

## Articles

### COURT-PACKING AND COMPROMISE

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The controversy precipitated by Franklin D. Roosevelt's Court-packing Plan is among the most famous and frequently discussed episodes in American constitutional history. During his first term as President, Roosevelt had watched with mounting discontent as the Supreme Court declared unconstitutional a series of measures central to his New Deal. Aging justices whom Roosevelt considered reactionary and out of touch had struck down the National Industrial Recovery Act ("NIRA"), the Agricultural Adjustment Act ("AAA"), federal railway pension legislation, federal farm debt relief legislation, critical portions of the Administration's energy policy, and state minimum wage legislation for women. In the spring of 1937 the Court would be ruling on the constitutionality of such major statutes as the National Labor Relations Act ("NLRA") and the Social Security Act ("SSA"), and a number of Roosevelt advisors doubted that the Court as then comprised would uphold those measures. The odds might have improved had FDR had an opportunity during his first term to appoint one or more justices to the Court, but no vacancies had occurred.

In November of 1936, Roosevelt enjoyed a spectacular reelection victory, winning the electoral college vote by a margin of 523-8. In the wake of this remarkable demonstration of public support, the President decided to move against the Court. On February 5, 1937, he sent to Congress a proposal to "reorganize" the federal judiciary. The bill contained a provision that would have empowered the president to nominate to the Supreme Court one additional justice for each sitting justice who had not retired within six months following his seventieth birthday. At

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the time there were six justices fitting that description. Accordingly, the bill, if enacted, would have permitted the president to appoint six new justices immediately, thereby enlarging the membership of the Court to fifteen. The bill ultimately was rejected by the Senate, and never received serious consideration in the House.<sup>1</sup> A number of scholars have argued that its prospects for congressional passage were never very bright.<sup>2</sup> It is often noted, however, that Roosevelt had numerous opportunities to accept compromise proposals for dealing with “the Court problem,” a number of which promised much better chances of enactment.<sup>3</sup> Yet the president repeatedly rejected such proposals, insisting instead that congressional leaders press forward with his own.<sup>4</sup> As Professor James Patterson put it, FDR “remained serenely confident, refusing even to discuss the possibility of compromise.”<sup>5</sup> A number of reasons have been offered to explain Roosevelt’s recalcitrance, and I do not dispute them here. Instead, I will suggest that such explanations are incomplete, and that a fuller understanding of the president’s calculations makes his posture appear more rational than is commonly thought.

The reasons for Roosevelt’s rejection of some alternatives to enlargement of the Court’s membership are well understood. The president and his advisors elected not to pursue proposals to

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1. See, e.g., Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. (forthcoming 2013).

2. JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 314 (1956); Lionel V. Patenaude, *Garner, Sumners, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 SW. HIST. Q. 36, 51 (1970); MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 26 (2002); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 561–62 (2002); E. Kimbark MacColl, *The Supreme Court and Public Opinion: A Study of the Court Fight of 1937*, at vi (1953) (unpublished Ph.D. dissertation, University of California at Los Angeles) (on file with the University of California at Los Angeles Library).

3. See, e.g., JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 78, 196–97, 207 (1938); LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 182 (1967); MCKENNA, *supra* note 2, at 301–03, 323–24, 326, 440, 445–47; JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 345 (2010).

4. ALSOP & CATLEDGE, *supra* note 3, at 78, 95, 109–13, 161, 197, 207, 210; BAKER, *supra* note 3, at 182, 190, 198–99 (1967); JAMES T. PATTERSON, *CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS* 122 (1981); MCKENNA, *supra* note 2, at 303, 440, 445–47; BURT SOLOMON, *FDR v. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* 126 (2009); SHESOL, *supra* note 3, at 327, 331, 345, 347–48, 439, 443, 446, 457; MacColl, *supra* note 2, at 288–89, 320, 328, 419, 426–27.

5. PATTERSON, *supra* note 4, at 94.

curtail the Court's appellate jurisdiction, because this would leave lower federal courts hostile to the New Deal with the unsupervised power of judicial review.<sup>6</sup> Proposed bills to require a supermajority of the justices to invalidate federal legislation were viewed as likely to be declared unconstitutional.<sup>7</sup> Moreover, if such a statute were upheld, it might reduce the opportunities for the Court to protect citizens against infringements of their civil liberties.<sup>8</sup>

The president also rejected the possibility of amending the Constitution to confer upon Congress greater regulatory authority than the Court had been prepared to recognize.<sup>9</sup> First, Roosevelt believed that the problem lay not with the Constitution but instead with the Court, and proposing such an amendment might be seen as conceding that the Court's decisions invalidating New Deal measures had been correct.<sup>10</sup> Second, there was disagreement within the administration and in the broader liberal legal community over the form that such an amendment should take, and indeed over whether one should be offered at all. Two years of effort by Justice Department lawyers had failed to yield an acceptable proposal.<sup>11</sup> In addition, any amendment would have to garner a vote of two-thirds in each house of Congress before winning ratification in thirty-six state

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6. See Memorandum from Alexander Holtzoff, to Homer Cummings, Attorney General, on the Appellate Jurisdiction of the Supreme Court 4 (Feb. 6, 1935) (unpublished manuscript) (on file with the University of Virginia); ALSOP & CATLEDGE, *supra* note 3, at 29; WILLIAM E. LEUCHTENBURG, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 386-87 [hereinafter LEUCHTENBURG, *Origins*].

7. Letter from Franklin Roosevelt to Felix Frankfurter (Feb. 9, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 382 (Max Freedman ed., 1967); Memorandum from W.W. Gardner to the Solicitor General, on the Congressional Control of Judicial Power to Invalidate Legislation 29-30, 64 (Dec. 10, 1936) (unpublished manuscript) (on file with the University of Virginia); FRANKLIN D. ROOSEVELT, [1937 The Constitution Prevails] THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT lxiv (1941); LEUCHTENBURG, *Origins*, *supra* note 6, at 386; ALSOP & CATLEDGE, *supra* note 3, at 29; MCKENNA, *supra* note 2, at 440.

8. LEUCHTENBURG, *Origins*, *supra* note 6, at 386.

9. ALSOP & CATLEDGE, *supra* note 3, at 28-29; BAKER, *supra* note 3, at 130; MCKENNA, *supra* note 2, at 440; SHESOL, *supra* note 3, at 328, 345-46, 381-82.

10. ROOSEVELT, *supra* note 7, at lviii-lxiii; ALSOP & CATLEDGE, *supra* note 3, at 28; LEUCHTENBURG, *Origins*, *supra* note 6, at 386; William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in ESSAYS ON THE NEW DEAL 74 (Harold F. Hollingsworth & William F. Holmes eds., 1969) [hereinafter Leuchtenburg, "*Packing*" *Plan*]; Diary of Homer Cummings 165 (Nov. 15, 1936) (unpublished manuscript) (on file with the University of Virginia); Memorandum on Policy 3-5 (unpublished manuscript) (on file with the University of Virginia).

11. ROOSEVELT, *supra* note 7, at lxii-lxiii; LEUCHTENBURG, *Origins*, *supra* note 6, at 384; BAKER, *supra* note 3, at 130; PATTERSON, *supra* note 4, at 89; SHESOL, *supra* note 3, at 348. See Memorandum on Policy, *supra* note 10.

legislatures. Roosevelt did not believe that any acceptable amendment could negotiate that course within a reasonable time.<sup>12</sup> For the same reasons, FDR opposed suggestions for an amendment that would have imposed a mandatory retirement age on the justices, or imposed supermajority voting requirements on the Court, or permitted Congress to overrule Supreme Court decisions.<sup>13</sup> The President believed that state legislatures were dominated by conservative interests and lawyers, both of whom would resist any such amendment.<sup>14</sup> As he wrote to his old friend Charles C. Burlingham, who favored the constitutional amendment approach, “You and I know perfectly well that the same forces which are now calling for the amendment process would turn around and fight ratification on the simple ground that they do not like the particular amendment adopted by the Congress. If you were not as scrupulous and ethical as you happen to be, you could make five million dollars as easy as rolling off a log by undertaking a campaign to prevent ratification. . . . Easy money.”<sup>15</sup> Finally, any legislation that Congress might enact pursuant to an amendment expanding its regulatory powers would remain subject to judicial review and interpretation.<sup>16</sup> Such a modification of the nation’s charter could not truly defang an obstinately hostile judiciary.

The consideration and rejection of all of these proposals left the administration with only one acceptable solution, and that was enlargement of the Court by statute.<sup>17</sup> But that did not end the possibilities for compromise. There were indications early in the struggle that members of Congress might have been prepared to accept a bill providing for two or three additional

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12. ROOSEVELT, *supra* note 7, at lxii; ALSOP & CATLEDGE, *supra* note 3, at 28–29; BAKER, *supra* note 3, at 130–31; LEUCHTENBURG, *Origins*, *supra* note 6, at 384–86; Leuchtenburg, “Packing” Plan, *supra* note 10, at 73; Letter from Franklin Roosevelt to Felix Frankfurter, *supra* note 7, at 381–82 (Max Freedman ed., 1967); Memorandum on Policy, *supra* note 10; Memorandum on Expediting the Amendment Procedure (unpublished manuscript) (on file with the University of Virginia); SHESOL, *supra* note 3, at 328.

13. MCKENNA, *supra* note 2, at 440, 447; BAKER, *supra* note 3, at 130–31; SHESOL, *supra* note 3, at 348.

14. LEUCHTENBURG, *Origins*, *supra* note 6, at 384–85.

15. SHESOL, *supra* note 3, at 348 (quoting FDR to Burlingham, February 19, 1937, PSF 165, FDRL).

16. ROOSEVELT, *supra* note 7, at lxiii; Leuchtenburg, “Packing” Plan, *supra* note 10, at 73; LEUCHTENBURG, *Origins*, *supra* note 6, at 386; Memorandum on Policy, *supra* note 10, at 5; BAKER, *supra* note 3, at 131.

17. ROOSEVELT, *supra* note 7, at lxiv; LEUCHTENBURG, *Origins*, *supra* note 6, at 387; Memorandum on Policy, *supra* note 10, at 13 (concluding that enlargement of the Court by statute “is the only safe, simple, and reasonably prompt way out of the dilemma”).

justices, even if they opposed expanding the Court's membership to fifteen. Democratic Senator Key Pittman wrote to Attorney General Homer Cummings proposing an eleven-member Court just three days after the President surprised the congressional leadership with his own proposal.<sup>18</sup> On February 20 a delegation of congressional leaders headed by Vice-President John Nance Garner, Senate Majority Leader Joe Robinson, and Senate Judiciary Committee Chairman Henry Fountain Ashurst urged the President to agree to a compromise providing for the addition of two or three additional justices. Roosevelt responded by "laugh[ing] in their faces."<sup>19</sup>

This posture continued well into the spring. After the Supreme Court had upheld the National Labor Relations Act on April 12, Robinson took presidential advisor Joe Keenan aside and urged the Administration to declare victory and liquidate the Court plan. "[I]f the president wants to compromise," Robinson told Keenan, "I can get him a couple of extra justices tomorrow."<sup>20</sup> Yet when this suggestion was conveyed to Roosevelt, he again rejected it.<sup>21</sup> A few weeks later, while the President was on a two-week fishing trip in the Gulf of Mexico, Robinson, Pat Harrison, and Alben Barkley invited James Roosevelt to lunch to break the news that there were not enough votes in the Senate to pass his father's bill. The Senate leaders urged that the President permit them to work out the best deal possible, and advisors such as Tommy Corcoran hoped that FDR would now suspend his pursuit of the Court bill so that Congress might attend to other pressing matters. Yet neither James Roosevelt nor Jim Farley was successful in persuading the President to accept a compromise, and FDR confirmed his resolve to his cabinet and congressional leaders upon returning to Washington May 14.<sup>22</sup> Just days later, Senator Burton

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18. Letter from Key Pittman to Homer Cummings (Feb. 8, 1937) (unpublished manuscript) (on file with the University of Virginia).

19. ALSOP & CATLEDGE, *supra* note 3, at 78; SOLOMON, *supra* note 4, at 126–27. Roosevelt also rejected Senator Pat McCarran's proposal for an increase of two justices. ALSOP & CATLEDGE, *supra* note 3, at 196. The President also received such suggestions in correspondence from individual citizens. See John P. Byrne to FDR, Apr. 18, 1933, FDRL OF 41-A, quoted in LEUCHTENBURG, *Origins*, *supra* note 6, at 350 (proposing a Court of twelve justices).

20. ALSOP & CATLEDGE, *supra* note 3, at 152–53; BAKER, *supra* note 3, at 182; MCKENNA, *supra* note 2, at 443; SOLOMON, *supra* note 4, at 184; ROBERT SHOGAN, *BACKLASH; THE KILLING OF THE NEW DEAL* 198 (2006).

21. ALSOP & CATLEDGE, *supra* note 3, at 153–56; BAKER, *supra* note 3, at 182; MCKENNA, *supra* note 2, at 443; SOLOMON, *supra* note 4, at 184; SHOGAN, *supra* note 20, at 198; SHESOL, *supra* note 3, at 435–36.

22. BAKER, *supra* note 3, at 190, 198; MCKENNA, *supra* note 2, at 450–52;

Wheeler informed the White House that Justice Willis Van Devanter would announce his retirement from the Court on May 18, and hinted that Justice George Sutherland also planned to retire soon. The time was ripe, Wheeler urged, for compromise on the Court bill. And still, the President refused to budge.<sup>23</sup> Even after the Court upheld the Social Security Act on May 24,<sup>24</sup> Roosevelt's press secretary Stephen Early told Scripps-Howard newspaper columnist Raymond Clapper that the president intended to press forward with his original proposal.<sup>25</sup>

Not until June 3 did Roosevelt finally authorize Robinson to seek the best compromise that could be salvaged.<sup>26</sup> By then, however, many were already saying that the time for compromise had come and gone.<sup>27</sup> Even two weeks earlier, a private meeting of Senate leaders of the opposition to the President's plan had revealed that they would no longer brook any talk of compromise.<sup>28</sup> On May 18, the Senate Judiciary Committee voted to disapprove the Court-packing bill by a margin of 10-8. Before doing so they discussed and rejected six compromise proposals, one of which would have increased the Court's membership to eleven.<sup>29</sup> That evening Senator Wheeler told reporters, "they are begging for a compromise, but they ought to know it's too late to talk of compromise."<sup>30</sup> Roosevelt speech writer Sam Rosenman later wrote of the Court-packing plan, "The thing that killed it was Roosevelt's refusal to compromise, when there was still time to compromise."<sup>31</sup> As

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SOLOMON, *supra* note 4, at 190-91; SHOGAN, *supra* note 20, at 199; SHESOL, *supra* note 3, at 443.

23. MCKENNA, *supra* note 2, at 457.

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

25. Leuchtenburg, "Packing" Plan, *supra* note 10, at 98.

26. ALSOP & CATLEDGE, *supra* note 3, at 215-16; BAKER, *supra* note 3, at 231-33; PATTERSON, *supra* note 4, 122; MacColl, *supra* note 2, at 438-39.

27. PATTERSON, *supra* note 4, at 122. "When it began to appear that he would not get his way, the President sent Thomas G. Corcoran (Tommy the Cork) to ask me if I would sound out some of my friends in the Senate as to whether it would be possible to increase the Court by two members. I had no sympathy with the plan to pack the Court, but went up to the Hill and saw some of my friends. They made it clear to me that, had the President in the beginning asked for only two additional members for the Supreme Court, he probably could have got them, but as the score then stood, with everyone embittered, the Senate would not authorize any increase. JESSE H. JONES WITH EDWARD ANGLY, *FIFTY BILLION DOLLARS: MY THIRTEEN YEARS WITH THE RFC* 263 (1951).

28. SOLOMON, *supra* note 4, at 192-93. See also MCKENNA, *supra* note 2, at 475; SHESOL, *supra* note 3, at 463-64.

29. MCKENNA, *supra* note 2, at 460-61; SOLOMON, *supra* note 4, at 198.

30. SOLOMON, *supra* note 4, at 199.

31. SOLOMON, *supra* note 4, at 257 (quoting Samuel I Rosenman, *The*

Tommy Corcoran confided to Harry Hopkins in 1939, “[w]e missed a compromise when that could have been accomplished.”<sup>32</sup> Wheeler later told Homer Cummings, while cooling off in the club house after a round of golf at Burning Tree, that “the Court fight might have been settled half a dozen times during its progress.”<sup>33</sup> Cummings himself recognized that “[i]t was probably a mistake not to have worked out in early season a substantial compromise.”<sup>34</sup> Had Roosevelt “shown moderation from the beginning,” concludes Professor Patterson, “he might have succeeded in obtaining some sort of moderate reform; as it was, his tenacity cost him many supporters and destroyed his chances for any reform at all.”<sup>35</sup> “The plan itself, his failure to consult his leaders, and his refusal to compromise marked the worst congressional bungling of his career.”<sup>36</sup>

Why was the President so resistant to compromise? First, as a number of scholars have noted, he believed that he had the support of the voters. Though a series of public opinion polls indicated that the Court-packing plan never enjoyed the support of a majority of respondents,<sup>37</sup> Roosevelt persistently maintained that “the people are with me.”<sup>38</sup> Brimming with confidence—some have called it “hubris”—in the wake of his great electoral victory, FDR ignored signs that his bill was in trouble.<sup>39</sup> Rosenman attributed the loss of the Court-packing fight in part to the “mistakes” of “overconfidence” and “stubbornness” on

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Reminiscences of Samuel I. Rosenman 11 (July 18, 1958), (unpublished manuscript) (on file with the Columbia University Oral History Research Office)).

32. ROBERT E. SHERWOOD, *ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY* 89–90 (1948).

33. Diary of Homer Cummings (June 12, 1938) (unpublished manuscript) (on file with the University of Virginia). See also *Court Plan Dead, But Not Buried*, LITERARY DIGEST, May 29, 1937 (“The opposition could point to Roosevelt’s persistent refusal time after time to accept a substitute program for his own”).

34. Diary of Homer Cummings (August 1, 1937) (unpublished manuscript) (on file with the University of Virginia). Burt Solomon reports that in July of 1937 Homer Cummings wrote in his diary, “We could have had an eleven-judge Court with all the rest of the bill, but we sinned away the day of grace.” SOLOMON, *supra* note 4, at 257. This is a wonderful quotation; unfortunately it does not appear in the passage of the Cummings diary to which Mr. Solomon attributes it, viz., July 25, 1937, see SOLOMON, *supra* note 4, at 317. Nor have I been able to locate the quotation in the Cummings Diaries for 1937, 1938, 1939, 1940, nor 1941.

35. PATTERSON, *supra* note 4, at 122.

36. *Id.* at 125.

37. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7, 67–71 (2002).

38. See, e.g., ALSOP & CATLEDGE, *supra* note 3, at 74, 77; PATTERSON, *supra* note 4, at 122; MCKENNA, *supra* note 2, at 324; SOLOMON, *supra* note 4, at 184.

39. ALSOP & CATLEDGE, *supra* note 3, at 154, 197; MCKENNA, *supra* note 2, at 324, 438; SHOGAN, *supra* note 20, at 238; SHESOL, *supra* note 3, at 417, 508–09.

the part of Roosevelt,<sup>40</sup> while Harry Truman chalked it up to “that growing ego of his, which notably wasn’t too minuscule to start with.”<sup>41</sup>

The President was not alone in this overconfidence. It was shared and reinforced by many of his advisors. At various stages of the fight Cummings, Corcoran, Benjamin Cohen, Joe Keenan, Robert Jackson, and Donald Richberg all counseled against compromise. Brushing off warnings from the Senate leadership, they insisted that victory was at hand and that compromise would be tantamount to surrender.<sup>42</sup> As Robert Shogan argues, the President’s “strongest supporters . . . would have viewed any giving of ground as a betrayal.”<sup>43</sup> The *Nation* reflected the view of many New Dealers when it insisted that the Court plan was “the key to the whole Administration program of Mr. Roosevelt’s second term.” Once the opposition had “forced Mr. Roosevelt to retreat on the Court bill,” they would “harry the Administration forces until they have surrendered all along the line.”<sup>44</sup>

In 1941, Roosevelt maintained that “[t]ime and again during the fight, I made it clear that my chief concern was with the objective—namely, a modernized judiciary that would look at modern problems through modern glasses. The exact kind of legislative method to accomplish that objective was not important. I was willing to accept any method proposed which would accomplish that ultimate objective—constitutionally and quickly. I received, however, no reasonable guarantee or assurance that some other definite method would obtain Congressional approval. Rumors of compromise were plenty; but never a definite agreement or offer. . . . And the best legislative advice which I could get from the Congressional leaders was that my own suggestion would ultimately be approved. That is the reason why no so-called compromise was ever submitted by me to the Congress; that is why it was

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40. SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 161 (1952).

41. Doris Kearns Goodwin, *Franklin D. Roosevelt, in* CHARACTER ABOVE ALL: TEN PRESIDENTS FROM FDR TO GEORGE BUSH 13, 35 (Robert A. Wilson ed., 1995).

42. ALSOP & CATLEDGE, *supra* note 3, at 113, 159–60, 214; MCKENNA, *supra* note 2, at 443, 464; SOLOMON, *supra* note 4, at 185.

43. SHOGAN, *supra* note 20, at 237.

44. “[I]f he should give up court reform he would be giving up . . . the rest of his program as well. He would have to fight every inch of the way for the Black-Connery labor-standards bill, for Senator Norris’s power and regional planning bill, for the ever-normal granary measure and the farm tenancy measure.” *Death and Politics*, THE NATION, July 24, 1937, at 88–89. *See also* BAKER, *supra* note 3, at 184.



necessary to persist in the plan originally proposed. Had any satisfactory compromise been definitely offered which would have been effective in attaining the objective, it would have been accepted by me.”<sup>45</sup>

On the surface, these contentions are not easily reconciled with the report, mentioned above, that a delegation of Democratic leaders unsuccessfully proposed a compromise of two or three additional justices to Roosevelt on February 20.<sup>46</sup> Nor do they seem to square with the fact that in April Senator Hatch proposed and the White House rejected a compromise bill that would have provided for the appointment of an additional justice for each of the four sitting justices who had reached the age of seventy-five without retiring, with appointments limited to one per year.<sup>47</sup> And as mentioned above, after the Court’s decisions upholding the National Labor Relations Act on April 12, Robinson told Joe Keenan that “[t]his bill’s raising hell in the Senate. Now it’s going to be worse than ever, but if the President wants to compromise I can get him a couple of extra justices tomorrow. What he ought to do is say he’s won, which he has, agree to compromise to make the thing sure, and wind the whole business up.” Yet once again FDR would hear nothing of the sort.<sup>48</sup> For these reasons, Roosevelt’s recollection of the prospects for compromise has been characterized as “somewhat disingenuous,”<sup>49</sup> “open to question,” and having little “basis in fact.”<sup>50</sup>

To be sure, Roosevelt was given ample reason to doubt that his bill ultimately would be approved, and proposals for a compromise that would have involved the addition of fewer than six judges appear to have been more definite than the President’s account suggests. But one can readily understand why FDR asserted that none of those compromise proposals would have been effective in attaining his objective of “a modernized judiciary that would look at modern problems through modern glasses.” For Roosevelt and his advisors

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45. ROOSEVELT, *supra* note 7, at lxx–lxxvi.

46. ALSOP & CATLEDGE, *supra* note 3, at 78; SOLOMON, *supra* note 4, at 126–27.

47. ALSOP & CATLEDGE, *supra* note 3, at 197; MCKENNA, *supra* note 2, at 447.

48. ALSOP & CATLEDGE, *supra* note 3, at 152–56; BAKER, *supra* note 3, at 182; MCKENNA, *supra* note 2, at 443; SOLOMON, *supra* note 4, at 184; SHOGAN, *supra* note 20, at 198; SHESOL, *supra* note 3, at 435–36.

49. SHOGAN, *supra* note 20, at 237.

50. MacColl, *supra* note 2, at 419–20; MCKENNA, *supra* note 2, at 438–39.

believed that there were only three current members of the Court who fit such a description, and six who did not.<sup>51</sup>

Though they had not always sided with the Administration, Brandeis, Stone, and Cardozo were the Court's most reliable supporters of the New Deal. Even they had voted to invalidate the National Industrial Recovery Act's (NIRA) Live Poultry Code,<sup>52</sup> to strike down the first Frazier-Lemke Farm Debt Relief Act,<sup>53</sup> and to deny Roosevelt the power to remove a "contentious" member of the Federal Communications Commission.<sup>54</sup> Only Cardozo had dissented from the majority opinion declaring the NIRA's "Hot Oil" program unconstitutional on nondelegation grounds.<sup>55</sup> But they had voted to uphold the Administration's monetary policy in the *Gold Clause Cases*,<sup>56</sup> the Railroad Retirement Act,<sup>57</sup> the first Agricultural Adjustment Act (AAA),<sup>58</sup> the Tennessee Valley Authority (TVA),<sup>59</sup> the Guffey Coal Act,<sup>60</sup> and New York's minimum wage statute.<sup>61</sup> A Justice Department memorandum prepared after the announcement of Justice Van Devanter's retirement in mid-May therefore classed each of these justices as "liberal."<sup>62</sup>

By contrast, the Four Horsemen—Justices Van Devanter, McReynolds, Sutherland, and Butler—"were such staunch conservatives that almost every time Roosevelt's Attorney General Homer Cummings went into court, he knew he had four votes against him."<sup>63</sup> To be sure, they had not always opposed the Administration. With the exception of McReynolds, they had voted to uphold the TVA.<sup>64</sup> In the spring of 1937, they would all vote to uphold the Railway Labor Act<sup>65</sup> and the application of the National Labor Relations Act (NLRA) to an interstate bus

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51. Diary of Homer Cummings (Dec. 26, 1936) (unpublished manuscript) (on file with the University of Virginia).

52. *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

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

54. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

55. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

56. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *United States v. Banker's Trust Co.*, 294 U.S. 240 (1935).

57. *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935).

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

59. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

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

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

62. Memorandum on the Features of the Proposed Plan (unpublished manuscript) (on file with the University of Virginia).

63. Leuchtenburg, "Packing" Plan, *supra* note 10, at 69–70.

64. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

65. *Virginian Railway Co. v. Federation*, 300 U.S. 515 (1937).

company.<sup>66</sup> And in May, Justices Van Devanter and Sutherland would vote to uphold the old-age pension provisions of the Social Security Act.<sup>67</sup> But in every other major case, the Four Horsemen had voted against the New Deal.<sup>68</sup>

This meant that if either Chief Justice Hughes or Justice Roberts joined the Four Horsemen, FDR's program might suffer defeat by a vote of 5–4 or 6–3. In the Administration's view, this had happened with unsettling frequency. True, these justices had supported the Administration in constitutional tests of the monetary program<sup>69</sup> and the TVA.<sup>70</sup> But both men had joined unanimous or near-unanimous opinions invalidating the NIRA<sup>71</sup> and the Frazier-Lemke Act.<sup>72</sup> Moreover, their votes to invalidate the AAA<sup>73</sup> and provisions of the Guffey Coal Act<sup>74</sup> had proved decisive, and Justice Roberts had supplied the fifth and deciding vote to strike down the Railroad Retirement Act<sup>75</sup> and New York's minimum wage law.<sup>76</sup> Hughes and Roberts simply were not sufficiently reliable. For this reason, even after the 1937 decisions upholding Washington State's minimum wage law,<sup>77</sup> the NLRA,<sup>78</sup> and the Social Security Act,<sup>79</sup> the aforementioned Justice Department memo classed them with the Four Horsemen as “conservative.”<sup>80</sup>

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66. *Washington, Virginia, & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937).

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

68. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935); *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *United States v. Banker's Trust Co.*, 294 U.S. 240 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *See also* *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (McReynolds, Van Devanter, Sutherland, and Butler, JJ., dissenting); *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 448 (1934) (Sutherland, Van Devanter, McReynolds, and Butler, JJ., dissenting).

69. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *United States v. Banker's Trust Co.*, 294 U.S. 240 (1935).

70. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

71. *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

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

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

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

75. *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935).

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

77. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

78. *Washington, Virginia, & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Labor Board Cases*, 301 U.S. 1 (1937).

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

80. Memorandum on the Features of the Proposed Plan, *supra* note 62.

The Administration thus believed that it was confronted with an unacceptably high probability of six votes opposing the New Deal, with only three in support. A compromise allowing the President to appoint two additional justices would do nothing to ameliorate this, as what had been 6–3 losses would now be negative votes of 6–5. Even a three-justice compromise was not sufficient to solve the problem. Three additional Roosevelt appointees would deadlock the vote at 6–6, but such an evenly divided Court might well affirm adverse decisions from lower federal courts dominated by more conservative appointees.<sup>81</sup> More justices would be necessary to ensure the safety of the New Deal.

This view persisted even after Hughes and Roberts joined majorities upholding Washington State’s minimum wage law on March 29 and the application of the National Labor Relations Act to manufacturing concerns on April 12. An unidentified Senator captured the views of several colleagues who seemed to be cooling toward the President’s proposal: “You don’t run so fast for a train once you have caught up with it. . . . The only real argument left is this: Is Judge Roberts going to stay where he is?”<sup>82</sup> But for Roosevelt and Cummings, the fact that this question remained open was dispositive.<sup>83</sup> A Justice Department

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81. See, e.g., PETER H. IRONS, *THE NEW DEAL LAWYERS* 13 (1982) (“in the period before 1937 (and for another decade, in fact) the federal bench was dominated by conservative Republicans . . . [who] shared . . . a 19th-century outlook on law and economics”).

82. SOLOMON, *supra* note 4, at 187 (quoting Albert L. Warner, *Roosevelt Presses Fight for Court Plan, Delays Labor Bill for Showdown*, NEW YORK HERALD TRIBUNE, Apr. 14, 1937).

83. See Memorandum on the Wake of *West Coast Hotel v. Parrish*, Plan 4-5 (unpublished manuscript) (on file with the University of Virginia):

Thus after twenty years of unabated struggle, minimum wage legislation is for the first time sustained by the Supreme Court by a bare majority vote. Four members of the Court still insist upon putting an interpretation upon the words “due process” and “equal protection of the law,” with which not one lawyer in a hundred and not one citizen in a thousand would agree. Only by the vacillating vote of a single justice was the constitutional right of the state legislatures reinstated after what seemed to be a hopeless struggle—to paraphrase Justice Holmes—to educate the Justices “in the obvious.” Four out of the nine Justices have dramatically revealed that they still entertain a view of the Constitution strikingly at variance with that of Chief Justice Marshall and the Founding Fathers because the view of the four dissenting judges would obviously make it impossible for the Constitution “to endure for ages to come and to be adaptable to the various crises of human events.” Unless the present personnel of the Court is enlarged, every new and debatable constitutional issue will come before the Court with four Justices definitely hostile to any theory which would permit the Constitution to be adapted to the needs of the time. If there should be any difference among any one of the five Justices whose minds are at all open regarding the applicability of the Constitution to new problems—the efforts of the legislatures, state or federal, to meet those problems will be

memo warned that Hughes and Roberts simply had capitulated to “the pressure of shotgun liberalism,” and worried that “[a]fter the passage of the Supreme Court statute, Hughes and Roberts will have no further incentive for shot-gun liberalism and are far more likely to be actuated by impulses of revenge.”<sup>84</sup> In a press release issued April 14, Cummings cautioned that,

Gratifying as these recent decisions are it must be remembered that they are five-to-four decisions, and it is impossible to predict what will be the attitude of the Court in connection with the whole range of necessary legislation dealing with child labor, sweat shops, minimum wages, maximum hours, old age benefits, and other social matters. All these have yet to run the gauntlet of judicial interpretation. The loss of one vote in the recent cases would have made the Constitution mean something quite different from what it appears to mean now, and four members of the Court still stand as a battalion of death against all major social legislation, state and national.

It is not a wholesome situation when an administration, under a mandate to carry out a progressive program, must face a court of nine, with four votes lost to it in advance. The margin is too narrow and the risk is too great.<sup>85</sup>

At about the same time, Senator Joseph O’Mahoney of Wyoming and Harvard economist William Z. Ripley asked the President why he would not compromise now that he had secured a liberal majority on the Court. The President responded that “a five-to-four majority was not enough for him. He said he wanted a Court that would ‘co-operate’ with the White House. He needed six new justices who would be friendly and approachable, men with whom he could confer, as man to man, on his great plans for social and economic reform and experiment.”<sup>86</sup> Presidential advisors such as Tommy Corcoran,

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nullified. It is intolerable that in this period of social and economic change the adaptability of the Constitution and the continuity of legal growth should rest upon the vacillating judgment and human frailty of a single Justice.

84. Memorandum on Features of the Proposed Plan, *supra* note 62.

85. Box 204, Cummings MSS. This view is reiterated in Cummings’s diary entry of May 4. Diary of Homer Cummings (May 4, 1937) (unpublished manuscript) (on file with the University of Virginia).

86. ALSOP & CATLEDGE, *supra* note 3, at 154–55. *See also id.* at 161. It does appear, however, that Roosevelt was already beginning to think about alternatives to his own plan. Homer Cummings reports that at a cabinet meeting on April 9—three days before the Wagner Act decisions were handed down—the President was “keen to have his own plan go through, but he would not object to a constitutional amendment dealing with the membership of the Court. I think at present he inclines to a constitutional amendment limiting judicial tenure to nine years instead of for life.” Diary of Homer

Ben Cohen, and Robert Jackson counseled FDR against accepting Robinson's offer of a two-justice compromise. An eleven-member Court, they cautioned, would not produce a "dependable" bench. As Jackson put it to Roosevelt, "[i]f you're going to pack a court at all you've got to really pack it."<sup>87</sup>

Even after the Court had sustained the Social Security Act on May 24, Roosevelt press secretary Steve Early told Scripps-Howard columnist Raymond Clapper the president would continue the Court fight because he didn't "know how long Hughes can keep Roberts liberal or how long Hughes will stay so."<sup>88</sup> A White House memorandum concluded that the President had secured "the liberalization of the interpretation of the Constitution," but had not yet attained "insurance of the continuity of that liberalism."<sup>89</sup> The President and his advisors were still counting Hughes and Roberts as conservatives.

But if the addition of two or three more justices to the Court would not solve the problem, why did the President insist upon six? Would not the addition of four bring the Administration's margin from 6-3 against to 7-6 in favor?<sup>90</sup> And would not the addition of five more justices increase that margin to 8-6?

Roosevelt recognized that even such larger additions would not provide him with the assurance he desired. More than two

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Cummings (Apr. 9, 1937) (on file with the University of Virginia). Indeed, by April 19, at Cummings' request, Solicitor General Stanley Reed had prepared the text of four possible constitutional amendments limiting judicial tenure: One that would require all sitting and future judges and justices to retire at 70; one that would terminate service at 70, but only for judges and justices appointed after ratification; one that would limit the tenure of all post-ratification appointees to nine years; and one, more complicated, providing for staggered nine year terms and implicating sitting judges and justices. Memorandum from the Solicitor General to the Attorney General (Apr. 19, 1937) (unpublished manuscript) (on file with the University of Virginia). This may have been at least in part a response to a report from Joe Keenan that the President's bill no longer enjoyed the backing of a key member of the Senate Judiciary Committee, Carl Hatch of New Mexico. See Memorandum by Joseph B. Keenan for the Attorney General, on the Court Reorganization Bill (Apr. 1, 1937) (unpublished manuscript) (on file with the University of Virginia), at the bottom of which appears the following handwritten note: "We seem now to be losing the support of Senator Hatch. Indeed unless we can change him he is definitely against us. JBK."

87. ALSOP & CATLEDGE, *supra* note 3, at 159, 214; MCKENNA, *supra* note 2, at 443; SOLOMON, *supra* note 4, at 185.

88. Leuchtenburg, "Packing" Plan, *supra* note 10, at 98 (quoting Raymond Clapper, Diary (May 24, 1937) (unpublished manuscript)).

89. MacColl, *supra* note 2, at 438; Leuchtenburg, "Packing" Plan, *supra* note 10, at 98, n. 80.

90. Such a proposal was also suggested to the President in correspondence from citizens. See LEUCHTENBURG, *Origins*, *supra* note 6, at 367, 376.

years earlier the President had promised the first available seat to Senate Majority Leader Joe Robinson of Arkansas. The pledge, which was tendered at Robinson's request, had been made through Postmaster General Jim Farley as a reward for the majority leader's loyal assistance in whipping New Deal legislation through the Congress.<sup>91</sup> Yet as faithful and effective as Robinson had been as a congressional lieutenant, Roosevelt and the liberals inside and outside of his Administration feared that Robinson would vote as a conservative once he had been invested with life tenure on the Court.<sup>92</sup> He had opposed the government construction of an electric power plant at Muscle Shoals in Alabama in the 1920s; he had been troubled by the NIRA's codes of fair competition; and he worried that the current deficit spending would "bankrupt the country and tend to centralize all power in the national government."<sup>93</sup>

Many New Dealers thus saw Robinson as "one who served the cause out of duty and party loyalty but in his heart and mind was not really one of them."<sup>94</sup> In an editorial entitled, "Robinson Will Not Do!," the *Nation* reminded its readers that "[a] Supreme Court Justice is not responsible to the president who appoints him." Robinson was "a conservative Southern provincial Democrat." His "closest bonds" were "with the Arkansas planter," and Harvey Couch, "the utilities magnate of the region," was "his fishing mate." "That a man who so thoroughly represents the ruling class in Arkansas should be elevated to the Supreme Court at this juncture," the editors warned, "is ironical and dangerous."<sup>95</sup>

Roosevelt's promise to Robinson meant that the President's first appointment under any compromise plan would bring the number of conservatives on the Court to seven. A two-justice compromise thus would bring the margin from 6-3 to 7-4. A three justice compromise would only narrow the gap to 7-5. A

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91. *Good Soldier*, TIME, July 15, 1935; Joseph Alsop, Jr. & Turner Catledge, *Joe Robinson, The New Deal's Old Reliable*, THE SATURDAY EVENING POST, September 26, 1936; ALSOP & CATLEDGE, *supra* note 3, at 156-58; Leuchtenburg, "Packing" Plan, *supra* note 10, at 100; SHOGAN, *supra* note 10, at 200; SOLOMON, *supra* note 4, at 185-86; SHESOL, *supra* note 3, at 309.

92. ALSOP & CATLEDGE, *supra* note 3, at 211; Leuchtenburg, "Packing" Plan, *supra* note 10, at 100; MCKENNA, *supra* note 2, at 470; SOLOMON, *supra* note 4, at 186, 201. How Robinson actually would have voted had he become a justice was and is of course only a matter of conjecture.

93. SHOGAN, *supra* note 20, at 200-02. See also ALSOP & CATLEDGE, *supra* note 3, at 157-58.

94. SHOGAN, *supra* note 20, at 202.

95. *Robinson Will Not Do!*, THE NATION, May 29, 1937, at 607-08.

four-justice compromise would still leave Roosevelt short of a working majority at 7-6. And even a five-justice deal would produce only a 7-7 deadlock, which might well affirm an adverse lower-court decision by an equally divided bench. Six justices was the absolute minimum number of appointments that FDR required to insure a dependable Court.

The President's bill would have provided for the appointment of an additional justice for each sitting justice who had not retired within six months following his seventieth birthday. Justice McReynolds had proposed such a measure with respect to lower-court judges when he had been Attorney General back in 1913, and it is often observed that Roosevelt and Cummings took great delight in hoisting the curmudgeonly justice by his own petard.<sup>96</sup> But FDR had an additional reason to be delighted by McReynolds' formula: it provided him with precisely the number of appointments that he needed. Setting the age threshold higher would have frustrated this purpose.

An undated Justice Department memorandum listing the birthdays and ages of the justices as of January 1, 1937, illustrates the point. At the bottom of the page appear handwritten notes observing the ages of Brandeis (80) and Van Devanter (77), and the dates upon which three other justices would reach the age of seventy-five: McReynolds (February 3, 1937); Sutherland (March 25, 1937); and Hughes (April 11, 1937). The handwritten notes do not mention any of the other four sitting justices. These notes suggest that Cummings and the President may have considered the possibility of a bill that would have authorized FDR to appoint an additional justice for each sitting justice who had reached the age of seventy-five without retiring. There were three such justices by the time that Roosevelt announced his plan on February 5, and such a bill would have given the President a total of five additional appointments by April 11, 1937. But that was not enough. The age had to be lower. Stone, Roberts, and Cardozo each was in his sixties, but Justice Butler, who was born on March 17, 1866, was now a little more than six months beyond his seventieth birthday. The appeal of McReynolds' formulation was that it

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96. ALSOP & CATLEDGE, *supra* note 3, at 33-36; LEUCHTENBURG, *Origins, supra* note 6, at 391-92, 394; Leuchtenburg, "Packing" Plan, *supra* note 10, at 74. See also Diary of Homer Cummings (Jan. 17, 1937) (unpublished manuscript) (on file with the University of Virginia).



swept in just enough justices to assure Roosevelt of a working majority.<sup>97</sup>

The promise to Robinson was thus the fly in the ointment of any potential compromise on the number of justices. There was, however, another potential avenue to secure a liberal majority on the Court: inducing the conservative justices to retire. It was widely rumored that both Justice Van Devanter and Justice Sutherland wished to leave the bench. Van Devanter had served on the Court since 1911, and at the age of seventy-seven was ready to step down. The seventy-four year old Sutherland's high blood pressure required that he write most of his opinions in bed, and he was similarly anxious to lighten his burden.<sup>98</sup> Yet the state of the judicial pension system at the time did not protect justices who had resigned from the Supreme Court from reductions in their stipends. Indeed, shortly after Justice Holmes had retired in 1932, the Economy Bill of 1933 had slashed his pension in half.<sup>99</sup>

In his capacity as Chair of the House Judiciary Committee, Hatton Sumners had sought to remove this disincentive to judicial retirement by introducing a bill that would allow Supreme Court justices to retire at full pay. The House had perversely rejected the bill in 1935,<sup>100</sup> but after the President had introduced his Court-packing bill, Sumners' proposal quickly sailed to passage in both the House and the Senate, and FDR signed it into law March 1.<sup>101</sup> In February, while his proposal was working its way to the President's desk, Sumners urged Roosevelt to accept the judicial retirement bill as an alternative to the Court-packing plan. Once it was enacted, Sumners represented, he could persuade at least two justices—presumably Van Devanter and Sutherland—to retire. But though the President did not oppose Sumners' bill, he rejected the suggestion that he abandon his own proposal. As James Roosevelt wrote of the proposal in his diary, "It wouldn't really

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97. Memorandum on the Ages of Federal Judges (unpublished manuscript) (on file with the University of Virginia).

98. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 302 (1963); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 302 (David J. Danelski & Joseph S. Tulchin eds., 1973); MacColl, *supra* note 2, at 146–47, 430; Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 43 (1967).

99. BAKER, *supra* note 3, at 67–68.

100. WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 38 (1970).

101. ALSOP & CATLEDGE, *supra* note 3, at 77; SWINDLER, *supra* note 100, at 69; Act of March 1, 1937, ch. 21, 50 Stat. 24.

cure the situation even if [Sumners] succeeds. . . .”<sup>102</sup> For even if the pension bill were to induce these two conservative justices to retire, Roosevelt would have to appoint Robinson to one of their seats. The appointment of a liberal justice to the second vacancy would still leave the Court in the control of a conservative 5-4 majority.

The enactment of the pension bill did induce the retirement of Justice Van Devanter, who on May 18 announced his intention to leave the Court at the end of the term. Yet Roosevelt did not immediately announce the nomination that Robinson and his friends were now expecting. Instead, the President dithered for two weeks.<sup>103</sup> The Senate Judiciary Committee recently had voted not to recommend his Court bill, which appeared to be in deep trouble in the upper chamber. Privately, FDR confided to Treasury Secretary Henry Morgenthau that he could not appoint Robinson because he was “not sufficiently liberal.” “If I had three vacancies,” the President continued, “I might be able to sandwich in Joe Robinson.” But, he told Morgenthau, he had no idea who, if anyone, might retire in the immediate future.<sup>104</sup> If the retirements of, say, Sutherland and McReynolds were to provide two additional vacancies, then the appointment of Robinson along with two liberals would give Roosevelt a 5-4 working majority on the Court. But if the two additional vacancies came from the retirements of, say, Brandeis and Cardozo, then filling Van Devanter’s seat with a Robinson appointment would offer no net gain whatsoever. It would remain a Court of six conservatives and three liberals.<sup>105</sup>

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102. SHESOL, *supra* note 3, at 345.

103. SHOGAN, *supra* note 20, at 202.

104. MCKENNA, *supra* note 2, at 469–70 (*quoting*, HENRY S. MORGENTHAU, JR., *DIARIES*, 69, 308–09). Roosevelt later claimed that he would have named Robinson to the Court, see JAMES A. FARLEY, *JIM FARLEY’S STORY: THE ROOSEVELT YEARS* 89 (1948), and both Charles Michelson and FDR secretary Grace Tully confirm this. See CHARLES MICHELSON, *THE GHOST TALKS* 182 (1944); GRACE TULLY, *F.D.R. MY BOSS* 224 (1949). Indeed, the White House came to recognize that failure to fulfill the pledge to Robinson would set off a revolt in the Senate. See ALSOP & CATLEDGE, *supra* note 3, at 209–14; MCKENNA, *supra* note 2, at 458–60, 467–72; SHESOL, *supra* note 3, at 448–53, 458–60.

105. At a meeting with the President on July 6, Senator Burton Wheeler told Roosevelt that Republican Senator William Borah of Idaho had authorized him to promise the resignation of two more justices if FDR would withdraw his Court bill. Wheeler assured Roosevelt that he had their word that the resignations would be forthcoming, but a doubtful Roosevelt nevertheless declined the offer. SOLOMON, *supra* note 4, at 225–26.

The retirement of Justice Van Devanter did change Roosevelt's initial calculus, however. To be sure, Robinson's appointment to the vacant seat would not reduce the number of conservatives on the Court. There still would be six of them. But because he no longer was required to appoint Robinson to one of the additional seats that would have been created by his original Court-packing bill, FDR now needed fewer additional appointments to insure a liberal majority. At this point he needed only four additional justices to bring the number of liberals from three to what would now be a commanding seven. Thus, when Roosevelt finally summoned an irritated Robinson to the White House in early June, and Robinson reported that FDR's six-justice plan was dead, the President authorized the majority leader to work out the best compromise he could salvage.<sup>106</sup> However, he cautioned the aspiring justice that "if there was to be a bride there must also be bridesmaids—at least four of them."<sup>107</sup> Again, this number was not selected at random.

A four-justice compromise opened the possibility of raising the age triggering appointment of an additional justice from seventy to seventy-five. Brandeis, McReynolds, Sutherland, and Hughes each had reached that age by mid-April of 1937, so that even after the retirement of the aged Van Devanter there would be enough elderly justices to provide Roosevelt with the necessary number of appointments. Even the addition of a six-month grace period would enable the President to nominate four additional justices by October 11, 1937, only a week into the Court's next term. Kentucky Representative Fred Vinson prepared just such a bill for introduction in early June.<sup>108</sup> On June 4, Cummings sent Solicitor General Stanley Reed a new

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106. SOLOMON, *supra* note 4, at 218; SHOGAN, *supra* note 20, at 204.

107. 2 HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES* 153 (1954).

108. MCKENNA, *supra* note 2, at 471 n.17. Vinson's bill provided:

(a) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy-five years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned."

See Memorandum from the Solicitor General to the Attorney General (June 1, 1937) (unpublished manuscript) (on file with the University of Virginia). Note that the provision for the appointment of an additional justice for any sitting justice who had served for at least ten years, whether continuously or not, and had not retired within six months of his seventy-fifth birthday, served to sweep in Hughes, who had served more than ten years, but not continuously.

proposed bill which would have provided for a Court of no fewer than eleven justices.<sup>109</sup> The bill would have amended the Judicial Code to provide that “[t]he Supreme Court shall consist of a Chief Justice and ten Associate Justices. . . . If, however, at any time the number of justices eligible for retirement shall constitute a majority of the Court, the President with the advice and consent of the Senate shall appoint such number of additional justices as may be necessary to make the number of justices not eligible for retirement exceed by not more than one the number of justices eligible for retirement.”<sup>110</sup> This proposal would have permitted FDR immediately to appoint two additional justices on top of the replacement for Van Devanter. Assuming that this latter spot went to the sixty-five year old Robinson, there would then be five justices over seventy and eligible for retirement: Hughes, Brandeis, McReynolds, Sutherland, and Butler. If Roosevelt offered the two additional appointments to persons under seventy, this bill would have given him no more additional appointments, and he would be stuck with a Court comprised by six conservatives and five liberals. But if Roosevelt strategically appointed liberal septuagenarians to these two additional seats, then those eligible for retirement would outnumber those below seventy by a margin of 7-4. Such strategic appointments would bootstrap four more additional appointments for the President, giving him a liberal margin of 9-6 on a Court of fifteen. This bill, which might have produced results very similar to those that would have followed from enactment of Roosevelt’s original plan, did not gain any traction in discussions with congressional leaders.

Later in the month, the Administration was considering three different substitute bills. A brief cover memorandum accompanying the text of each of the proposals explained that “Draft No.1” would provide for “a permanent court of 11,” and permitted additional appointments for each sitting justice aged 75 or older, but only one in each calendar year, with a maximum membership of 15. “This draft will permit filling Mr. Justice Van Devanter’s place and appointment of two new justices to bring the court up to 11. In addition, one additional justice may be appointed in 1937 and a second in 1938. This gives 4 appointments now and a 5th in January.”<sup>111</sup> Assuming that Van

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109. See Memorandum from the Solicitor General to the Attorney General (June 7, 1937) (unpublished manuscript) (on file with the University of Virginia).

110. *Id.*

111. Untitled Memorandum (unpublished manuscript) (on file with the University of

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Devanter's seat went to Robinson, this proposal would have permitted the appointment of three countervailing liberal justices in 1937, deadlocking the Court at 6–6. The appointment of an additional liberal in January of 1938 would have given Roosevelt his working majority less than halfway through the Court's next term.

The memorandum explained that “Draft No. 2” would also provide for “a permanent Court of 11.” This draft, however, would permit the appointment of additional justices only “if a majority of the Court is over 75,” and then only at the rate of one per calendar year and with a maximum membership of 15. The memorandum explained that, because only four of the current justices of what would become an eleven-member Court were over 75, “[t]he provisions for additional justices because of an aged Court will not be operative unless every justice now over 66 stays on the Court until March 2, 1945 (when both Butler and Cardozo have become 75).” Only then would a majority of the Court be over 75. Thus, the memo explained, this proposal would “permit filling Mr. Justice Van Devanter's place and also the appointment of two new justices to bring the Court up to 11.”<sup>112</sup> Assuming that Van Devanter's seat went to Robinson, this proposal therefore would have given FDR only five reliable votes on an 11-member Court. Only with the retirement of another conservative justice would Roosevelt have his majority.

The memorandum explained that “Draft No. 3” would provide for “a permanent court of 9.” Additional justices could be appointed for each justice over 75, but only one per calendar year, and with a maximum membership of 15. The memorandum observed that “[t]his draft will permit filling Mr. Justice Van Devanter's place and also the appointment of one additional justice in 1937 and a second in 1938. This gives two appointments and a third in January.”<sup>113</sup> Again assuming Robinson's appointment to Van Devanter's seat, and assuming no further deaths or resignations, this proposal would have resulted in a 6–4 conservative majority for the remainder of 1937, a 6–5 conservative majority in 1938, and a deadlocked Court in 1939. Only in January of 1940 would the President have his 7–6 liberal majority.

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Virginia).

112. *Id.*

113. *Id.*

Moreover, as a Justice Department memorandum pointed out, the proposal's provision for a permanent Court of nine meant that if a sitting justice were to retire, resign, or die during a year in which there were more than nine justices on the Court, that justice could not be replaced with a new appointment. Thus, to illustrate, assume that Robinson were appointed to Van Devanter's seat, that Black were appointed as an additional justice in 1937, that Reed were appointed as an additional justice in 1938, that Frankfurter were appointed as an additional justice in 1939, and that there were no other personnel changes to the Court. As of 1939 the Court would consist of twelve justices, evenly divided between liberals and conservatives. Now suppose that as a result of some combination of retirements and deaths Brandeis, Stone, and Cardozo all were to leave the Court in 1939. Under these circumstances, the memo pointed out, Roosevelt could appoint replacements for none of them. The Court would shrink back to a membership of nine, with six conservatives and three liberals. Roosevelt could appoint an additional justice in 1940, but that would only bring the margin back to 6-4 in favor of the conservatives. Assuming no conservative deaths or retirements, it would be January of 1942 before the Court was even back to its 1939 deadlock, and 1943 before the President would have his majority. Thus, the memo observed, "[t]his plan will not add to the opportunity to liberalize the bench by filling normal vacancies through death, retirement or resignation. The effect of its provisions for shrinking back to nine in the present condition of the Court will probably work out practically as merely substituting one appointment a year under the 'age principle' for the normal expectancy of one appointment a year by filling vacancies occasioned through resignation, retirement or death."<sup>114</sup>

Even an additional conservative resignation would not solve Roosevelt's problem. Again, assume Robinson's appointment to Van Devanter's seat, Black's appointment as an additional justice in 1937, and Reed's appointment as an additional justice in January of 1938. Assuming no other personnel changes, this would yield a 6-5 conservative majority. Now assume that immediately following Reed's appointment Sutherland were to retire. Under the terms of the proposal, FDR would not be entitled to appoint a successor to Sutherland, and the Court would deadlock at 5-5 for the remainder of 1938. Only in

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114. Memorandum on the Features of the Proposed Plan, *supra* note 62.

January of 1939 would the President be authorized to appoint a third additional justice to secure a 6-5 majority. Thus, the memo pointed out, “[e]ven if Mr. Justice Sutherland should retire during 1938 there would thus be no assurance of a liberal majority during 1938.”<sup>115</sup>

The author of the memo worried that “[t]his raises very real practical risks over the next two years in view of the following facts:

(1) The cases which will come before the Court in the next and the succeeding terms will be power cases (on which the present court showed its teeth on the last decision day)<sup>116</sup> and labor cases (Wagner Act<sup>117</sup> and Black-Connery Bill<sup>118</sup>) which the new statute providing for direct appeal will bring to the Court a year earlier than heretofore.”

(2) After the passage of the Supreme Court statute, Hughes and Roberts will have no further incentive for shot-gun liberalism and are far more likely to be actuated by impulses of revenge.

(3) After any new judges have been appointed by this Administration, the Court will have become the Administration’s ‘packed court’—beyond criticism by the Administration.<sup>119</sup>

“Under such circumstances,” the memo concluded, “the present form of the proposed provisions for shrinking the Court back to nine make them exceedingly dangerous.” It was “very important that: (1) The Court should reach its maximum liberal

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115. *Id.*

116. The reference here is to the Court’s announcement on June 1 that it had granted certiorari in *Alabama Power v. Ickes* and *Iowa City Light & Power Co. v. Ickes*, 301 U.S. 681 (1937), challenging the power of the Public Works Administration to make loans and grants to municipalities in order to construct and operate electrical power plants that would compete with private companies in the production and distribution of electricity. *Alabama Power* would be decided in early 1938, *see infra* note 141. The decree in *Iowa City* would be vacated and the case dismissed as moot in October of 1937, *see* 302 U.S. 769 (1937).

117. The reference here is presumably to *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938), *Consolidated Edison Co. v. NLRB*, 305 U.S. 188 (1938), and *NLRB v. Fainblatt*, 306 U.S. 601 (1939), each of which involved questions of the power of Congress under the National Labor Relations Act to regulate the labor relations of companies engaged in manufacturing or production.

118. The Black-Connery bill, which would form the basis of what would become the Fair Labor Standards Act of 1938, had been introduced in Congress on May 24. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 465-90 (1939).

119. Memorandum on the Features of the Proposed Plan, *supra* note 62.

strength as quickly as possible because the crucial years for decisions under the New Deal are the next two when the statutes passed this year<sup>120</sup> will be under adjudication,” and “(2) Because of the accusations of a packed Court and the necessity for public confidence in the new decisions, the liberal majorities should be as wide as possible as soon as possible.” The proposed bill did not achieve those critical objectives.<sup>121</sup>

Located in the Homer Cummings papers is an unsigned speech, apparently prepared early in the Court fight, which argued that securing a liberal Court majority was a matter of pressing urgency and that pursuit of a constitutional amendment would involve unacceptable delay. The speech concluded by urging its audience to “[f]ollow the judgment of the President and leader who has never failed your needs nor failed to win your battles. Follow his judgment that a bird in the hand this Spring is worth far more than the same bird in the bush three or four years from now!”<sup>122</sup> The consideration of Drafts 2 and 3 evinced a recognition that the bird that the President had sought in the Spring was no longer within his grasp, and that he might indeed have to wait nearly three years to possess it.

The bill ultimately introduced in the Senate by Robinson was a variation on Draft No. 3. It permitted the appointment, at the rate of no more than one per year, of an additional justice for each sitting justice aged seventy-five or older. Robinson’s bill solved the problem of Court shrinkage identified in the Justice Department memorandum by allowing the President to fill vacancies caused by death, resignation, or retirement if it were

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120. In March Congress had passed a second Bituminous Coal Conservation Act to replace the one struck down in *Carter v. Carter Coal Co.* The Administration also anticipated the passage in 1937 of the Fair Labor Standards Act and a new Agricultural Adjustment Act to replace the statute invalidated in *United States v. Butler*, but neither was enacted until 1938. Roosevelt also hoped for passage of Senator George Norris’s regional planning bill, the so-called “seven little TVA’s,” but that measure also failed of passage. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 161–62, 250–51, 255, 261–62 (1963) [hereinafter LEUCHTENBURG, *NEW DEAL*]; DEXTER PERKINS, *THE NEW AGE OF FRANKLIN ROOSEVELT* 63 (1957); RONALD L. FEINMAN, *TWILIGHT OF PROGRESSIVISM: THE WESTERN REPUBLICAN SENATORS AND THE NEW DEAL* 137–39 (1981); MCKENNA, *supra* note 2, at 442; SOLOMON, *supra* note 4, at 258.

121. Memorandum on the Features of the Proposed Plan, *supra* note 62. “Under such circumstances, it would seem that the Administration’s supporters in Congress intended that the idea of one new judge a year for each judge over 75 should not be in substitution for but additional to the normal filling of vacancies in the Court occasioned by the death, retirement or resignation of any justice whether or not over 75.” *Id.* See also Memorandum on the Proposed Substitute Court Bill (unpublished manuscript) (on file with the University of Virginia).

122. The Real Issue (unpublished manuscript) (on file with the University of Virginia).



necessary to maintain at no fewer than nine the number of justices under the age of 75. But it did nothing to increase the rate at which additional justices might be appointed, and therefore nothing to ameliorate the concern that the Court might remain under conservative control until January of 1940.<sup>123</sup>

Debate on the substitute bill began July 6.<sup>124</sup> Robinson believed that a narrow majority of Senators ultimately would vote for the bill,<sup>125</sup> but it faced the prospect of a dogged filibuster in the upper chamber<sup>126</sup> and the determined opposition of the Judiciary Committee in the House.<sup>127</sup> The bill never would surmount either of these hurdles. As the week wore on votes began to slip away,<sup>128</sup> and the Washington summer heat and the strain of the struggle took their toll on the Majority Leader. On July 14 he was found dead of a heart attack on the floor of his Capitol Hill apartment.<sup>129</sup>

Robinson's death sealed the fate of the substitute bill. A number of Senators had pledged to support the measure only out of personal affection for the Majority Leader.<sup>130</sup> Four of these legislators paid an unscheduled call to the White House on July 15 and pleaded with the President to withdraw the substitute bill and agree to some other accommodation. Once again, the President rejected the overture.<sup>131</sup> Within a week the number of defecting Democrats had grown even larger, and Vice-President Garner informed Roosevelt that he lacked the votes to pass the bill in the Senate. Roosevelt authorized Garner

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123. 81 Cong. Rec. 6788 (July 6, 1937). Cf. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 680 (1985) [hereinafter Leuchtenburg, *Second Life*] ("Under this so-called "compromise," FDR lost very little. The most immediate effect of the measure would be to permit Roosevelt by the beginning of January 1938—only six months away—to add three justices to the Court: one for the 1937 calendar year, one for the 1938 calendar year, and one to fill Van Devanter's slot"); SHESOL, *supra* note 3, at 477–78 (Roosevelt "had not sacrificed much in terms of the Court bill's provisions").

124. MCKENNA, *supra* note 2, at 496–98.

125. *Id.* at 495; SOLOMON, *supra* note 4, at 235; MacColl, *supra* note 2, at 457, 463.

126. ALSOP & CATLEDGE, *supra* note 3, at 246, 248, 250; BAKER, *supra* note 3, at 233–35, 239, 246–47; MCKENNA, *supra* note 2, at 499, 501; SOLOMON, *supra* note 4, at 187, 220, 231, 235; SHESOL, *supra* note 3, at 475.

127. ALSOP & CATLEDGE, *supra* note 3, at 264–65; BAKER, *supra* note 3, at 243; MCKENNA, *supra* note 2, at 504; *End of Strife*, TIME, July 26, 1937.

128. *End of Strife*, *supra* note 127, at 10–13.

129. ALSOP & CATLEDGE, *supra* note 3, at 254–67; BAKER, *supra* note 3, at 240–53; MCKENNA, *supra* note 2, at 498–505.

130. PATTERSON, *supra* note 4, at 123; SOLOMON, *supra* note 4, at 242; MacColl, *supra* note 2, at 463; Leuchtenburg, *Second Life*, *supra* note 123, at 687.

131. ALSOP & CATLEDGE, *supra* note 3, at 269–70; BAKER, *supra* note 3, at 255–56; SOLOMON, *supra* note 4, at 242.

to seek another compromise, but Wheeler and the opposition stood firm against any enlargement of the Court.<sup>132</sup> On July 22 the Senate voted to recommit the bill to the Judiciary Committee with instructions that all provisions concerning the Court's membership be deleted.<sup>133</sup> Robinson's death thus "was the end, not only of the original plan, but the compromise version as well."<sup>134</sup> "The death of Joe Robinson," Professor Leuchtenburg concludes, "doomed all hopes for Roosevelt's plan."<sup>135</sup>

But if Robinson's death made passage of the compromise bill impossible, it also made it unnecessary.<sup>136</sup> Unburdened of the obligation to appoint the conservative Arkansas Senator to Van Devanter's seat, Roosevelt was now free to nominate the liberal Senator Hugo Black of Alabama, who was confirmed August 17.<sup>137</sup> This only narrowed the conservative margin from 6–3 to 5–4, meaning that Roosevelt would need still another conservative retirement in order to secure his liberal majority. But that retirement would not be long in coming. Like his colleague Justice Van Devanter, Justice Sutherland actually made his decision to leave the Court shortly after the passage of Hatton Sumners' judicial retirement bill in early March.<sup>138</sup> He later informed several correspondents that the pendency of the Court-packing plan was the only reason that he had not retired shortly thereafter.<sup>139</sup> He would remain on the bench only for a portion of the 1937 October term, during which time he would participate

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132. ALSOP & CATLEDGE, *supra* note 3, at 278–83; MCKENNA, *supra* note 2, at 514–16; SOLOMON, *supra* note 4, at 248–50; Leuchtenburg, *Second Life*, *supra* note 123, at 687.

133. ALSOP & CATLEDGE, *supra* note 3, at 285–94; BAKER, *supra* note 3, at 271–74; MCKENNA, *supra* note 2, at 517–21.

134. PATTERSON, *supra* note 4, at 123.

135. Leuchtenburg, "Packing" Plan, *supra* note 10, at 105.

136. See *Senator Robinson's Death Shocks the Nation*, THE CHRISTIAN CENTURY, July 28, 1937, at 940 ("Harsh as it sounds to say it, Mr. Robinson's death actually adds to the reasons why the President does not need any longer to have a court-packing bill passed in order to safeguard the legality of liberal legislation"); *Death and Politics*, *supra* note 44, at 88 ("however much the President personally mourns the loss of a close and devoted friend, the inherent consequences of Senator Robinson's death should be, in political terms, favorable to the President's larger program").

137. Justices of the Supreme Court of the United States During the Time of these Reports, 302 U.S. iii (1937).

138. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, *supra* note 98, at 303.

139. Letter from George Sutherland to Nicholas Murray Butler (Jan. 12, 1938) (unpublished manuscript) (on file with the Library of Congress); Letter from George Sutherland to Mr. Preston (Jan. 18, 1938) (unpublished manuscript) (on file with the Library of Congress); Letter from George Sutherland to Richard R. Lyman (Jan. 21, 1938) (unpublished manuscript) (on file with the Library of Congress).

in only a handful of significant cases. In none of these would he cast the deciding vote.<sup>140</sup> He would not participate in any more cases involving the National Labor Relations Act, and his retirement came months before the Fair Labor Standards Act even became law. However, he did participate in the pending power cases about which the Justice Department memo had expressed such concern the preceding summer. In fact, he wrote the opinion in each case. And in each instance the Government's position prevailed.<sup>141</sup>

It was on January 5, 1938, just two days after he had awarded the Government its victory in the power cases, that Sutherland wrote to the President to inform him of his intention to retire on the 18th of the month. Roosevelt nominated Stanley Reed to replace Sutherland on January 15. The nomination was confirmed by the Senate on January 25, and Justice Reed assumed his seat on the Court on January 31.<sup>142</sup> Reed's replacement of Sutherland had at long last secured for the President the liberal Court majority he so intensely desired. On February 5, 1938, a year to the day after Roosevelt had announced his plan, and less than a week after Reed had taken the oath of office, Frank Gannett wrote to a correspondent: "Since the President now controls the Supreme Court, our only hope lies in influencing the members of Congress." "Little wonder," observed Professor Leuchtenburg, "that Roosevelt claimed that he had lost the battle but won the war."<sup>143</sup>

In claiming that he had won the war, FDR meant that the Court-packing plan had induced the justices to uphold legislation that they would not otherwise have approved.<sup>144</sup> This particular

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140. See *Breedlove v. Suttles*, 302 U.S. 77 (1937) (unanimously upholding Georgia poll tax); *Palko v. Connecticut*, 302 U.S. 319 (1937) (holding by a vote of 8-1 that the Double Jeopardy Clause does not apply to the States); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (holding, by a vote of 5-4, that imposition of a state corporate income tax on a federal government contractor did not violate the federal government's intergovernmental tax immunity).

141. *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (unanimously holding that a private power company lacked standing to challenge the constitutionality of loans and grants made by the Public Works Administration to municipalities to construct and operate electrical generation and distribution systems in competition with the private company); *Duke Power Co. v. Greenwood County*, 302 U.S. 485 (1938) (same).

142. 303 U.S. iv (1938).

143. Leuchtenburg, "Packing" Plan, *supra* note 10, at 109 (quoting Letter from Frank Gannett to E.A. Dodd (Feb. 5, 1938) (unpublished manuscript)).

144. ROOSEVELT, *supra* note 7, at lxvi-lxxii. See also Memorandum (July, 1939) (unpublished manuscript) (on file with the University of Virginia) and Supplemental Memorandum (July, 1939) (unpublished manuscript) (on file with the University of Virginia). Others have shared Roosevelt's view. See, e.g., Richard H. Pildes, *Is the*

claim is quite doubtful.<sup>145</sup> Indeed, the Administration's assessment of the longer-term reliability of Hughes and Roberts as supporters of economic regulation proved to be correct. Though they would vote to uphold a number of New Deal initiatives after 1937,<sup>146</sup> these two justices nevertheless persisted in voting to invalidate federal and state regulations of the economy on the grounds that they violated the Takings<sup>147</sup> or Due Process Clauses<sup>148</sup> of the Fifth Amendment, or the Due Process,<sup>149</sup> Equal Protection,<sup>150</sup> or Privileges or Immunities<sup>151</sup>

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*Supreme Court A "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 132 (2010) ("The conventional wisdom among constitutional academics, focused narrowly on the Court itself, is that FDR lost the battle, but won the war").

145. See MCKENNA, *supra* note 2, at xx–xxv, 436–37, 536; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1893 (1994).

146. See, e.g., *Phelps-Dodge Co. v. NLRB*, 313 U.S. 177 (1941) (upholding National Labor Relations Act (NLRA) against Fifth Amendment challenge); *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381 (1940) (upholding Bituminous Coal Conservation Act of 1937); *Mulford v. Smith*, 307 U.S. 38 (1939) (upholding Agricultural Adjustment Act of 1938); *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (upholding NLRA against Commerce Clause challenge); *Tennessee Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (upholding right of TVA to sell electric power in competition with private power companies); *Currin v. Wallace*, 306 U.S. 1 (1939) (upholding Tobacco Inspection Act of 1935); *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938) (upholding NLRA against Commerce Clause challenge); *United States v. Bekins*, 304 U.S. 27 (1938) (upholding Municipal Bankruptcy Act of 1937); *NLRB v. Santa Cruz Fruit Packing Co.*, 303 U.S. 453 (1938) (upholding NLRA against Commerce Clause challenge); *Electric Bond Co. v. SEC*, 303 U.S. 419 (1938) (upholding Public Utility Holding Company Act of 1935); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (holding that privately-owned power companies had no standing to challenge the constitutionality of federal loans and grants to aid in the construction of municipally-owned power plants).

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

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

149. See *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 577 (1940) (Roberts, J., and Hughes, C.J., dissenting from opinion holding that oil proration order of Texas Railroad Commission did not deprive the company of its property without due process); *Thompson v. Consolidated Gas Utilities, Corp.*, 300 U.S. 55 (1937) (Hughes, C.J., and Roberts, J., join opinion invalidating gas proration order of Texas Railroad commission on the ground that it deprived the company of its property without due process).

150. See *Charleston Fed. Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 192–92 (1945) (Roberts, J., dissenting from opinion upholding tax assessments against equal

Clauses of the Fourteenth. Internal Court records reveal that it was only very reluctantly that Hughes agreed to join the portion of *United States v. Darby*<sup>152</sup> upholding federal regulation of wages and hours of employees engaged in “production for commerce.”<sup>153</sup> Such records similarly show that Roberts initially opposed upholding the regulation sustained in *Wickard v. Filburn*,<sup>154</sup> and there is reason to doubt that either of the justices ultimately would have voted to sustain those measures had more of their colleagues shared their reservations. Even after *Darby*, Roberts would file dissents from decisions upholding the application of the Fair Labor Standards Act to various local employments on the ground that the Commerce Clause did not authorize Congress to reach them.<sup>155</sup> And though he eventually acquiesced in the authority of these precedents,<sup>156</sup> he continued to construe the statute not to apply to matters of purely local concern that he believed were reserved to the states.<sup>157</sup> Roberts also persisted in registering dissenting objections to delegations of congressional authority to the executive branch,<sup>158</sup> and throughout his tenure remained “in almost continuous opposition” to the claims of the administrative agencies that were integral to the New Deal vision of government.<sup>159</sup> Roosevelt

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protection challenge); *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459 (1937) (Hughes, C.J., joining opinion invalidating Georgia statute imposing different regulations on stock and mutual insurance companies).

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

152. 312 U.S. 100 (1941).

153. See CUSHMAN, *supra* note 145, at 208–09.

154. 317 U.S. 111 (1942). See CUSHMAN, *supra* note 145, at 212–13.

155. *Warren-Bradshaw Drilling Co. v. Hall*, 88, 93–95 (1942) (Roberts, J., dissenting); *A. B. Kirschbaum v. Walling*, 316 U.S. 517, 527 (1942) (Roberts, J., dissenting).

156. See *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Walton v. Southern Packing Corp.*, 320 U.S. 540, 543 (1944).

157. See *Borden v. Borella*, 325 U.S. 679, 685–86 (1945) (Stone, C.J., and Roberts, J., dissenting); *East 40th Street Building, Inc., v. Callus*, 325 U.S. 578 (1945); *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945); *McLeod v. Threlkeld*, 319 U.S. 91 (1943); *Overstreet v. North Shore Corp.*, 318 U.S. 120 (1943) (Roberts, J., and Jackson, J., dissenting); *Overnight Motor Transportation Co., Inc., v. Missal*, 316 U.S. 572 (1942) (Roberts, J., dissenting).

158. See *Bowles v. Willingham*, 321 U.S. 503, 529 (1945) (Stone, C.J. and Roberts, J., dissenting from opinion rejecting non-delegation challenge to Emergency Price Control Act of 1942); *Yakus v. United States*, 321 U.S. 414, 448 (1944) (Roberts, J., dissenting from opinion rejecting non-delegation challenge to Emergency Price Control Act of 1942); *H.P. Hood & Sons v. United States*, 307 U.S. 588, 583 (1939) (Roberts, J., dissenting from opinion rejecting non-delegation challenge to Agricultural Marketing Agreement Act of 1937).

159. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 191 (1963).

and his advisors were right: Hughes and Roberts were not “dependable.”

Yet there is truth to the larger claim that Roosevelt won the war, if only because the conflict was a war of attrition. Sumners’ retirement bill was sufficient to assure the prompt departures of Van Devanter and Sutherland, which combined with Robinson’s death in July assured the President of a liberal Court majority. As Senator Ashurst counseled Roosevelt somewhat ghoulishly not long before the announcement of the Court-packing plan, “Father Time, with his scythe, is on your side.”<sup>160</sup>

On the morning of February 5, 1937, Tommy Corcoran took a cab to the Supreme Court building. His task was to warn Justice Brandeis of the President’s forthcoming announcement of the Court-packing proposal before it became public knowledge. Corcoran entered the justices’ robing room to the disapproving looks of Hughes and McReynolds, and handed Brandeis a press release outlining the President’s proposal. After reading it, the Justice thanked Corcoran for his courtesy, but then added, “tell your president he has made a grave mistake. All he had to do was wait a little while. I’m sorry for him.”<sup>161</sup> Brandeis was, of course, correct. One can understand why, in early 1937, Roosevelt thought that he needed to expand the Court’s membership to fifteen in order to have a “dependable bench” within a reasonably short time. In retrospect, however, it becomes clear that the realization of this objective did not require any expansion of the Court at all. Meanwhile, the President’s Court-packing proposal helped to precipitate the formation of an opposition bloc in Congress that would frustrate much of his second-term legislative agenda.<sup>162</sup> From the vantage of history, therefore, it appears that the Court-packing plan was an entirely unnecessary misadventure through which Roosevelt ultimately lost far more than he gained.

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160. BAKER, *supra* note 3, at 8; SHESOL, *supra* note 3, at 206.

161. SHESOL, *supra* note 3, at 297.

162. See LEUCHTENBURG, *New Deal*, *supra* note 120, at 250–54, 260, 272–73, 279 (1963); PATTERSON, *supra* note 4, at 126–337; FEINMAN, *supra* note 120, at 136–44; PAUL CONKIN, *THE NEW DEAL* 90 (2d ed. 1975); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 156–59 (1995); MCKENNA, *supra* note 2, at 301, 442.