to *Butler* commentators generally concluded that Stone’s dissent had the better of the argument. (p. 232). And yet despite this, Roberts continued after *Butler* to vote to invalidate the Guffey Coal Act in *Carter Coal* and the minimum wage in *Tipaldo*. Where, one wonders, was his concern for “worldly approval” then? This would suggest that the justice generally retired to “a soundproof room” (p. 523) to consider his decisions, but that on this particular occasion the chamber’s noise-reduction technology malfunctioned.

In fairness, Mr. Shesol suggests that the noise generated in the wake of *Tipaldo* was simply of a different order than anything that had come before. He reports that “out of 344 editorials on the *Tipaldo* ruling, only 10 supported it. Not only that: dozens of the most conservative papers went a step (perhaps several steps) further and said that if the states lacked any power to fight sweatshop conditions, then the Constitution might have to be amended after all.” (p. 222). “Here, at last, was the wave of national revulsion that had been expected for years and had failed, until now, to materialize. When the Court had overturned the NRA, the AAA, and the Guffey Coal Act, when it chiseled away at states’ rights in other decisions, there had been protests, clamor, but nothing like this.” (p. 222). This was because the minimum wage, unlike the New Deal, had quietly achieved “overwhelming popularity. More than a third of the states had such laws on the books, in some cases for decades. The minimum wage served an obvious and desperate human need. And though the poli-

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119 In what impresses me as a strained reading of Justice Sutherland’s *Parrish* dissent, Mr. Shesol characterizes it as a “scolding” of Roberts “for bowing to public opinion or the pressure of his peers,” reporting that during its delivery “Roberts, with reason, looked annoyed” and “glanced coldly at his accuser.” *Id.* at 407–08.

cy did reflect a certain paternalism, it was no weird concoction of the Brain Trust, it had put down deep roots, and even the Liberty League could hardly be roused to condemn it.” (p. 222).

One must wonder, of course, whether Roberts could have been so ignorant of the broad and deep public support for the minimum wage before the fact that the reaction to *Tipaldo* would have greatly surprised him. Yet perhaps in light of Roberts’ apparent general lack of responsiveness to “clamor” over the Court’s decisions, and taking into account Roberts’ earlier decision in *Nebbia*, Mr. Shesol ultimately stops short of asserting this stronger relationship between the reaction to *Tipaldo* and Roberts’ vote in *Parrish*. Instead, he is more circumspect, affirming that “[i]f any of this had an effect on the decision, it can never be measured; nor would it suggest that either justice changed his basic beliefs in the face of events.” He modestly maintains that the question of Roberts’ motivation “ha[s] never really been answered,” and is a matter about which “one could only speculate.” (p. 415).

Mr. Shesol is prepared to offer a speculation, however, and in doing so he follows the thoughtfully-considered judgments reached by Merlo Pusey, Richard Friedman, and Edward Purcell that the public outcry following the *Tipaldo* decision might have prompted Roberts to face squarely the question of *Adkins*’ continued vitality.<sup>120</sup> That reaction, Mr. Shesol argues, may have made Hughes and Roberts “more likely to examine his beliefs and then act on them—to take a bold step, to confront a tough choice and no longer avoid it.” (p. 415).

[O]ne need not speculate wildly to posit that some of these events, to some degree, weighed on the minds of Roberts and Hughes and placed a finger on their internal scales. This would explain their relief when the minimum-wage issue came back before the Court so soon after *Tipaldo*. . . . Their later protestations aside, it is hard to escape the conclusion that they shed their self-imposed restraints and faced the fundamental issue because events had led them to see *Parrish* as precisely what they wished it to be: a second chance, a shot at redemption.

(p. 415).

This is a plausible conjecture that has been embraced by the eminent scholars to whom I have referred, and they may well be correct. I certainly cannot prove that they are not. But I do not believe that Mr. Shesol’s conclusion is as difficult to escape as he makes it out to

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<sup>120</sup> MERLO J. PUSEY, THE SUPREME COURT CRISIS 51 (1937); Merlo J. Pusey, *Justice Roberts’ 1937 Turnaround*, 1983 Y.B. SUP. CT. HIST. SOC. 102, 106; Richard Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1893, 1952 (1994); Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 289–90 (1994).

be. Instead, I believe that the performances of Hughes and Roberts in the minimum wage cases can be explained adequately without reference to the public reaction to *Tipaldo*. Let us take Hughes first. The Chief Justice had a strong preference for distinguishing rather than overruling precedents where possible, a preference that has been noted by many<sup>121</sup> and, as Mr. Shesol notes, was lamented by Stone in the wake of *Tipaldo*.<sup>122</sup> In *Tipaldo*, Hughes believed that a relevant distinction could be drawn, and he sought to sustain the statute on that basis. No such distinction was available in *Parrish*, and Hughes therefore was squarely confronted with the option of either invalidating the statute on the authority of *Adkins* or sustaining the minimum wage law by overruling the 1923 precedent.

As for Roberts, the memorandum he prepared is not without its difficulties, but some of his recollections point toward the understanding ultimately articulated by his later confidante, Felix Frankfurter. Roberts reported that at the conference at which certiorari was granted in *Tipaldo*, he told his colleagues that he “saw no reason to grant the writ unless the Court were prepared to re-examine and overrule the *Adkins* case.”<sup>123</sup> This would suggest that Roberts was not saying that he would not reach the issue of *Adkins*’ continuing authority unless New York asked him to; he was instead saying that he was

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121 Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 35 (1967) (remarking on Hughes’s “talent for making nice distinctions in the interest of creative continuity. He thoroughly disliked the overruling of a precedent, but his gift for differentiation fostered the controlled evolution of doctrine”); SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 279 (1951) (“He sought, virtually above all else, to maintain the dignity and prestige of the Court and this he thought in no small measure depended upon the stability of its decisions. This attitude was reflected . . . in the great lengths to which he sometimes went . . . in attempting to find distinctions to avoid overruling precedent. . . . [He] sedulously sought to protect the precedents of the Court, sometimes at the risk of offending logic.”). See also MASON, *supra* note 58, at 796 (remarking on Hughes’s capacity “to invent meaningless distinctions”); F.D.G. Ribble, *The Constitutional Doctrines of Chief Justice Hughes*, 41 COLUM. L. REV. 1190, 1210 (1941) (claiming that Hughes possessed “a consummate skill in distinguishing adverse or apparently adverse cases”). Justice Roberts himself later commented on this quality. See OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 18 (1951) (describing one of Hughes’s opinions as having “labored valiantly, and, as I think, unsuccessfully, to distinguish the earlier cases”). Paul Freund once characterized a distinction drawn by Hughes as one that “could be remembered just long enough to be stated once.” Freund, *supra* note 121, at 35.

122 Alpheus Thomas Mason reports that Stone, who joined Hughes’s dissent, thought it “a sad business to stand only on differences of the two statutes,” and “could not understand why ‘the Chief Justice felt it necessary to so limit his opinion.’” MASON, *supra* note 58, at 423 (quoting Stone to Frankfurter, June 3, 1936). See also SHESOL, *supra* note 2, at 219–20.

123 Frankfurter, *supra* note 106, at 314.



prepared to consider the issue of whether *Adkins* should be overruled, but that he would not join an opinion upholding the New York statute on the ground that it was distinguishable from the measure invalidated in *Adkins*. At the conference following the argument Roberts reports that he stated that he was “unwilling to put a decision” on the ground for which New York had argued, namely, that the two statutes could be meaningfully distinguished.<sup>124</sup> It is unclear whether Brandeis, Stone, and Cardozo had yet expressed their view that a decision upholding the statute should be based on a rejection of *Adkins*’ authority, but it was almost certainly clear, as was ultimately the case, that Hughes would not join such an opinion. Roberts did not believe that the Court could legitimately sustain the statute unless there were a majority to overrule *Adkins*. Because there was not, he acquiesced in an opinion invalidating the statute on the authority of *Adkins*—just as Holmes and Stone had in the 1920s, even when state attorneys had specifically requested that the Court overrule *Adkins*.<sup>125</sup> As Frankfurter put it in 1955, “when the *Tipaldo* case was before the Court in the spring of 1936,” Roberts “was prepared to overrule the *Adkins* decision. Since a majority could not be had for overruling it, he silently agreed with the Court in finding the New York statute under attack in the *Tipaldo* case not distinguishable from the statute which had been declared unconstitutional in the *Adkins* case.”<sup>126</sup> Two years earlier Frankfurter had written to Paul Freund: “The fact is that Roberts did not switch. He was prepared in *Tipaldo* to make a majority overruling *Adkins*. He was not prepared to distinguish *Adkins*. Because there was no majority for overruling *Adkins* he was in the majority in the *Morehead* case. . . .”<sup>127</sup>

<sup>124</sup> *Id.*

<sup>125</sup> See *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (including Taft, Holmes, Sanford, and Stone all concurring silently in affirming per curiam a decision invalidating Arkansas minimum wage statute on authority of *Adkins*); *Murphy v. Sardell*, 269 U.S. 530 (1925) (including Brandeis alone dissenting from per curiam decision striking down Arizona’s minimum wage statute, with Taft, Sanford, and Stone concurring silently and Holmes concurring only because he regarded himself as bound by the authority of *Adkins*). As Charles Curtis noted: “Roberts had done no more by joining with the ex-majority [in *Tipaldo*] than to follow [*Adkins*] as a precedent that was binding on him. No more, indeed, than Holmes himself had done, when he accepted *Adkins* in the two cases that had come up from Arizona and Arkansas shortly afterwards.” CHARLES CURTIS, *LIONS UNDER THE THRONE: A STUDY OF THE SUPREME COURT* 163–64 (1947).

<sup>126</sup> Frankfurter, *supra* note 106, at 314. Paul Freund apparently concurred in this interpretation. See Freund, *supra* note 121, at 29–30.

<sup>127</sup> Felix Frankfurter to Paul Freund, microformed on Felix Frankfurter Papers, Harvard Law School Library, at Part III, Reel 15, *quoted in* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 633 n.78 (1994). See also ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 479 (“Prepared to reverse *Adkins* but not to distinguish it, Roberts

Interestingly, Frankfurter's understanding may help to resolve a difficulty with the account that attempts to shift the blame to the New York attorney general for failing to request that the Court overrule *Adkins*. Several commentators who question that account have rightly observed that in 1938 Roberts voted in *Erie Railroad v. Tompkins*<sup>128</sup> to overrule the nearly century-old precedent of *Swift v. Tyson*<sup>129</sup> even though neither of the parties had challenged the vitality of that decision.<sup>130</sup> Edward Purcell has plausibly and charitably suggested that Roberts may have felt so badly burned by the *Tipaldo* fiasco that he thereafter revised his approach to such issues.<sup>131</sup> That may be true, but if Frankfurter's understanding is correct, then *Erie* may support rather than impeach the claim that Roberts was consistent in these matters. For when Hughes presented *Erie* to the conference, he announced that: "If we wish to overrule *Swift v. Tyson*, here is our opportunity."<sup>132</sup> Perhaps in part as a result of Hughes's leadership—which may have been prompted by the *Tipaldo* experience—a majority to overrule *Swift* was assembled. In *Tipaldo*, by contrast, Hughes was not prepared to overrule *Adkins*, and as a consequence, no majority to do so could be formed. If this account of the minimum wages cases is correct, then it is hard to see *Parrish* as representing any kind of "yielding."<sup>133</sup>

Indeed, if this account is correct, then it lends support to a possibility that Mr. Shesol entertains but is ultimately reluctant to embrace. One reason that Roberts may have been persuaded to uphold the minimum wage statute in *Parrish*, Mr. Shesol suggests, was the extensive reliance Hughes's majority opinion placed on Roberts' opinion in *Nebbia*: "Following Roberts's own reasoning, Hughes marched to the finish. *Nebbia* had crippled the doctrine of substantive due process, and now *Parrish* finished it off." (pp. 406–07). Had this "af-

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felt that existing alternatives left him no choice but to vote with those who would strike down the New York law"); THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 81 n.89 (1956) ("Mr. Justice Roberts's position in the two cases can be harmonized as the view of one who was unable to distinguish the *Adkins* case but who would accept an opportunity to overrule it.").

128 304 U.S. 64 (1938).

129 41 U.S. 1 (1842).

130 See John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 66–67 (1969); HENDEL, *supra* note 121, at 130; Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 HIST. 286, 296 (1978); Purcell, *supra* note 120, at 289–90.

131 Purcell, *supra* note 120, at 289–90.

132 MASON, *supra* note 58, at 478.

133 I elaborate portions of this account in greater detail in CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 26, at 92–104.

firmation of *Nebbia* brought Roberts on board?” “Perhaps,” Mr. Shesol concedes, but he then adds that “Hughes had cited *Nebbia* in his *Tipaldo* dissent as well—to no discernible effect.” (p. 407). It is true that Hughes cited *Nebbia* in *Tipaldo*, but there he had not been prepared to say of it what he would in *Parrish*, namely, that he found it “impossible to reconcile” *Adkins* with the “well-considered declarations” of the *Nebbia* opinion.<sup>134</sup> Perhaps it was not a mere citation to *Nebbia* that made the difference to Roberts, but rather a frank recognition of its implications for *Adkins*, implications that so many commentators had perceived in the wake of *Nebbia*’s announcement.<sup>135</sup>

## 2. *The Labor Board Cases*

Mr. Shesol’s account of the cases challenging the constitutionality of the National Labor Relations Act is similarly plagued by doctrinal misunderstandings, and again uneasily juxtaposes internal and external explanatory factors. He observes that the drafters of the statute “wrote a preamble to the act that read like a legal brief. It took pains to establish that labor issues were not—as many, perhaps most, of the justices believed—a local concern . . .” (p. 422). It is true that the act’s preamble took such pains, but the notion that many or most of the justices believed that “labor issues” were “a local concern” rests upon yet another deficiency in Mr. Shesol’s grasp of doctrine. It is true that under some circumstances the Court had regarded employment relations as a local matter over which the states alone had jurisdiction.<sup>136</sup> But the Court had made clear in numerous decisions that there were circumstances under which such relations fell under congressional jurisdiction. In several cases the justices had held that industrial disputes might be reached under the Sherman Act where there was proof of intent to restrain interstate commerce.<sup>137</sup> And in the domain of interstate transportation, the Court had upheld the federal Hours of Service Act;<sup>138</sup> the Federal Employers’ Liability Act, which abrogated employers’ common law tort defenses;<sup>139</sup> the Federal

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134 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

135 *See* CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 81–83.

136 *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 107 (1933); *United Leather Workers Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

137 *Bedford Cut Stone Co. v. Stone Cutters’ Ass’n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

138 *Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm’n*, 221 U.S. 612 (1911).

139 *Second Employers’ Liability Cases*, 223 U.S. 1 (1912).

Safety Appliance Act;<sup>140</sup> and the Adamson Act, which regulated both wages and hours of railroad employees during World War I.<sup>141</sup> In 1930, the justices unanimously upheld the self-organization provisions of the Railway Labor Act of 1926 as applied to railway clerks.<sup>142</sup> Seven years later another unanimous bench would uphold the collective bargaining provisions of the 1934 amendments to the Act and their application to back-shop employees.<sup>143</sup>

In view of these many well-established precedents, it is simply extraordinary for Mr. Shesol to claim that Roberts' 1935 opinion invalidating the Railway Pension Act of 1934 "had not only questioned but ridiculed the idea that labor relations had anything to do with interstate commerce." (p. 432). His opinion in *Alton* did nothing of the sort. The majority's view was not that "labor relations" had nothing to do with interstate commerce, but instead that the relationship between interstate commerce and a specific type of labor regulation—retirement pensions for workers—was too attenuated to support federal regulation. What makes this extravagant accusation all the more astonishing is the fact that Mr. Shesol implicitly concedes its inaccuracy a mere two pages earlier. The Court's unanimous opinion upholding the application of the NLRA to an interstate bus company, he writes, could not be considered a "breakthrough," "since interstate bus companies were in the business of carrying people across state lines . . . ." (pp. 429–30).

The fact that this decision upholding the NLRA was regarded as unsurprising underscores the exaggerated nature of Mr. Shesol's claim that "almost no one believed the act was constitutional." (p. 421). It would be more accurate to say that many harbored doubts concerning the constitutionality of certain of its potential applications.<sup>144</sup> Chief among these were labor disputes at manufacturing es-

140 *S. Ry. Co. v. United States*, 222 U.S. 20 (1911).

141 *Wilson v. New*, 243 U.S. 332 (1917).

142 *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) (McReynolds did not participate).

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

144 Consider, for example, the comparative margins by which the NLRA and the Guffey Coal Act were passed in Congress. The NLRA passed the Senate by a vote of 63-12. 79 CONG. REC. 7681, at 2415 (1935). It was passed in the House by a voice vote. 79 CONG. REC. 9731, at 3228 (1935). By contrast, the Guffey Coal Act, which Homer Cummings had told FDR was "clearly unconstitutional," SHESOL, *supra* note 26, at 153, had been pried out of Committee only by the extraordinary intervention of the president, who urged the members not to "permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Franklin D. Roosevelt to Samuel B. Hill, July 5, 1935, *reprinted in* 79 CONG. REC. 13449 (1935). Because of such constitutional doubts, the Guffey Coal Act was passed in the Senate by the much narrower margin of 45-37. 79 CONG. REC. 14084

tablishments. With this concern in mind, as Mr. Shesol reports, the Act's "Findings and Policy" maintained that labor disputes "burdening or obstructing" the free flow of commerce<sup>145</sup> might be "part of a current of commerce that stretched, unbroken, across the nation." In such cases "strikes and other standoffs over wages, hours, pensions, and working conditions" could have "a direct effect on interstate commerce. When workers walked out or sat down, plants were shuttered; when plants were shuttered, goods could not flow." (p. 422). In accordance with this legal theory, "the lawyers of the Labor Board developed a master plan for testing the Wagner Act's constitutionality. They scoured the dockets of appellate courts across the country for labor cases that combined the most abusive practices, the most sympathetic victims, and the most auspicious set of legal issues. The government's lawyers carefully selected cases concerning large companies and small ones, major industries and lesser ones, businesses that manufactured goods, and businesses that provided services—all with direct bearing (the board's lawyers believed) on interstate commerce." (p. 423).

Those charged with administering the statute and defending it in Court certainly shared Senator Wagner's faith in its constitutionality.<sup>146</sup> Charles Fahy, general counsel to the National Labor Relations Board, felt that his job in preparing test cases for the Wagner Act "was immeasurably assisted by the careful draftsmanship of this beautifully drafted statute." Despite the Court's recent decision in *Carter Coal*, he was confident that the NLRA would survive constitutional challenge before the Court.<sup>147</sup> Fahy maintained that "the Wagner 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." "In fact," he confessed, "I thought

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(1935). It passed in the House by a vote of 194-68. 79 CONG. REC. 13666-67 (1935). In the Senate, twenty-four Democrats joined twelve Democrats and one Farmer-Laborite in voting against the Guffey bill; in the House, ninety-three Democrats joined seventy-three Republicans and two Progressives in opposition. See Thomas C. Longin, *Coal, Congress, and the Courts: The Bituminous Coal Industry and the New Deal*, 35 WEST VIRGINIA HIST. 101, 110-111 (1974). For more detail, see, e.g., CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 159-61 (describing the origins of the Guffey Coal Act and the results of the final vote).

145 H.R. REP. NO. 1147 (1935), *reprinted in* UNITED STATES NATIONAL LABOR RELATIONS BOARD, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 3032-33, 3035 (1985).

146 See IRONS, *supra* note 48, at 231-32 (outlining the due process and commerce clause arguments that Senator Wagner used to argue that the Act was constitutional).

147 *Id.* at 252-53 (quoting from author interview with Charles Fahy, June 22, 1978).

it might be sustained by a vote other than Roberts'."148 Fahy was utterly confident 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 . . . ."149

After *Carter* was handed down, NLRB Chairman Warren Madden similarly exuded confidence. Madden insisted that "It is obvious that decisions which relate to work on a commodity before the commodity has begun to move on an interstate journey, or after it has reached the end of an interstate journey, do not justify a prediction that the court will apply the same rule to work on a commodity which is at a mid-point in a long interstate journey." The Court's stream of commerce precedents established that "local" activities, such as those taking place in the Chicago stockyards, were subject to federal control if they were located in a current of interstate commerce. Those precedents made it "obvious," Madden asserted, that the Wagner Act could be applied to "employees in the Chicago stockyards" and to "the workers in a great meatpacking plant." The same was true of other manufacturing concerns located in a current of interstate commerce. "The same reasoning applies to the employees in a great steel mill or to a truck factory to which materials are sent from other states to be assembled and shipped on again," Madden concluded. "The Constitution and the state give the Labor Board jurisdiction over these situations. . . ."150

In contrast to the level of detail in which he covers some of the political history of the Court-packing plan, Mr. Shesol's discussion of the doctrinal issues facing the government lawyers defending the Wagner Act is rather terse and perfunctory—as if it were a discussion almost not worth having. He observes that: "According to commerce clause doctrine . . . some activities had an immediate, direct, or proximate effect on interstate commerce; others, arguably, did not." (p. 422). "Some companies were located amid the 'current' of commerce, others at its beginning or end." "Some industries were 'affected with a public interest,' others were not." (p. 422). What Mr. Shesol does not seem to understand is that the category of "business affected with a public interest" was actually a due process concept rather than a Commerce Clause concept. That concept would play an important role in determining whether the statute's collective bar-

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148 CHARLES LEONARD, A SEARCH FOR A JUDICIAL PHILOSOPHY: MR. JUSTICE ROBERTS AND THE CONSTITUTIONAL REVOLUTION OF 1937, at 109–10 (1971).

149 IRONS, *supra* note 48, at 252–53, 268.

150 3 U.S. L. WEEK 1041, 1041–42 (1936).

gaining provisions could survive a due process challenge.<sup>151</sup> Moreover, this due process concept played an important role in the current of commerce doctrine, under which the Court had held that the only local businesses that could be located in a stream of interstate commerce and thereby affect that commerce directly were businesses affected with a public interest.<sup>152</sup> But Mr. Shesol does not appear to understand this relationship. Instead, he concludes this brief discussion with the vague assertion that “[a]ll these considerations would have some bearing on the Supreme Court’s verdict on the Wagner Act.” (p. 422). One is left with the impression that this complicated, “inexact and inconsistent” body of legal doctrine would have “some bearing” on the Court’s decision; but what kind of bearing that might be, and the extent of its influence, are left unstated and unexplored. Yet even the suggestion that these niceties of constitutional doctrine might have anything to do with the Court’s disposition again rests uneasily next to Mr. Shesol’s earlier intimations that the justices were motivated by ideology and class interests and unconstrained by legal ideas.

Mr. Shesol argues that on the journey to joining the majority in the *Labor Board* decisions, Hughes and Roberts “had traveled different roads, and Roberts had the more difficult passage. Hughes had taken an expansive view of the commerce power for many years,” dating back to his decision in the *Shreveport Rate Case*<sup>153</sup> upholding federal regulation of intrastate rates for rail carriage during his term as an Associate Justice. (p. 431). “His concurrence in *Carter* twenty years later was an aberration, born less of conviction than a desire to avoid the embarrassment of another 5-4 split.” (p. 432). With his “return to form” in the *Labor Board Cases*, Mr. Shesol suggests, Hughes was atoning for his “failure to stand up to the conservatives in *Carter* . . . .” “Roberts, by contrast, had tended to take an orthodox view of the commerce power. He had signed the majority opinion in *Carter*” and, as mentioned previously, in *Alton* “had not only questioned but ridiculed the idea that labor relations had anything to do with interstate commerce.” (p. 432).

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151 See CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 26, at 109–38 (detailing how the due process concept of a business affected with a public interest shaped the analysis of various labor laws).

152 *Id.* at 141–55 (discussing the evolving current of commerce doctrine in connection with business affected with the public interest).

153 234 U.S. 342 (1914) (upholding regulation of intrastate railroad rates under the federal government’s commerce power).

The last of these charges we have disposed of earlier. But there are many other critical things to be said about this set of claims. First, so far as I am aware, there is absolutely no evidence that Hughes concurred in *Carter* not out of conviction but in order to avoid the embarrassment of a 5-4 split. The sources to which Mr. Shesol cites do not support the claim, which appears to be sheer speculation asserted as fact. Second, if the Chief Justice was trying to avoid a 5-4 split, he failed to do so: the Court did in fact split 5-4 on the issue of whether the price regulation provisions of the statute were severable from the labor regulation provisions. This division led Hughes, Brandeis, Stone, and Cardozo to affirm the constitutionality of the price regulation provisions—something the majority declined to do on the grounds that the price regulations were inseverable from the offending labor regulations and therefore must fall along with them. In this respect Hughes did “stand up to the conservatives in *Carter*.” (p. 432).

Third, with respect to the issue presented in the *Labor Board Cases*—whether congressional power under the Commerce Clause reached labor relations in activities of production—Hughes reached the same conclusion in *Carter* as had the majority. Hughes differed with the majority over the severability of the price regulation provisions, but not over the constitutionality of the labor regulation provisions. He stated categorically: “I agree . . . that production—in this case mining—which precedes commerce, is not itself commerce; and that the power to regulate commerce among the several States is not a power to regulate industry within the State.”<sup>154</sup> He went on to add that a particular provision of the labor title of the Guffey Act was invalid not only on nondelegation and due process grounds, but also because it “goes beyond any proper measure of protection of interstate commerce and attempts a broad regulation of industry within the State.”<sup>155</sup> “Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly,” Hughes insisted. “Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution.”<sup>156</sup> In short, Hughes’s position on the Commerce Clause issue was no less orthodox than that of Roberts. The fact that

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154 *Carter v. Carter Coal*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion).

155 *Id.* at 318–19.

156 *Id.* at 317–18.



Roberts joined the majority opinion and Hughes concurred does not differentiate their positions on that issue.

Fourth, the difference of opinion between Hughes and Roberts on the Commerce Clause issue in *Alton* was irrelevant to the issue presented in the *Labor Board Cases*. All of the justices agreed that the employment relations of interstate railroads could be regulated by Congress in some respects, including the protection of self-organization and the requirement of collective bargaining. This much the Railway Labor Act cases, the Federal Hours of Service Act cases, the Federal Employers' Liability Act cases, and the Federal Safety Appliance Act cases made clear. The question in *Alton* was whether the Commerce Clause authorized Congress to mandate the creation of an employer-funded pension system for workers who were admitted by all to be engaged in interstate commerce. The question in the *Labor Board Cases*, by contrast, was whether the effects of the activities of employees engaged in manufacturing could support congressional jurisdiction. The *Labor Board Cases* concerned the depth of the commerce power's penetration into areas of conventional state authority, such as production; *Alton* concerned the scope of that power's lateral reach with respect to employees admittedly engaged in interstate commerce.

The irrelevance of *Alton* to the disposition of the commerce power issue in the *Labor Board Cases* becomes apparent when one investigates the manner in which the precedent was treated in that litigation. The Jones & Laughlin Corporation did tersely invoke *Alton* in its brief,<sup>157</sup> but everyone else treated the case as inapposite. The brief for the NLRB felt no need to engage it;<sup>158</sup> the lower federal court decisions invalidating the application of the Act to the various manufacturing concerns did not invoke it;<sup>159</sup> Chief Justice Hughes felt no need

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157 See 33 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 333, 354, 371, 385, 414 (Philip B. Kurland & Gerhard Casper eds., 1975) (providing examples of how the *Jones & Laughlin* Court cited *Alton* in its brief; for instance, at 333 as the last case in string-cite; at 354 and 371 as "see also" cites; at 385, reiterating point made at 354; and at 414 within a due process argument).

158 There was only one inconsequential citation of *Alton* in the NLRB's brief. See *id.* at 250 ("The comment of the Court in *Railroad Retirement Board v. Alton R.R. Co.*, 295 U.S. 330, is apt here (p. 373): "The meaning of the commerce and due process clauses of the Constitution is not so easily enlarged by the voluntary acts of individuals or corporations.""). The brief did not treat it as a precedent the Government needed to distinguish.

159 See the reproduction of the circuit court opinions in *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 79-84 (1937) (McReynolds, J., dissenting) (describing in detail three lower court cases without mentioning *Alton*).

to grapple with it in his majority opinion;<sup>160</sup> and the Four Horsemen in dissent did not so much as mention it.<sup>161</sup> This strongly suggests that the Government lawyers arguing the cases, and the judges and justices adjudicating them, did not view the Commerce Clause holding in *Alton* as having any bearing on the issues raised in the *Labor Board Cases*.

With respect to the Commerce Clause issue presented in the *Labor Board Cases*—whether the Commerce Clause empowered Congress to regulate the labor relations of employers engaged in production—the records of Hughes and Roberts revealed no meaningful differences. Roberts had joined Hughes’s majority opinion in *Schechter*. As mentioned previously, they had reached the same conclusions in *Carter Coal* with respect to the power of Congress to regulate labor relations at the mine. In 1933 both Hughes and Roberts had joined Sutherland’s opinion holding that, because the effect on interstate commerce of a union’s attempt to secure a closed shop through a strike and boycott of a structural steel manufacturer was “indirect,” it was beyond the reach of the commerce power under the Sherman Act.<sup>162</sup> With respect to the question of federal power to regulate production, Hughes had joined Roberts’s opinion in *Butler* restricting the power of Congress to do so through conditional spending. Indeed, Justice Stone reported that when Hughes presented the *Butler* case to the conference, he denounced the AAA as “a regulation of agriculture within the states and an invasion of the reserved powers of the states.”<sup>163</sup> In the month preceding *Butler* Hughes had joined Roberts’ opinion invalidating a regulatory federal excise tax on liquor dealers on the ground that it constituted “a clear invasion of the police power, inherent in the States . . . .”<sup>164</sup> So far as I am aware, there was not a single case in which Hughes and Roberts had reached divergent conclusions on the power of the federal government to regulate local activities of production under the Commerce Clause.

It is true that as an Associate Justice, Hughes had written in the *Minnesota Rate Cases* that “the execution by Congress of its constitu-

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160 See *id.* at 30–43 (citing and discussing many contemporary commerce clause cases but not mentioning *Alton*).

161 See *id.* at 76–103 (McReynolds, J., dissenting) (neglecting to mention *Alton* even in dissenting opinion).

162 *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 107 (1933) (“If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts . . .”).

163 Memorandum Re: n. 401, *United States v. Butler* (Feb. 4, 1936) (Harlan Fiske Stone MSS, Box 62, on file with Manuscript Division, Library of Congress).

164 *United States v. Constantine*, 296 U.S. 287, 295 (1935).

tional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter,"<sup>165</sup> and that this premise formed the basis of his opinion in the *Shreveport Rate Cases* holding that Congress could regulate the intrastate rates charged by interstate rail carriers where it was necessary to prevent discrimination against interstate commerce. But one must exercise care in attributing too much significance to these statements and decisions. For a short time before Hughes wrote these opinions, he joined a unanimous decision in which it was stated that Congress may protect interstate commerce "no matter what may be the source of the dangers which threaten it."<sup>166</sup> The author of that opinion upholding the Federal Safety Appliance Act was Willis Van Devanter, whose views of the commerce power were quite orthodox. In fact, Van Devanter joined Hughes's opinions in both the *Minnesota Rate Cases* and in *Shreveport*. So did Justice Day, who four years later would write the majority opinion in *Hammer v. Dagenhart*.<sup>167</sup> The major opinions applying and extending the *Shreveport* doctrine<sup>168</sup> were typically unanimous,<sup>169</sup> and indeed Justices Sutherland and Van Devanter each authored one of them.<sup>170</sup> And Justice Roberts apparently felt no difficulty in joining opinions applying the *Shreveport* doc-

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165 *Simpson v. Shepard (Minnesota Rate Cases)*, 230 U.S. 352, 399 (1913).

166 *S. Ry. v. United States*, 222 U.S. 20, 27 (1911).

167 247 U.S. 251 (1918).

168 *See Florida v. United States*, 292 U.S. 1, 12 (1934) (citing *Shreveport* for the proposition that Congress has the power to require that intrastate rates may not be used to hinder interstate commerce); *United States v. Louisiana*, 290 U.S. 70, 74 (1933) (applying the *Shreveport* rule that Congress has the power to protect interstate shippers from discriminatory intrastate rates); *Colorado v. United States*, 271 U.S. 153, 164 (1926) ("The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U.S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce."); *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 485 (1924) (citing *Shreveport* for the proposition that federal control of intrastate commerce is appropriate when necessary for the maintenance of adequate interstate commerce); *R.R. Comm'n of Chicago v. Chicago, Burlington & Quincy R.R., Co.* 257 U.S. 563 (1922) (applying generally the *Shreveport* discrimination rule).

169 At least the opinions were unanimous as to the constitutional issue. *See United States v. Village of Hubbard*, 266 U.S. 474, 480–81 (1925) (McReynolds, J., dissenting) (writing separately to call the Court to address the limits of the Interstate Commerce Act). In *American Express Co. v. South Dakota ex rel. Caldwell*, 244 U.S. 617, 629 (1917), Justice McKenna dissented without opinion. McKenna had joined the majority in *Shreveport*, so it is unlikely that his dissent was based on the Commerce Clause issue.

170 *See Alabama v. United States*, 279 U.S. 229, 230 (1929); *Ill. Cent. R.R. Co. v. State Pub. Utils. Comm'n*, 245 U.S. 493, 502 (1918).

trine.<sup>171</sup> Perhaps this may be attributed to the fact that the *Shreveport* doctrine was widely understood to be confined to the domain of rail transportation. No federal court relied on the *Shreveport* doctrine to support federal regulatory power outside the railroad context until 1934, and the Supreme Court did not do so until 1937.<sup>172</sup> A quick review of the *United States Reports* similarly discloses no reliance on the precedent by counsel in the major commerce power cases decided in the two decades following its announcement.<sup>173</sup> When Justice Cardozo wrote in his *Carter Coal* dissent that federal regulation of the price at which coal was sold in intrastate commerce could be upheld “[w]ithin rulings the most orthodox,” he relied upon the *Shreveport Case* and its progeny as the authority for this assertion.<sup>174</sup> There was nothing “unorthodox” about Hughes’s Commerce Clause jurisprudence.

In short, there appears to be no warrant for Mr. Shesol’s claim that the *Labor Board Cases* marked a “return to form” for Hughes, but not for Roberts. Insofar as the questions of federal power raised in those cases were concerned, the antecedent views of the two Justices were substantially identical. Yet Mr. Shesol contends that “[t]he same pressures—doctrinal, political, personal” (we are left to guess about the comparative significance of each of these)—“that had nudged Roberts into the liberal camp”—note again the language of attitudinalism—“on the minimum wage had also, it now appeared, changed his mind about the commerce clause.” (p. 432). Yet there is an important difference in Mr. Shesol’s analysis of the role played by these pressures in *Parrish* and the *Labor Board Cases*, respectively. With re-

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171 See, e.g., *Florida*, 292 U.S. at 12 (citing *Shreveport* for the proposition that Congress may require that intrastate agencies to operate in a way that does not cripple interstate commerce); *Louisiana*, 290 U.S. at 70 (applying the *Shreveport* rule that the federal government can prohibit intrastate economic practices that are prejudicial to interstate commerce).

172 Cushman, *supra* note 79, at 1130–31 (2000) (“For if you Shepardize *Shreveport*, you will find that every case following it from its announcement in 1914 up to the mid-1930s involved regulation of a business affected with a public interest: railroads.”).

173 For examples of major commerce power cases that do not cite *Shreveport*, see, e.g., *United Leather Workers Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 458–61 (1924). See also *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 350–81 (1922); *Stafford v. Wallace*, 258 U.S. 495, 503–12 (1922). *Shreveport* was invoked at argument in *Bd. of Trade of the City of Chicago v. Olsen*, 262 U.S. 1, 16–31 (1923), but by the party arguing that the Grain Futures Act was *unconstitutional*. *Id.* at 24. It was not referred to in the decision upholding the Act.

174 *Carter v. Carter Coal*, 298 U.S. 238, 328–29 (1936) (Cardozo, J., dissenting) (citing *Shreveport* for the proposition that Congress has the power to protect the business of interstate rail carriers when local rates are so low that they divert business from interstate competitors).

spect to *Parrish*, recall that Mr. Shesol merely argues that such pressures prompted Hughes and Roberts to face the constitutional issue squarely and to express their actual views on the merits. In that case, Mr. Shesol was not prepared to “suggest that either justice changed his basic beliefs in the face of events.” (p. 415). In the *Labor Board Cases*, by contrast, Mr. Shesol asserts that these pressures compelled Roberts—but not Hughes—to change his mind on a matter of doctrine. But in view of the substantial identity of their views of the scope of federal power to regulate production, if the *Labor Board Cases* marked a change of mind rather than a return to form for Roberts, then they did so for Hughes as well.

It is my view that the *Labor Board Cases* marked a significant doctrinal departure for neither justice, and there were many contemporaries who took the same view. Numerous commentators writing in the pages of the law journals perceived no significant discontinuity in Commerce Clause doctrine, and many lower federal court judges, both Democratic and Republican appointees, believed that *Carter Coal* remained good law.<sup>175</sup> As Solicitor General Stanley Reed wrote to Homer Cummings: “I do not see any clear inconsistency between Wagner on the one hand and the Guffey or N.R.A. decision on the other. The Wagner decision is based on the right to remedy situations which obstruct or tend to obstruct interstate commerce. The Guffey and the Poultry Code were aimed directly at wages, hours, and labor conditions.”<sup>176</sup> These observers believed that the craftsmanlike labors of the draftsmen who prepared the statute and the efforts of the government lawyers who selected, cultivated, briefed, and argued the test cases had not been superfluous, but in fact had played a vital role in reconciling the Administration’s regulatory ambitions with the governing constitutional authorities. Surely it is an overstatement to assert, as Mr. Shesol does, that the *Labor Board Cases* recognized “a federal government with all the authority it needed, unencumbered by the doctrine of state sovereignty” and “opened the door to a dramatic expansion of federal power.” (p. 434). As Hughes wrote in the *Jones & Laughlin* opinion: “Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of

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175 See CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 177–80 (recounting the political and academic reaction to the Labor Board Cases).

176 Stanley Reed, Memorandum for the Attorney General, April 22, 1937, National Archives, Washington, D.C., Dept. of Justice 114-115-2, *quoted in* LEUCHTENBURG, *supra* note 33, at 318–19.

our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."<sup>177</sup>

Mr. Shesol maintains that "virtually everyone on both sides of the fight believed: that the Supreme Court, seeking to save itself from being packed, had simply surrendered. The Court had bent so as not to break." (p. 434). But this assessment of the doctrinal significance of the opinions and their intended effect on the Court-packing plan is belied by the Administration's own reactions to the decisions. Indeed, part of the reason that Roosevelt continued to resist compromise on the Court-packing bill even after the decisions in the *Labor Board Cases* was that he, unlike Mr. Shesol, did not see the Court's decisions as dramatically expanding the scope of congressional power under the Commerce Clause. As Mr. Shesol himself reports:

Analyses by Justice Department lawyers concluded that "the new definition of interstate commerce rests on a precarious foundation" and that the Court still "may not sustain any of" the wages and hours bill that Cohen and Corcoran were drafting. Federal regulation of that nature might still be out of bounds. The *Jones & Laughlin* decision, as some (including Hughes) pointed out, was not wholly out of keeping with existing doctrine; it modified existing paradigms (the "direct-indirect" test; "stream of commerce" theory) rather than upending them. And because the opinion had not overruled *Carter* or *Schechter* but merely dismissed them as "not controlling here," they could still be cited as precedent.

(p. 438).

So, when asked by a reporter about the effect of the Wagner Act opinions on the Court bill, FDR replied that those decisions were limited to collective bargaining. He said he had asked his advisers whether the decisions applied to child labor, or minimum wages, or maximum hours; their reply, he said, was "the Lord only knows!" (p. 437). And Mr. Shesol stresses that:

Roosevelt's skepticism was not just for show. It reflected a consensus among his advisers that while the administration had reclaimed a bit of lost ground, two thirds of all workers—those in service jobs and in industries that were clearly intrastate in character—had nothing to gain from the decisions. Also, as Robert Jackson recalled, Roosevelt and his aides felt that as great as the victory appeared, the justices were "now going to whittle it down by decision of individual cases until it won't mean anything." . . . So Roosevelt saw no choice but to keep on fighting . . .

(p. 438).

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<sup>177</sup> Nat'l Labor Relations Bd. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (internal citations omitted).

This leaves one wondering why, if the Court “had simply surrendered” in the *Labor Board Cases*, it did not do so clearly enough to achieve the putative objective of getting the Administration off of its back. If the aim was to assure New Dealers that the Court had capitulated to their constitutional vision, one wonders, then why did Hughes write an opinion leaving so many of them doubtful that the Court had in fact done so?

Mr. Shesol is prepared to concede that the matter may have been more complicated. “Actual experience,” he recognizes, “—in the form of the sit-down strikes—may too have had an effect” on Roberts’ votes in the *Labor Board Cases*. (p. 432). This impresses me as the more plausible claim—with respect to both Roberts and Hughes—but it must be analyzed with care. First, as Melvyn Dubofsky has observed, the scale of industrial unrest in 1937 was not historically singular. “[O]nly 7.2 per cent of employed workers were involved in walkouts . . . and their absence from work represented only 0.0043 per cent of all time worked.”<sup>178</sup> These percentages were approximately the same as those experienced during the strike wave of 1934, which Commissioner of Labor Statistics Isadore Lubin had concluded “could not match 1919 in intensity, duration, or number of workers involved.” Second, it appears that the United Auto Workers, who waged the largest and most serious set of sit-down strikes, did so because they doubted (quite reasonably, it appears) that they had sufficient votes to win recognition elections under the provisions of the Wagner Act.<sup>179</sup> It is therefore not clear that upholding the Act offered any meaningful prospect of ameliorating those particular labor disturbances. Moreover, the largest of those strikes—the one at the General Motors plant in Flint, Michigan—was actually settled on February 11, 1937, the day that the *Labor Board Cases* were being argued, and more than two months before the Court rendered its decisions.<sup>180</sup>

The “actual experience” of the sit-down strikes may, however, have persuaded the justices of the accuracy of the Government’s theory of the cases: that a labor disturbance at a manufacturing plant could cause a blockage in a flow of interstate commerce, and that the fed-

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178 Melvyn Dubofsky, *Not So “Turbulent Years”*: *Another Look at the American 1930’s*, 24 *Amerikastudien* 5, 12–13 (1979).

179 *See id.* at 16 (“[T]he sit-down technique was chosen consciously to compensate for the union’s lack of a mass membership base.”); SIDNEY FINE, *SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937*, at 111, 118–19, 144, 181–82, 185–88, 255–56 (1969) (describing the history of the strike and the social and political forces that shaped it); J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* 124–26, 137 (1968) (“The UAW was then too weak to risk elections.”).

180 FINE, *supra* note 179, at 303–12 (describing the settlement of the GM strike).

eral government was empowered to employ reasonable means to prevent such blockages from occurring, and to dislodge them once they had formed. In the peroration of his argument before the Court, Labor Department solicitor Charles Wyzanski alluded to the sit-down strikes in Michigan immediately before concluding that: “where two colossal forces are standing astride the stream of commerce threatening to disrupt it, it cannot be that this Government is without power to provide for the orderly procedure by which the dispute may be adjusted without interruption to the stream of commerce.”<sup>181</sup> Here we see an instance in which emphasis on the significance of an external factor—a social fact that was not part of the formal record before the Court—if properly understood, is congruent with an internal account.

### III. THE RELATIONSHIP BETWEEN THE LEGAL AND POLITICAL STORIES

Mr. Shesol’s final analysis of the relationship between the political story and the legal story reproduces the tensions manifest in his relation of the legal story. Here again, internal and external factors lie together uneasily. To his credit, he recognizes that the constitutional revolution that culminated in the affirmation of the New Deal order was spread out over a longer period of time than the familiar reference to the “Constitutional Revolution of 1937” would suggest. He rejects Edward Corwin’s assertion that American constitutional law

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<sup>181</sup> Arguments in Cases Arising Under Labor Acts Before the Supreme Court, Sen. Doc. 52 (75-1), 173–74 (1935). Mr. Shesol makes fewer mistakes in his briefer discussion of the *Social Security Cases*, though he does make the occasional curious claim. For instance, he notes that Cardozo voted in conference with Stone, Brandeis, and Roberts “to dismiss the challenge to the pensions provision on the grounds that the plaintiff lacked standing to sue. Hughes, however, had insisted on hearing the case, possibly with an eye to ending the term emphatically with another landmark liberal decision.” Why Brandeis, Stone, and Cardozo would have been opposed to ending the term in this manner is not clear. Mr. Shesol adds that at the conference Hughes “joined the four conservatives (whose motives, surely, were different than his) in voting to consider the act on the merits.” SHESOL, *supra* note 2, at 435. The inference to be drawn here is that the conservatives voted to decide the case on the merits because they wanted to invalidate those provisions of the statute. This might make sense had the vote on the merits been 5-4 in favor of upholding the statute. But the tally was 7-2. Van Devanter and Sutherland voted with Hughes in the majority. Mr. Shesol also maintains that Cardozo “did affirm the portion of the AAA ruling that concerned the general welfare clause, but effectively reversed the part that constrained the taxing and spending power.” *Id.* at 454. Mr. Shesol does not explain this claim, so it is not clear on what he bases it. But it is worth pointing out that justices such as Hughes, Roberts, Van Devanter, and Sutherland may very well have thought that there was an important distinction to be drawn between using the fiscal powers to regulate agricultural production in the states and using those powers to finance retirement pensions and unemployment benefits.



had never undergone a revolution “so radical, so swift, so altogether dramatic’ as the one the Supreme Court completed during those few months of 1937” as “premature—but only slightly.” (p. 519). “Just as the revolution took some time to set in motion—the first shots, with hindsight, appear to have been cases like *Nebbia* and *Blaisdell* (both in 1934), or even their antecedents,” he observes, “it took some time to complete.” (p. 519). Perhaps thinking of such Commerce Clause landmarks as *United States v. Darby* (1941) and *Wickard v. Filburn* (1942), Mr. Shesol agrees that “several years would pass before *Jones & Laughlin* and other liberal triumphs had the ring of finality.” (p. 519).

Mr. Shesol also recognizes the importance of transformative Court appointments to the advancement and consolidation of the constitutional revolution. “It is unlikely,” he writes, “that the transformation in the Court’s outlook would have been either sweeping or enduring without a concurrent transformation in its personnel.” (p. 519). Mr. Shesol continues:

By 1942, Roosevelt—who had completed his entire first term as president without naming a single justice—had appointed all the justices of the Supreme Court but two: Stone, whom FDR elevated to chief justice when Hughes retired in 1941, and Roberts. This new Court, which included Felix Frankfurter and Robert Jackson, effectively settled the argument that had dominated Roosevelt’s first term as well as the preceding three decades—the judicial and political debate over the constitutionality of economic reform. Congressional power to regulate commerce, the majority now ruled, was virtually without limit. The increasingly nebulous distinction between “direct” and “indirect” commerce [effects] was finally discarded.

(pp. 519–20).

Mr. Shesol further reports that “[d]ecisions grounded in . . . the due process clause [and] the contracts clause”—which he persists in characterizing as “the unloved doctrinal legacies of *laissez-faire*”—“were overturned in short succession, leaving no major area of constitutional law unaltered.<sup>182</sup> The Court, at long last, had reconciled itself to the twentieth century.” (p. 520).

Roosevelt thought that this process had taken “too long,” but Mr. Shesol quite judiciously sees some value in gradual, deliberate change. He finds appealing “another way of looking at the lag between his signing of New Deal laws and the Court’s endorsement of them. ‘In a democracy,’ [Roosevelt’s] former aide Stanley High wrote, “‘people have time to catch their breath.’ And the Constitu-

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<sup>182</sup> For an exploration of potential limits on the commerce power that lingered into the early 1940s, see CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 212–19.

tion, as James Bryce observed years earlier, ‘secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it.’” So

whatever the motives of Roosevelt’s critics, it must be acknowledged that they provoked a debate about the constitutional principles of the New Deal—a debate that arguably needed to take place and that the congressional opposition was too enfeebled to lead. The belief in strict limitations of governmental power, having held sway in courtrooms for decades, deserved to be heard one more time by the bench, the public, and the president himself. Not to be heeded, necessarily, but at least to be heard. Beginning with the first New Deal cases, the Court required FDR to answer a serious and sustained constitutional critique. In the end, his position prevailed; and his reforms, most people agreed, stood on more solid ground.

(pp. 520–21).

As Hughes declared before a joint session of Congress in January of 1939: “If our checks and balances sometimes prevent the speedy action which is thought desirable . . . they also assure in the long run a more deliberate judgment. And what the people really want they generally get.” (p. 528).

Yet even here Mr. Shesol reverts to characterizing Hughes and Roberts as the moving parts in the story. Roosevelt’s transformative appointments were necessary, Mr. Shesol explains, because “Hughes and Roberts soon parted company with the Court’s true liberals, though not in every case and not quite to the degree that Roosevelt had feared. After 1937, the two swing justices were more inclined than before to sustain economic regulations but were less deferential toward the other branches than their newer brethren were.” (p. 519) The suggestion again is that Hughes and Roberts became more liberal in 1937, then became more conservative thereafter, though not as conservative as they had been in 1935 and 1936. Left unexplored is the possibility that they voted more frequently (though not invariably) to uphold economic regulations in 1937 and thereafter because the statutes that came before the Court in those years in their view typically rested on a surer constitutional foundation—owing in no small part to the lessons that legislative draftsmen and government lawyers had learned from the legal failures of the early New Deal.<sup>183</sup>

Indeed, Mr. Shesol’s final analysis of the crisis strongly reasserts the language of movement that has suffused his account, and his verdict on the justices in motion is not altogether kind. He regards it as “an abiding irony that so much of this constitutional revolu-

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<sup>183</sup> See *id.* at 182–207; Cushman, *supra* note 51 (explaining how congressional draftsmen reworked legislation to respond to the constitutional concerns of Supreme Court justices).

tion . . . occurred during the tenure of Charles Evans Hughes,” the Man on the Flying Trapeze. (p. 521). As New York’s governor, Hughes “had been known as a reformer, but never a revolutionary.” Hughes “placed his faith” in “rational, gradual process, the slow unfolding and maturing of ideas.” (p. 521). “Through the 1935–36 term this left him uncomfortably—and untenably—caught between the Court’s two camps.” “At the height of the constitutional crisis,” Mr. Shesol reports in what he regards as a telling episode, “a dance company performed an interpretation of the Supreme Court. The three liberals danced on one side, the five conservatives (including Roberts) on the other, and Hughes flitted back and forth between them. This once godlike man had become a tragic, or tragicomic, figure.” (p. 521). In 1936, Pearson and Allen charged that Hughes “became a weak-kneed oscillator between the two wings of the Court, until he fell, discredited and exhausted, in the middle.”<sup>184</sup> Appropriating their vocabulary, Mr. Shesol asserts that “like Roberts, Hughes swung back and forth as if he believed that the mere fact of his oscillation, his refusal to alight for long in either camp, established some kind of balance.” (p. 521). But if this was his strategy, Mr. Shesol concludes, it did not succeed. “If a middle ground existed on that bitterly divided Court, the Chief Justice never found it.” (p. 521). Instead, as he writes of *Tipaldo*, while “Hughes still clung to the center, it was an illusion, a vacuum, a vanishing point.”<sup>185</sup> (p. 220).

Mr. Shesol insists that it was “unfair” for the Chief Justice’s critics to cast him as “King Canute, foolishly trying to reverse the tide.” (p. 521). “Hughes was not trying to hold the law or the nation back; rather, he seemed to believe that he could advance the interpretation of the Constitution by minute degrees, by fine shadings, by cleverly distinguishing away precedents instead of boldly overruling them.” True, “the judicial process is most often an incremental one.” (p. 521). But Hughes, we are told, wasn’t always mindful of what Mr. Shesol understands: that “there are times when progress—in law and policy—must be made by bold strokes and clean breaks, if the government is not to fall dangerously out of step with social and economic realities. The 1930s was one of those times.” (pp. 521–22).

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184 PEARSON & ALLEN, *supra* note 55, at 97.

185 This rather sharp judgment is particularly curious in view of the fact that Brandeis, Stone, and Cardozo each explicitly joined Hughes’s *Tipaldo* dissent, 298 U.S. 587, 631 (1936), and that Stone began his separate dissent, which was joined by Brandeis and Cardozo, with the affirmation: “I agree with all that the Chief Justice has said.” *Id.* When four justices of the caliber of Hughes, Brandeis, Stone, and Cardozo all have agreed with a particular legal conclusion, one might reflect long and hard before pronouncing it illusory or vacuous.

Mr. Shesol grants that: “Whether the Chief Justice saw himself as responding to the dictates of the cases at hand, or was acting to save the Court or country” in 1937 “can never be known . . .” (p. 522). But he does not appear to take seriously the possibility that Hughes might have been voting his conscience in the cases that came before the Court all along, and that whether he ended up voting with the “liberals” or the “conservatives” turned on the particular issues presented in particular cases. Instead he credits Hughes with having “the acumen to recognize the inevitable.” (p. 522). He recognized that the Court could not continue to resist “the popular urge . . . for what in effect was a unified economy.” He came to this realization “too late to prevent some of the worst excesses of the 1935–36 term, but soon enough to undermine the Court bill and then to lead a steady, purposeful march toward a more flexible interpretation of the Constitution.” (p. 522). In the end, Hughes “kept faith” with the man he had been in 1910, when he had “advised a group of Yale students that ‘whether you like it or not, the majority will rule. . . . I believe you will come to put your trust, as I do, in the common sense of the people of this country, and in the verdicts they give.’” (p. 522).

But this portrayal of Hughes as a re-converted simple majoritarian cannot account for the fact that he continued in 1937 and thereafter to vote to invalidate economic regulations that he thought violated the Constitution.<sup>186</sup> Nor can it explain his hesitation to uphold the provisions of the Fair Labor Standards Act regulating wages and hours of all employees engaged in “production for commerce” under the commerce power in *United States v. Darby*.<sup>187</sup> To the end of his judicial career, Hughes continued to maintain that the Constitution placed significant limits on the power of the people’s democratically-elected representatives in the domain of political economy.

At the end of his account, Mr. Shesol frankly engages the debate between internalists and externalists, and he has some critical things

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186 See *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55 (1937) (invalidating a gas proration order issued by the Rail Road Commission of Texas); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937) (holding that an economic regulation that discriminated between mutual companies and stock companies violated the equal protection clause); *R.R. Comm’n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 584–85 (1940) (Roberts, J., McReynolds, J., and Hughes, C.J., dissenting) (disagreeing with opinion upholding a commission’s oil proration order); *United States v. Rock-Royal Cop.*, 307 U.S. 533, 583–87 (1939) (Roberts, J., and Hughes, C.J., dissenting) (dissenting because the order in question deprived the appellees of their property without due process of law in violation of the Fifth Amendment).

187 See CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 26, at 208–09 (“At the *Darby* conference, Hughes expressed substantial reservations about the power of Congress to regulate all ‘production for commerce.’”).

to say to each camp. In the course of his discussion he reveals that he does not understand the debate very well, and he attributes to at least some of the participants anxieties about adjudication, and aspirations to resolve global questions about judicial behavior, that I do not believe they harbor. In addition, he contradicts his own dominant historiographical premises, and he fails to provide any useful framework for evaluating the questions of causation that have so engaged academic historians.

Mr. Shesol notes that: “Hughes objected violently to the idea that any decision of the period was ‘influenced in the slightest degree by the President’s attitude, or his proposal to reorganize the Court.’ The claim, he insisted, was ‘utterly baseless.’” (p. 523). He correctly reports that, though many contemporaries subscribed to the switch-in-time thesis, “[d]ecades later . . . a number of historians, legal scholars, and others would question the claim. Some, like Chief Justice William Rehnquist, agreed that Roosevelt won the war, but believe that ‘he won it the way the Constitution envisions such wars being won—by the gradual process of changing the federal judiciary through the appointment process.’ Others place greater weight on the doctrinal changes that preceded the Court fight and doubt that the events of 1936 and 1937 had much (or anything) to do with the shift in doctrine.” (pp. 522–23).

Mr. Shesol maintains that this debate rests on “a false dichotomy.” This may be true, but if it is, it is certainly not the dichotomy that Mr. Shesol describes. He poses the dichotomy as one between “the idea that the Court is either a purely legal institution or a political body,” between the claims “that justices are either impervious to social, political, and cultural influences or utterly at their mercy.”<sup>188</sup> The internalist position is, on this account, particularly laughable. Such people apparently believe that the Court is “a vacuum,” that the Court building “has a soundproof room.” They subscribe to “the myth of the Court as ‘a ‘vehicle of revealed truth’ (as one scholar put it, sardonically), incapable of doing that which the law and the facts did not require . . . .” (p. 523).

It is hard to know about which participants in the current debate Mr. Shesol is writing here—the sardonic quotation is from the title of

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<sup>188</sup> Among the other “many unhelpful antitheses that prevailed at the time and persist to this day” that Mr. Shesol indicts in this passage are the ideas “that the framers’ intentions are either easily discernible or always ambiguous (or even irrelevant)” and “that legal doctrines are either preordained by the Constitution or are artificial constructs . . . .” SHESOL, *supra* note 2, at 523.

a book published by Alpheus Thomas Mason in 1953<sup>189</sup>—but the views outlined by Mr. Shesol do not correspond to those of any constitutional historian of the period with whose work I am familiar. These antitheses are built on a misunderstanding of the debate. The participants have not sought to determine what “the Court is” or how “justices are.” They have been interested in understanding the best explanation of certain events and their causes. Various participants see various internal and external factors as having greater or lesser explanatory power with respect to those events. But so far as I am aware, no one takes the extreme positions with which Mr. Shesol takes issue. It is no revelation that the “reality . . . is more complex” (p. 523) than the caricatured options Mr. Shesol has presented. Everyone understands that.

Mr. Shesol then goes on to assert that: “At its core, this is not a debate about the timing of the transformation. It is an argument about the nature of the judicial process, and what makes judges decide as they do.” (p. 523). I won’t presume to speak for others, but I will hazard the assumption that I am not alone in thinking that the debate is in fact about the timing of and the reasons for the transformation. It is not about an attempt to understand *the* nature of *the* judicial process, nor about what makes *judges* decide as they do. It is instead an effort to understand particular historical actions of particular historical actors, to achieve the best understanding of a discrete historical phenomenon, rather than to derive covering laws that might apply across person, place, and time. I would consider it irresponsible to infer from the resolution of that discrete issue any universal proposition about whether we live under the rule of law or the rule of men, and I assume that my colleagues on both sides of the debate generally would agree.

Because he misunderstands the nature of the enterprise in which constitutional historians have been engaged, Mr. Shesol misdiagnoses the motivations of those who find the internalist account more persuasive. “To acknowledge that external events play a role in decisions is frightening to many,” Mr. Shesol explains, “for it suggests that the judicial system is, in the end, not one of laws but of men—and thus vulnerable to the prejudices and whims and base instincts of men.” (p. 523). This is a substantial sociological claim, and yet Mr. Shesol presents no evidence to support it. Such a speculative claim to psycho-historiographical insight reminds one of Justice Cardozo’s famous dissent in *United States v. Constantine*, where he ridiculed the

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189 MASON, *supra* note 58.

Court's invalidation of a federal tax on liquor dealers. Notwithstanding the "professed" purpose of the statute to raise revenue, Cardozo observed, the majority held that another, illegitimate purpose "not professed, may be read beneath the surface," and on the basis of that imputed purpose the statute was declared invalid. "Thus," Cardozo concluded, "the process of psychoanalysis has spread to unaccustomed fields."<sup>190</sup>

In venturing his own recipe for analysis, Mr. Shesol makes some statements that many readers may find hard to take. "Too often," he tells us, "the Hughes Court's internal conflict has been portrayed as one between liberal justices who were responsive to the national emergency and conservative justices who were indifferent to it." (p. 524).<sup>191</sup> This might be seen as a little much coming from someone who has argued that Sutherland and his fellow conservatives' response to the New Deal and their defense of "indifferent government" was driven by a devotion to the "stern discipline" of a Spencerian "severity" that would "exterminate" the "incapable," the "imprudent," the "idle," and the "weak." (p. 69). Mr. Shesol then tells us that: "Like all judges, the Nine Old Men were imbued with an ethic of impartiality." (p. 523). Again, this contention rests uneasily next to his earlier claims that the Four Horsemen were driven by a fanatical devotion to Social Darwinism and *laissez-faire*. "They were constrained by precedent, procedure, doctrine"—how doctrine differs from precedent in Mr. Shesol's view is not entirely clear—"and the particular cases in front of them, all of which limited their range of maneuver." (p. 523). But recall that much of Mr. Shesol's account is written as if these internal legal factors did not in fact operate as meaningful constraints on judicial action, which was instead determined by extra-legal factors. Moreover, if their "range of maneuver" was limited by these internal legal factors, then how were the justices to make the "bold strokes and clean breaks" that Mr. Shesol calls for?

Mr. Shesol asserts more plausibly—if uncontroversially—that the justices "were not merely judges; they were men—politically minded and socially aware men. All, to varying degrees, were attuned to

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190 *United States v. Constantine*, 296 U.S. 287, 298–99 (1935) (Cardozo, J., dissenting).

191 *See* SHESOL, *supra* note 2, at 524 ("In truth, both sides responded to the emergency as they themselves defined it: the liberals by giving the other branches of government greater room to relieve human suffering through new experiments; the conservatives by waging a last stand for 'individual initiative, self-reliance, and other cardinal virtues which I was always taught were necessary to develop a real democracy,' as George Sutherland wrote a friend in 1937.").

changes in the climate of opinion and mindful of the level of public esteem for their institution and themselves as individuals.” (pp. 523–24). This may be so, but note that it does not do a great deal to help explain the continued resistance of the Four Horsemen. Those justices do not seem to have had much interest in making sure that they got on the right side of history.

Mr. Shesol concludes that the justices “were neither oblivious to life outside their chambers nor immune to feelings of pride, shame, vanity, rage, regret . . .” (p. 524). “They were capable of change: growth, regression, and inconsistency. They were, again to different degrees, open to influence by legal briefs, oral arguments, pressure from their peers, and, not least, national events.” (p. 524).

All of this is perfectly plausible, but with the possible exception of the minimum wage cases, Mr. Shesol offers no sustained effort to identify the salient causal elements and to demonstrate the causal relationships in any individual instance. Instead, this passage again calls attention to the lack of a sense of historiographical coherence in Mr. Shesol’s account. He has tried to place what he sees as all of the potentially relevant factors on the table, but he never does so in a way that helps the reader to make sense of the Court’s pattern of behavior. The challenge, as I see it, is to integrate the various factors that one believes help to explain the Court’s behavior into an account that helps the reader to understand how these factors were related—not just that they are possible explanatory variables. In Mr. Shesol’s case, the challenge is heightened due to the fact that some portions of his interpretive account conflict with or are at least in considerable tension with other portions.

This may in part account for the fact that Mr. Shesol ultimately does not confront that challenge. Instead, on the crucial issue, he punts. “It is, in the end, impossible to know what sways a judge,” he concludes. (p. 524). “Even the judges themselves do not always know whether their decisions are driven, in the main, by doctrine or emotion, by the dictates of law or politics or conscience.” (p. 524). And so Mr. Shesol leaves us with the rather unsatisfying thought that the truth lies somewhere between two utterly implausible alternatives that no serious constitutional historian embraces, and that we cannot expect to do much better than that. Just as he complains of Hughes’s judicial performance, Mr. Shesol’s account vacillates between internal and external explanations, but ultimately he never finds a firm “middle ground” on which to stand. Perhaps it is Mr. Shesol, rather than Chief Justice Hughes, who is The Man on the Flying Trapeze.



## CONCLUSION

Mr. Shesol's rendering of the political story in *Supreme Power* is very nicely done. But his account of the legal story is far more problematic, and must be consumed with great caution. Moreover, the interpretive ambivalence that permeates his recounting of the legal story hampers his efforts to specify the relationship between the legal and political stories. These shortcomings will limit the book's value to scholars.

