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Inside the “Constitutional Revolution” of 1937

Barry Cushman

The nature and sources of the New Deal Constitutional Revolution are among the most discussed and debated subjects in constitutional historiography. Scholars have reached significantly divergent conclusions concerning how best to understand the meaning and the causes of constitutional decisions rendered by the Supreme Court under Chief Justice Charles Evans Hughes.¹ Though recent years have witnessed certain refinements in scholarly understandings of various dimensions of the phenomenon, the relevant documentary record seemed to have been rather thoroughly explored. Judicial opinions, case records and appellate briefs, congressional hearings and debates, scholarly and popular commentary, and the papers of the justices all had been examined in considerable detail. Though further review of the papers of government lawyers promised to shed additional light on aspects of the period’s legal and constitutional development, it appeared that the portion of the documentary record illuminating the intentional states of the justices had been exhausted.

Recently, however, a remarkably instructive set of primary sources has become available. For many years, the docket books kept by a number of the Hughes Court justices have been held

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¹ For a survey and analysis of the scholarly literature, see Barry Cushman, *The Jurisprudence of the Hughes Court: The Recent Literature*, 89 Notre Dame L Rev 1929 (2014).

by the Office of the Curator of the Supreme Court. Yet the existence of these docket books was not widely known, and access to them was highly restricted. In April of 2014, however, the Court adopted new guidelines designed to increase access to the docket books for researchers. These docket books supply a wealth of information concerning the internal deliberations of the justices, much of which has been analyzed in detail elsewhere.² This article considers what the docket books can teach us about the cases comprising what some have called the “switch-in-time”: *West Coast Hotel Co v Parrish*,³ which upheld Washington State’s minimum wage law for women and overruled *Adkins v Children’s Hospital*;⁴ the *Labor Board Cases*,⁵ which upheld the constitutionality of the National Labor Relations Act;⁶ and the *Social Security Cases*,⁷ which upheld the constitutionality of provisions of the Social Security Act⁸ establishing an old-age pension system and a federal-state cooperative plan of unemployment insurance, as well as corresponding state unemployment compensation statutes.

During the 1936 October Term, the Court’s personnel consisted of Chief Justice Hughes and Associate Justices Willis Van Devanter, James Clark McReynolds, Louis D. Brandeis, George Sutherland, Pierce Butler, Harlan Fiske Stone, Owen J. Roberts, and Benjamin N. Cardozo. For

² See Barry Cushman, *Vote Fluidity on the Hughes Court: The Critical Terms, 1934-1936*, 2017 U Ill L Rev 269 (2017); Barry Cushman, *The Hughes Court Docket Books: The Late Terms, 1937-1940*, 55 Am J Leg Hist 361 (2015); Barry Cushman, *The Hughes Court Docket Books: The Early Terms, 1929-1933*, 40 J S Ct Hist 103 (2015). See also Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 S Ct Rev 345 (2016).

³ 300 US 379 (1937).

⁴ 261 US 525 (1923) (invalidating District of Columbia’s minimum wage law for women).

⁵ *Associated Press v National Labor Relations Board*, 301 US 103 (1937); *NLRB v Friedman-Harry Marks Clothing Co*, 301 US 58 (1937); *NLRB v Fruehauf Trailer Co*, 301 US 49 (1937); *NLRB v Jones & Laughlin Steel Corp*, 301 US 1 (1937).

⁶ 49 Stat 449 (1935).

⁷ *Helvering v Davis*; 301 US. 619 (1937); *Steward Machine Co v Davis*, 301 US 548 (1937); *Carmichael v Southern Coal & Coke Co*, 301 US 495 (1937); *Chamberlin v Andrews*, 299 US 515 (1936).

⁸ 49 Stat 620 (1935).

the 1936 Term, the Office of the Curator's collection contains the docket books of five of these justices. Unfortunately, the docket books of Chief Justice Hughes and Justices Sutherland and Cardozo do not appear to have survived, and it seems that for the 1936 Term Justice McReynolds followed his regular practice of burning his docket book at the conclusion of each Term.⁹ Though Van Devanter's docket book for the Term survives and contains entries for most of the cases decided by the Court that year, it contains no records of conference votes or conference discussion. As a consequence, it is of little use to the historical researcher.

The collection does, however, contain the Term's docket books kept by Justices Stone, Roberts, Brandeis, and Butler. The Stone docket book contains records of the conference votes in most cases, and occasionally some notes on the remarks made by colleagues during conference discussions. The Roberts docket book similarly contains records of the conference votes in most cases, along with an occasional but none-too-frequent note on conference discussions. Professor Paul Freund, who clerked for Justice Brandeis during the 1932 Term, reported that for most of his judicial career the Justice destroyed his docket books at the end of each Term.¹⁰ Brandeis discontinued this practice toward the end of his tenure, however, and as a result the Curator's collection holds his docket book for the 1936 Term. Brandeis's docket book contains records of the conference votes in most cases, along with occasional notes on conference discussions. Regrettably, in some instances the Justice's notes on the conference discussion are obscured by a pasted-over, typed account of the ultimate disposition.

⁹ Dennis J. Hutchinson and David J. Garrow, eds, *The Forgotten Memoir of John Knox* 84 (2002). The Office of the Curator does, however, contain McReynolds's docket book from the 1934 Term. It also houses Cardozo's docket book from the 1932 Term.

¹⁰ Chief Justice William H. Rehnquist and Professor Paul A. Freund: "A Colloquy," Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1989), [reprinted in 124 FRD 241, 347 \(1988\)](#).

The Curator's collection also contains Justice Butler's docket book for the 1936 Term. Butler's docket book provides not only a record of conference votes, but also a remarkably rich set of notes on conference discussions. These notes corroborate numerous accounts of Hughes's conduct of the Court's conferences,¹¹ at which the Chief Justice would begin with a masterful presentation of the facts and issues in each case and a statement of his own views of how those issues should be resolved. The justices next would present their own views in descending order of seniority, and finally would cast their votes in ascending order of seniority, with Hughes voting last. Butler's notes therefore often consist principally of the Chief Justice's remarks, which help to compensate for the fact that Hughes's docket books and Court papers have not survived.¹²

Considered in concert with information previously known, the data revealed by these four docket books shed considerable new light on the nature of the Court's deliberations in each of these three sets of cases. Let us take up each of them in turn.

I. The Minimum Wage Cases

In the June, 1936 decision in *New York ex rel. Morehead v Tiplado*, Justice Roberts voted with the Four Horsemen (Van Devanter, McReynolds, Sutherland, and Butler) to strike down New York's minimum wage law for women. In the March, 1937 decision in *West Coast Hotel*

¹¹ See, for example, the discussion and sources collected in William G. Ross, *The Chief Justiceship of Charles Evans Hughes, 1930-1941* at 219–21 (2007).

¹² With the exception of the McReynolds OT 1934 Docket Book, which was donated to the Curator's office in the 1990s by a descendant of a law clerk, each of these docket books remained in the Supreme Court building after the respective justice either retired or died while in office. It is not known why these volumes were retained, nor why not all of the sets of docket books are complete. In 1972 all of the "historic" docket books held in the Supreme Court building were boxed up by the Court's Marshal at the order of Chief Justice Warren Burger, and were later transferred to the Curator's Office. Email communication from Matthew Hofstedt, Associate Curator, Supreme Court of the United States, Aug 26, 2014.

Co v Parrish, by contrast, Roberts joined the four *Tipaldo* dissenters to uphold Washington State’s minimum wage law for women. This “switch” calls out for an explanation, and in 1945, the year of his retirement from the Court, Roberts supplied one at the request of Felix Frankfurter.¹³ Roberts explained in his 1945 memorandum that the New York Attorney General had not requested that the Court overrule *Adkins v Children’s Hospital*, but that in *West Coast Hotel* “the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it.”¹⁴ For many, the take-away from the memorandum was that the fault for the result in *Tipaldo* lay not with the Court but instead with New York’s timorous lawyers.

It was true that the New York Attorney General had not asked the justices to overrule *Adkins*. It also was true that in its opinion upholding the statute in *West Coast Hotel*, the Washington State Supreme Court 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.”¹⁵ It was true as well that counsel for the party *challenging* the Washington statute 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.”¹⁶ And because the Washington statute was substantially identical to the law struck down in *Adkins*, it is difficult to see how the Court could have affirmed the State court without overruling *Adkins*. But despite all of this, the fact that New York’s lawyers had not requested that *Adkins* be overruled was not particularly helpful

¹³ Frankfurter held the memorandum that Roberts produced at his request until Roberts’s death in 1955, when he published it in the *University of Pennsylvania Law Review*. Felix Frankfurter, *Mr. Justice Roberts*, 104 U Pa L Rev 314, 314 (1955).

¹⁴ *Id.* at 314–15.

¹⁵ 300 US at 389.

¹⁶ Appellant’s Answer to Brief of Amicus Curiae, *West Coast Hotel Co v Parrish*, at 18.

to Roberts's explanation. For there was no denying that neither the brief for the party *defending* the statute in *West Coast Hotel*, nor the *amicus curiae* brief filed by the attorneys for the state of Washington, had requested that *Adkins* be overruled.¹⁷ In that respect, the litigation posture of *West Coast Hotel* was no different from that in *Tipaldo*.

Other evidence, however, suggests a different explanation. As I have noted, the Roberts memorandum is not without its difficulties, but some of the Justice's 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."¹⁸ This suggests that it was not Roberts's position that he would not confront the issue of *Adkins*'s continuing authority unless the State asked him to. This remark suggests instead that Roberts was prepared to consider the question of whether *Adkins* should be overruled, but that he would not join an opinion upholding the New York measure on the ground that it was distinguishable from the statute invalidated in *Adkins*. Roberts's memorandum recounts that he stated at the conference following the argument in *Tipaldo* that he was "unwilling to put a decision" on the ground for which New York had contended, namely, that the two statutes could be meaningfully distinguished.¹⁹ But that was precisely the ground upon

¹⁷ See Brief for the Appellee, *West Coast Hotel Co v Parrish*; Brief of Amici Curiae, *West Coast Hotel Co v Parrish*.

¹⁸ Frankfurter, 104 U Pa L Rev at 314 (cited in note 13).

¹⁹ *Id.* In an interview with Merlo J. Pusey, Roberts recalled: "When the case came before the judicial conference, we discussed it thoroughly and decided simply to let the old precedent stand. New York had come down to the Court without challenging the old precedent, *Adkins v Children's Hospital*. I thought that was a dishonest argument. I wasn't going to vote...to indicate there was any distinction. I agreed to stand on what was done before." Quoted in Charles Leonard, *A Search for a Judicial Philosophy* 90 (1971).

which Hughes planted his flag.²⁰ Hughes was famously averse to overruling precedents where he did not regard it as absolutely necessary, and he has been subject to criticism for the distinctions he sometimes fashioned in order to avoid such official disruptions to the Court's doctrine.²¹ In his dissenting opinion in *Tipaldo*, Hughes insisted that the two statutes were distinguishable, and he therefore refused to entertain the question of whether *Adkins* should be overruled.²² And though Brandeis, Stone, and Cardozo joined this opinion,²³ Hughes declined to join them in Stone's dissent calling for *Adkins* to be overruled.²⁴ This caused Stone to complain that it was "a sad business to stand only on differences of the two statutes," and that he "could not understand why 'the Chief Justice felt it necessary to so limit his opinion.'"²⁵

²⁰ A line from Justice Sutherland's majority opinion in *Adkins* had stated that "a statute requiring the employer...to pay the value of services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable." 261 US at 559. The statute at issue in *Adkins*, by contrast, had "ignored" the "moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence." Id at 558. Benjamin Cohen had seized on that language in drafting the New York statute, which required that employers pay a "fair wage" based on "the fair and reasonable value of the service rendered," and it was on this basis that the lawyers for New York had sought to distinguish *Adkins*. Though Hughes and the other dissenters found the distinction constitutionally significant, Sutherland and the other remaining members of the *Adkins* majority did not. See William Lasser, *Benjamin V. Cohen: Architect of the New Deal* 154–56 (2002).

²¹ Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv L Rev 4, 35 (1967); Samuel Hendel, *Charles Evans Hughes and the Supreme Court* 279 (1951); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 796 (1956); F.D.G. Ribble, *The Constitutional Doctrines of Chief Justice Hughes*, 41 Colum L Rev 1190, 1210 (1941); Owen J. Roberts, *The Court and the Constitution* 18 (1951). Paul Freund once characterized a distinction drawn by Hughes as one that "could be remembered just long enough to be stated once." Freund, 81 Harv L Rev at 35.

²² 298 US at 618–31 (Hughes, CJ, dissenting).

²³ Id at 631.

²⁴ Id at 631–36 (Stone, J, dissenting).

²⁵ Mason, *Harlan Fiske Stone: Pillar of the Law* at 423 (cited in note 21) (quoting Stone to Frankfurter, June 3, 1936).

Roberts was the author of the landmark due process decision in *Nebbia v New York*, which many observers believed had implicitly overruled *Adkins*.²⁶ Commentators therefore expressed considerable surprise when he joined the *Tipaldo* majority,²⁷ and a satisfied sense of resolution when he voted to uphold the Washington statute the following year.²⁸ In a letter to Paul Freund written in 1953, Frankfurter explained the reason for the *Tipaldo* hiccup on the road from *Nebbia* to *West Coast Hotel*. “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*

²⁶ See Thomas C. Chapin, *Stare Decisis and Minimum Wages*, 9 U Colo L Rev 297, 306 (1937); Robert Hale, *Minimum Wages and the Constitution*, 36 Colum L Rev 629, 633 (1936); Morris Duane, *Government Regulation of Prices in Competitive Business*, 10 Temple L Rev 262, 264 (1936); John E. Hannigan, *Minimum Wage Legislation and Litigation*, 16 BU L Rev 845, 865 (1936); Hugh Willis, *Constitutional Law of the United States* 736 (1936); *Recent Cases*, 85 U Pa L Rev 109, 118 (1936); Thomas Raeburn White, *Constitutional Protection of Liberty of Contract: Does It Still Exist?*, 83 U Pa L Rev 425, 438, 440 (1935); Norman J. Macbeth, Jr, Note, *Present Status of the Adkins Case*, 24 Ky L J 59, 66 (1935); Note, *Nebbia v People: A Milestone*, 82 U Pa L Rev 619, 619, 622 (1934); Francis W. Matthys, *Recent Decision*, 9 Notre Dame L Rev 468, 470 (1934); Alpheus Thomas Mason, *Labor, the Courts, and Section 7(a)*, 28 Am Pol Sci Rev 999, 1007–08 (1934); Joseph H. Mueller, Note, *Price Fixing*, 23 Ill Bar J 89, 91 (1934). See also *Nebbia*, 291 US at 555 (McReynolds, J, dissenting) (“The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable and for the public good”).

²⁷ See Olin Browder, Jr, Note, *Validity of New York Minimum Wage Law*, 25 Ill Bar J 75, 76 (1936); Louis H. Rubenstein, *The Minimum Wage Law*, 11 St John’s L Rev 78, 82–83 (1936); Comment, 34 Mich L Rev 1180, 1187 (1936). See also *Tipaldo*, 298 US at 635–36 (Stone, J, dissenting) (arguing that *Nebbia* “should control the present case,” is “irreconcilable with the decision and most that was said in the *Adkins* case,” and has “left the Court free of [*Adkins*’s] restriction as a precedent. We should follow our decision in the *Nebbia* case”).

²⁸ See Kurt Stern, Note, *Recent Interpretation by the Supreme Court of Liberty of Contract in Employment Cases*, 11 U Cin L Rev 82, 89 (1937); Paul Y. Davis, *The Washington Minimum Wage Decision*, 12 Ind L J 415, 417 (1937); Chapin, 9 U Colo L Rev at 306 (cited in note 26); Browder, Jr, 25 Ill Bar J at 286 (cited in note 27); Note, *Progress in the Minimum Wage Struggle*, 22 Iowa L Rev 565, 570–71 (1937).

case. . . .”²⁹ Two years later, in the *University of Pennsylvania Law Review*, Frankfurter announced publicly that “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.”³⁰ In Frankfurter’s accounting, Roberts had not believed that the Court could legitimately sustain the New York statute unless a majority of the justices was prepared to overrule *Adkins*. Because there was not such a majority, he acquiesced in an opinion invalidating the statute on the authority of *Adkins*, just as Stone and *Adkins* dissenters Chief Justice William Howard Taft and Justices Oliver Wendell Holmes, Jr. and Edward Terry Sanford had in the 1920s—even when state attorneys had specifically requested that the Court overrule *Adkins*.³¹

²⁹ 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 Age of Roosevelt: The Politics of Upheaval* 479 (1960) (“Prepared to reverse *Adkins* but not to distinguish it, Roberts 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”).

³⁰ Frankfurter, 104 U Pa L Rev at 314 (cited in note 13). Freund apparently concurred in this interpretation. See Freund, 81 Harv L Rev at 29–30 (cited in note 21).

³¹ See *Donham v West-Nelson Mfg Co*, 273 US 657 (1927) (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 US 530 (1925) (Taft, Sanford, and Stone concurring silently in per curiam decision striking down Arizona’s minimum wage statute, 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).

This explanation suggested that the reason for the outcome in *Tipaldo* rested not with the litigation strategy of the New York Attorney General, but instead with Hughes’s refusal to confront the question of whether *Adkins* should be overruled. When Hughes got his “shot at redemption”³² later that same year, however, he certainly made the most of it. Butler typically did not keep notes of remarks made during discussions concerning whether to grant *certiorari* or note probable jurisdiction, but when the justices met on October 10, 1936 to decide whether to hear *West Coast Hotel*, he did. The case came up on appeal rather than on *certiorari*, so the issue was whether to note probable jurisdiction. Appeals remained an area of the Court’s nominally mandatory jurisdiction, but a 1936 treatise on the Court’s jurisdiction that Hughes had commissioned two of his former clerks to prepare reminded its readers that the Court would not note probable jurisdiction unless the case presented a “substantial federal question.”³³ The Court would reject a case where the federal question involved was “frivolous,” or where the question was “deemed to be foreclosed by well settled principles enunciated in prior decisions.”³⁴ As then-Professor Frankfurter and James Landis had put it in an article published in 1930, counsel were obliged to “persuade the Court that the record presents an issue that is not frivolous and is not settled by prior decisions.”³⁵

³² Jeff Shesol, *Supreme Power: Franklin D. Roosevelt vs. The Supreme Court* 415 (2011).

³³ Reynolds Robertson and Francis R. Kirkham, *The Jurisdiction of the Supreme Court of the United States* 48 (1936).

³⁴ *Id.* at 96.

³⁵ Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv L Rev 1, 12 (1930). The authors went on to observe, “[p]lainly the question of substantiality is neither rigid nor narrow. The play of discretion is inevitable To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings,” the question of substantiality “operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari.” *Id.* at 12, 14. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 Colum L Rev 1643, 1708 (2000).

This was the question with which the Court was faced at the conference on probable jurisdiction that October. The principles articulated in *Adkins* would have appeared to be well-settled. They had been affirmed in *per curiam* decisions in 1925 and again in 1927,³⁶ and had been vigorously championed by Butler’s majority opinion in *Tipaldo* only four months earlier. Yet Butler records Hughes as presenting the case to the conference with the statement, “This case is under *Adkins* rather than *Tipaldo*.”³⁷ *Tipaldo*, he appeared to assert, did not actually settle the precise principles set out in *Adkins*, because the statutes involved in the two cases had differed materially. Nevertheless, those principles had been settled in *Adkins* and the two *per curiam* decisions handed down shortly thereafter, and if they were to be affirmed again, *West Coast Hotel* might have been handled by a simple summary reversal. But the Court instead noted probable jurisdiction and set the case down for briefing and argument.³⁸

At the December 19 conference after oral argument in *West Coast Hotel*, Hughes made clear why he had wanted to hear the case. Butler recorded the Chief as asking, “Can *Adkins* be distinguished.” Hughes maintained that the argument in favor of the statute “that [the] Hotel [was a public] utility etc. [was] not good.” It offered a “Possible but not satisfactory distinction” from *Adkins*. “Then” Hughes raised the question, “should *Adkins* be overruled.” He indicated that he “Agreed with Taft’s [dissenting] op[inion]” in *Adkins*. “J’s opn has more weight now.” Those challenging the statute had “not shown” that the “Reasonable value” of the employee’s labor was “less than [a] living wage.” In concluding his argument in favor of overruling *Adkins*,

³⁶ See note 31.

³⁷ Butler OT 1936 Docket Book. Butler reports that Hughes “quoted words of the act.” Some of the words in the next sentence unfortunately are difficult to make out, but it appears to read, “*Adkins* case distinguished because act of gross final [illegible].”

³⁸ *Id.*

Hughes “Cited other instances of overruling.”³⁹ Brandeis did not often take notes of remarks made during conference discussions, but on this occasion he wrote, “CJ thinks we should overrule *Adkins Case*.”⁴⁰

The public reaction to *Tipaldo* had been very unfavorable. Out of 344 newspaper editorials on the decision, only ten supported it. Some sixty of these publications, including some of the more conservative, called for a constitutional amendment to overturn it. Even Herbert Hoover stated in response to the decision that “something should be done to give back to the states the powers they thought they already had.”⁴¹ The Republican Party’s 1936 campaign platform included a plank favoring minimum wages for women and children, and the Party’s presidential candidate, Alf Landon, endorsed such legislation in his telegram to the convention accepting the Party’s nomination.⁴² The public outcry following *Tipaldo* was simply of a different order than the criticism that had been leveled at the Court for earlier decisions invalidating New Deal measures.

Though Frankfurter maintained that Roberts had been prepared in *Tipaldo* to face squarely the issue of whether *Adkins* should be overruled, some scholars have suggested that it was the strength of the public reaction to *Tipaldo* that prompted Roberts to take that step in *West*

³⁹ *Id.*

⁴⁰ Brandeis OT 1936 Docket Book. Each of the available docket books records both Hughes and Roberts as voting to affirm at the December 19 conference. Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book (“Hold for Stone”); Brandeis OT 1936 Docket Book (“Hold for Justice Stone”). Stone was absent from the conference on account of a lengthy illness, but his docket book also records the vote as 4-4 on December 19 (“12/19/36 Hold for Stone”), with Stone’s vote later entered by pencil. Stone OT 1936 Docket Book. The Roberts and Brandeis Docket Books show Stone returning to cast the deciding vote on February 6.

⁴¹ Schlesinger, *The Age of Roosevelt* at 489 (cited in note 30).

⁴² Kirk Porter and Donald Johnson, *National Party Platforms, 1840-1972* at 367 (1973); Curtis, *Lions Under the Throne* at 154 (cited in note 31); Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, at 151 & n 74 (1972).

Coast Hotel.⁴³ The docket books do not enable us to evaluate that hypothesis with respect to Roberts, but they do with respect to Hughes. At the October 10 conference on whether to note probable jurisdiction in *West Coast Hotel*, Butler records Hughes as saying, “Public mind much disturbed – Campaign.”⁴⁴ The reference to “Campaign” is a bit obscure, but it presumably refers to the fact that both of the major political parties were exercised about the issue and critical of the *Tipaldo* decision. But there can be no doubt that the mention of the “disturbed” state of the “public mind” refers to the response to *Tipaldo*. None of the docket books records Hughes as raising such considerations during the deliberations on the merits in *West Coast Hotel*, nor have I seen in any of the docket books records of this sort of consideration being raised in any other case. Indeed, in view of Hughes’s record in cases involving due process, it seems very likely that if he had confronted the question of whether *Adkins* should be overruled in the spring of 1936, he would have determined that it should. It did not take the reaction to *Tipaldo* to persuade Hughes that *Adkins* was wrong on the merits. But his remarks at the conference on probable jurisdiction suggest that that reaction may have played at least some role in his determination to confront the issue of *Adkins*’s continuing authority in *West Coast Hotel*.⁴⁵

In any event, the docket books reveal that, whereas in *Tipaldo* Hughes refused to confront the question of whether *Adkins* should be overruled, in *West Coast Hotel* Hughes took the lead in urging his colleagues to confront and overrule that precedent. This may help to resolve a difficulty with the account that attempts to shift the blame for *Tipaldo* to the New York attorney

⁴³ Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U Pa L Rev 1891, 1952 (1994); Edward A. Purcell, Jr, *Rethinking Constitutional Change*, 80 Va L Rev 277, 289–90 (1994); Merlo J. Pusey, *Justice Roberts’ 1937 Turnaround*, 1983 YB Sup Ct Hist Soc 102, 106.

⁴⁴ Butler OT 1936 Docket Book.

⁴⁵ Accord, Merlo J. Pusey, *The Supreme Court Crisis* 51 (1937).

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*⁴⁶ to overrule the nearly century-old precedent of *Swift v Tyson*⁴⁷ even though neither of the parties had challenged the vitality of that decision.⁴⁸ The docket book accounts in *West Coast Hotel*, however, suggest that *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.”⁴⁹ Perhaps in part as a result of Hughes’s leadership—which may have been prompted by his experience in *Tipaldo*—a majority to overrule *Swift* was assembled. In *Tipaldo*, by contrast, Hughes played an isolated, idiosyncratic role in the deliberations and did not take the lead in confronting *Adkins*. As a result, no majority to overrule that decision could be assembled. But in *West Coast Hotel*, even though none of the litigants had requested that *Adkins* be overruled, Hughes played the kind of leadership role that he would in *Erie*. The explanation for Roberts’s “switch” in the minimum wage cases thus would appear to lie not in the litigation strategies of the parties, but instead in the conduct of the Chief Justice.⁵⁰

⁴⁶ 304 US 64 (1938).

⁴⁷ 41 US 1 (1842).

⁴⁸ See John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 *Labor Hist* 44, 66–67 (1969); Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 *Hist* 286, 296 (1978); Purcell, *Rethinking Constitutional Change*, 80 *Va L Rev* 277 at 289–90 (cited in note 43); Hendel, *Charles Evans Hughes and the Supreme Court* at 130 (cited in note 21).

⁴⁹ Merlo J. Pusey, *Charles Evans Hughes* 710 (1951).

⁵⁰ Because the conference vote in *West Coast Hotel* was taken six weeks before the President unveiled his Court-packing plan, which was a very closely guarded secret, it is widely agreed that the plan could not have been a causal factor in the Court’s deliberations. See Barry Cushman, *Rethinking the New Court Deal* 18 (1998). It is also doubtful that the Roosevelt’s landslide victory in the 1936 election played any appreciable role. See *id* at 25–32. For reasons to doubt that public reaction to the Court’s earlier decisions significantly affected Roberts’s votes

II. *The Labor Board Cases*

No less celebrated than *West Coast Hotel* were four sharply divided decisions in which the Court upheld the Government in cases testing the constitutionality of the National Labor Relations Act (NLRA): *NLRB v Jones & Laughlin Steel Corp.*,⁵¹ which upheld application of the Act to a large steel manufacturer; *NLRB v Fruehauf Trailer Co.*,⁵² upholding application of the Act to a mid-sized company making trailers; *NLRB v Friedman-Harry Marks Clothing Co.*,⁵³ upholding application of the Act to a small clothing manufacturer in Richmond, Virginia; and *Associated Press v National Labor Relations Board*,⁵⁴ upholding the Act's application to a major wire service notwithstanding the company's First Amendment objections. Unfortunately, in all but the *Associated Press* case, the docket books are not very revealing about the conference deliberations. Brandeis did not record the vote in any of the cases.⁵⁵ Stone and Roberts recorded only that each vote was 5-4, with the Four Horsemen dissenting.⁵⁶ Butler recorded the vote in each case, as well as some remarks of Hughes concerning the *Jones & Laughlin* case. According to Butler's notes, Hughes stated: "Extensive operations. Aliquippa Local not I.C. [interstate commerce] normally under control of state. Power 'to protect' against direct burden."⁵⁷

Butler preserved lengthy notes on the conference discussion in *Associated Press*, however, presumably in part because it appears to have been the one of the *Labor Board Cases* in which

during the 1936 Term, see Cushman, 89 Notre Dame L Rev at 1984 (cited in note 1); Barry Cushman, *The Man on the Flying Trapeze*, 15 U Pa J Con Law 183, 235-37 (2012).

⁵¹ 301 US 1 (1937).

⁵² 301 US 49 (1937).

⁵³ 301 US 58 (1937).

⁵⁴ 301 US 103 (1937).

⁵⁵ Brandeis OT 1936 Docket Book.

⁵⁶ Stone OT 1936 Docket Book; Roberts OT 1936 Docket Book.

⁵⁷ Butler OT 1936 Docket Book. Butler mistakenly recorded Hughes as voting with the Four Horsemen in *Fruehauf*.

the justices considered whether the NLRA was facially invalid.⁵⁸ After laying out some of the facts, Hughes posed the question, “Is it [the NLRA] void on its face?” In order to answer that question, he next “examined [the] Act,” noting that it covered labor disputes that “affect ‘Commerce,’” which section 6 of the Act “defines classically.” “But for this”—determining whether a labor dispute was one “‘affecting com[merce]”—Hughes continued, “ct. is to say what is permissible.” This was because the statute “Refers to [the] constitutional range of power.” The question was, “Is each legitimate?” To be such, the effect of the dispute “must be so ‘immediate and direct’ as to affect com[merce].” The aim of the Act, Hughes observed, was to “Protect employ[ee]s in bargaining.” He then added that “‘agencies and instrumentalities’” of commerce “are like the principal.” Both were “interstate com[merce].” Thus, Hughes concluded, the Act was “not void on [its] face.”⁵⁹

Hughes next asked, “Is A.P. engaged in i.c. [interstate commerce]?” Here Hughes “Referred to cases on trans[portation] unions [illegible] intelligence.” He “Used illustration to show state law can not burden A.P. [pre]dominantly in i.c.” “Then (passing A.P.[’s] 5th Am. [objection]),” Butler noted parenthetically, Hughes took up the question of “Freedom of Press.” Here, he maintained, there was “no compulsion”—the requirement was “only to have representation.” “Membership [in a union] does[n’t] in itself interfere with freedom of Press,” Hughes argued. A.P.’s “Right of discharge must be saved except for membership.” Hughes therefore concluded that the Circuit Court’s decision upholding the Act should be affirmed.⁶⁰

⁵⁸ Butler OT 1936 Docket Book. In the published decisions that issue was analyzed and resolved in *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 29–32 (1937).

⁵⁹ Butler OT 1936 Docket Book.

⁶⁰ Id.

Van Devanter spoke next, and he voiced disagreement neither with Hughes’s analysis of the statute’s facial validity, nor with his Commerce Clause analysis of the Act as applied to the Associated Press (AP). Neither did he defend AP’s Fifth Amendment objections to the statute. Instead, he argued that the Circuit Court should be “Reverse[d] solely on [the] ground of interference with freedom of [the] press.” AP was in the business of “forming” and “shaping” the news, and in order to do so “impartially & fairly” it was under a “Duty” to have “unbiased employees.” For this reason, Van Devanter argued, “A.P. can oppose unions.” McReynolds agreed that the “Freedom [of the] Press [argument was] good.” He also maintained that AP was “a partnership” and “can employ whom they please.” Finally, Sutherland agreed that “A.P. can follow any policy it please.”⁶¹ So far as Butler’s notes reveal, none of the Four Horsemen maintained that the AP was not engaged in interstate commerce. In the end, Sutherland’s dissent for his fellow Horsemen confined itself to the First Amendment issue, expressly without meaning “thereby to record our assent to all that has been said with regard to other questions in the case.”⁶²

Perhaps the most interesting fact that the docket books reveal about the conference on the *Labor Board Cases* is the date on which it took place. The cases were argued on February 9, 10, and 11—in the immediate wake of President Roosevelt’s February 5 announcement of his Court-packing plan—and many scholars have contended that they were decided in the Government’s favor due to the pressure brought to bear by FDR’s proposal.⁶³ In the ordinary course the *Labor*

⁶¹ Id.

⁶² 301 US at 134 (Sutherland, J, dissenting).

⁶³ Nelson L. Dawson, *Brandeis and the New Deal*, in Nelson L. Dawson, ed, *Brandeis and America* 152 (1989); Murphy, *The Constitution in Crisis Times* at 115, 153-54 (cited in note 42); Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* vii, 122-24 (1968); Richard C. Cortner, *The Wagner Act Cases* 188 (1964); Alpheus Thomas Mason, *The Supreme Court: Palladium of Freedom* 137-38, 145-46 (1963); Alpheus Thomas Mason and William Beaney,

Board Cases probably would have been discussed and voted on at the conference held on the Saturday following oral argument.⁶⁴ In this instance, that would have been February 13, still in the early days the Plan's life, when many of its proponents were most optimistic about its prospects for passage. The justices did meet for conference on February 13, and they voted on at least six cases, including *Herndon v Lowry*⁶⁵ and *Hartford Steam Boiler, Inspection, & Ins Co v Harrison*.⁶⁶ But they did not discuss the *Labor Board Cases*. Nor did they discuss those cases on the following Saturday, February 20. Indeed, it does not appear that the justices even met for conference on that day—the docket books contain no record for that date of any votes on or discussions of cases.⁶⁷ Instead, the conference at which the discussion and vote on the *Labor Board Cases* took place was held on Saturday, February 27.⁶⁸

The Supreme Court in a Free Society 95, 182, 184 (1959); Fred Rodell, *Nine Men* 247, 250 (1955); Carl B. Swisher, *American Constitutional Development* 944, 954 (2d ed 1954); Robert Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv L Rev 645, 677 (1946); Benjamin F. Wright, *The Growth of American Constitutional Law* 200, 202, 225 (1942); Edward S. Corwin, *Court over Constitution* 127 (1938).

⁶⁴ Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv L Rev 5, 17 (1949) (“After argument, a case was always discussed and voted upon at the noon conference the following Saturday.”)

⁶⁵ Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book.

⁶⁶ Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book; Stone OT 1936 Docket Book. Other cases voted on in conference that day include No. 494, *Swayne & Hoyt, Ltd v US*; No 460, *Van Beeck v Sabine Towing Co*; No 549, *Lawrence v Shaw*; and No 563, *Hoffman v Rauch*.

⁶⁷ Stone OT 1936 Docket Book; Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book.

⁶⁸ Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book. Stone's docket book records the votes on pages dated February 13, but there are subsequent pages indicating that the conference votes were held on February 27. It appears that the person on Stone's staff in charge of preparing docket book pages before conferences entered the dates on which the cases ordinarily would have been taken up, and later prepared pages entering the dates on which the cases actually were taken up. Stone apparently simply recorded the conference votes on the former set of pages, and never transferred them to the latter. Stone did the same with two other cases that were argued during the week of February 8 but discussed at conference February 27,

The docket books do not disclose the reasons for the delay in the Court’s deliberations, but the two weeks between February 13 and February 27 witnessed important developments in the fortunes of the Court-packing plan. By February 13 there were already significant reasons to doubt that the President’s plan would be enacted by Congress. There was the nearly unanimous denunciation of the plan in the media.⁶⁹ There was the deluge of mail and telegram traffic into congressional offices that ran heavily against the plan.⁷⁰ There was the comparable flood of supportive correspondence addressed to the justices.⁷¹ There was the very public opposition of the Chairman of the House Judiciary Committee, Hatton Sumners of Texas.⁷² There was the passage by the House on February 10th of a previously-stalled judicial pension bill that opponents of the plan hoped would defuse the crisis by creating an attractive inducement to retirement for some of the elderly justices.⁷³ There was the public opposition to the bill by every Republican member of the Senate, and by nearly twenty of their conservative Democratic

Virginian Railway Co v System Federation No 40, 300 US 515 (1937), and *Washington, Virginia, & Maryland Coach Co v NLRB*, 301 US 142 (1937). Stone OT 1936 Docket Book.

⁶⁹ Shesol, *Supreme Power* at 301–05 (cited in note 32); Burt Solomon, *FDR v the Constitution: The Court-Packing Fight and the Triumph of Democracy* 110, 113–14 (2008); Robert Shogan, *Backlash: The Killing of the New Deal*, 122 (2006); James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933–1939*, at 87, 89–90 (1967); Pusey, *Charles Evans Hughes* at 753 (cited in note 49); Joseph Alsop and Turner Catledge, *The 168 Days* 71–72 (1938).

⁷⁰ Shesol, *Supreme Power* at 305–06 (cited in note 32); Solomon, *FDR v the Constitution* at 112–13 (cited in note 69); Shogan, *Backlash* at 123 (cited in note 69); Marian McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* 303–04 (2002); Patterson, *Congressional Conservatism and the New Deal* at 87–88 (cited in note 69); Alsop and Catledge, *The 168 Days* at 71–72 (cited in note 69).

⁷¹ Pusey, *Charles Evans Hughes* at 753–54 (cited in note 49).

⁷² Shesol, *Supreme Power* at 343–44 (cited in note 32); McKenna, *Franklin Roosevelt and the Great Constitutional War* at 314–16 (cited in note 70); Shogan, *Backlash* at 121 (cited in note 69); Alsop and Catledge, *The 168 Days* at 67 (cited in note 69).

⁷³ Shesol, *Supreme Power* at 342–44 (cited in note 32); Solomon, *FDR v the Constitution* at 125–26 (cited in note 69); Shogan, *Backlash* at 82–84, 123–24 (cited in note 69); McKenna, *Franklin Roosevelt and the Great Constitutional War* at 266, 301–02, 317, 335–37 (cited in note 70); Alsop and Catledge, *The 168 Days* at 77 (cited in note 69).

colleagues.⁷⁴ And on February 13 came the announcement that liberal Democratic Senator Burton Wheeler of Montana would lead the fight in opposition to the President's bill.⁷⁵

By February 13 Hughes and his colleagues were aware of two additional, highly salient pieces of information. First, they knew that the factual predicate for the President's proposal was vulnerable to challenge. In his message to Congress, Roosevelt had charged that the Court was failing to deliver "full justice" because it was "forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants."⁷⁶ The appointment of additional justices, Roosevelt contended, was necessary in order to relieve and eliminate this "congestion" on the Court's calendar by "supplement[ing] the work of older judges and accelerat[ing] the work of the court."⁷⁷ Brandeis, who as the Court's sole octogenarian was deeply offended by Roosevelt's claim that he and his elderly colleagues had been failing to discharge their duties with alacrity, later suggested to Wheeler that he solicit a letter from the Chief Justice answering the President's allegations. Hughes agreed to Wheeler's request,⁷⁸ and Wheeler read Hughes's letter to great effect when the opponents of the bill opened their testimony at the hearings before the Senate Judiciary Committee on March 22.

Hughes's letter reported that the Court was "fully abreast of its work," that there was "no congestion of cases upon our calendar," and that in fact "[t]his gratifying condition has obtained

⁷⁴ Alsop and Catledge, *The 168 Days* at 70–71, 88, 96 (cited in note 69).

⁷⁵ *Id.* at 101.

⁷⁶ 81 Cong Rec 878 (1937).

⁷⁷ *Id.*

⁷⁸ Leonard Baker, *Back to Back: The Duel Between FDR and the Supreme Court* 153–56 (1967); Burton K. Wheeler and Paul F. Healy, *Yankee from the West* 328–29 (1962); Alsop and Catledge, *The 168 Days* at 124–26 (cited in note 69).

for several years. We have been able for several Terms to adjourn after disposing of all cases which are ready to be heard.”⁷⁹ Responding to the charge that the justices had declined to grant meritorious petitions for *certiorari*, Hughes insisted that the contrary was the case. The Court had been, if anything, too liberal in accepting cases for review. Indeed, many of the petitions denied had been so wholly lacking in merit that they ought never to have been presented for consideration.⁸⁰ Moreover, Hughes observed, an “increase in the number of Justices of the Supreme Court...would not promote the efficiency of the Court.” Indeed, the Chief Justice maintained 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.”⁸¹

Robert Jackson later remarked that Hughes’s letter “did more than any one thing to turn the tide in the Court struggle.”⁸² Shortly after Wheeler had read the letter before the Judiciary Committee, Vice-President John Nance Garner telephoned FDR at Warm Springs to tell him, “We’re licked.”⁸³ Though Hughes and his brethren could not be certain that they would have the opportunity to refute Roosevelt’s charges in a public forum, they must have anticipated early on the both the possibility and the likely effect.

⁷⁹ *Reorganization of the Federal Judiciary*, Hearings on S 1392 before the Senate Commission on the Judiciary, 75th Cong, 1st Sess 488 (1937).

⁸⁰ *Id* at 489.

⁸¹ *Id* at 491.

⁸² New York Times, June 24, 1943, quoted in Pusey, *Charles Evans Hughes* at 766 (cited in note 49).

⁸³ Baker, *Back to Back* at 159–60 (cited in note 78); Wheeler and Healy, *Yankee from the West* at 333 (cited in note 78).

The second salient fact about which the justices had inside information by February 13 was the result in the pending minimum-wage case of *West Coast Hotel Co v Parrish*. They knew that Hughes and Roberts had joined Brandeis and Cardozo in voting to uphold the law at the conference on December 19, and they knew that the ailing Stone, as expected, had returned to cast the deciding vote in favor of the statute at the conference on February 6.⁸⁴ In short, they already knew that the “self-inflicted wound”⁸⁵ of *Tipaldo*, which had so “disturbed” the “public mind,” would soon be healed. Hughes also knew that he could control the timing of the decision’s announcement. In fact, the Chief Justice delayed the delivery of the opinion for several weeks in order to avoid conveying the false impression that the Court had reversed course on the minimum-wage issue in response to the Court-packing plan. He therefore held the opinion until the propitious date of March 29—exactly one week after Wheeler’s dramatic reading of Hughes’s letter at the Judiciary Committee hearings.⁸⁶

Here again, the impact was significant. “[I]t was obvious,” surmises Leonard Baker, “that the decision upholding the minimum wage would make it more difficult to push FDR’s Court plan through the Senate.”⁸⁷ “Particularly after the Roberts switch, there was no nationwide desire for altering the Court, and as a result, no great desire in Congress either.”⁸⁸ James MacGregor Burns concluded that “[b]y April, the chances for the Court plan were almost nil.”⁸⁹ The justices

⁸⁴ See note 40.

⁸⁵ Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods, and Achievements: An Appraisal* 50 (1928).

⁸⁶ Pusey, *Charles Evans Hughes* at 757 (cited in note 49).

⁸⁷ Baker, *Back to Back* at 179 (cited in note 78).

⁸⁸ *Id.* at 191.

⁸⁹ James MacGregor Burns, *Roosevelt: The Lion and the Fox* 303 (1956).

certainly could have anticipated this public and congressional response to *West Coast Hotel*, and they knew the outcome of that decision long before they met to discuss the *Labor Board Cases*.

But if the justices knew all of this by February 13, they had the opportunity to learn much more about the Court-packing plan's fortunes over the course of the two weeks following. Wheeler was able to recruit other liberal and progressive colleagues such as Gerald Nye and Lynn Frazier of North Dakota and Henrik Shipstead of Minnesota to the opposition.⁹⁰ By the middle of the month regular Democrats Joseph C. O'Mahoney of Wyoming and Tom Connally of Texas had added their names to the ranks of the plan's opponents.⁹¹ Many other Democratic senators remained conspicuously noncommittal.⁹² Soon a group of eighteen Democratic senators opposed to the plan met for dinner at the home of Maryland Democrat Millard Tydings for the purpose of forming a steering committee to lead the opposition.⁹³ By February 15, Roosevelt's Secretary of the Treasury Henry Morgenthau gave the plan only a 50-50 chance of passage.⁹⁴

Within a few days another ominous signal would emerge. The Administration had planned to introduce the bill in the House, whose members were more dependent upon presidential favor

⁹⁰ Alsop and Catledge, *The 168 Days* at 103 (cited in note 69). See also Shesol, *Supreme Power* at 346 (cited in note 32).

⁹¹ Alsop and Catledge, *The 168 Days* at 87–88 (cited in note 69).

⁹² William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in Harold M. Hollingworth and William F. Holmes, eds, *Essays on the New Deal* 88 (1969); Leon Keyserling, *The Wagner Act: Its Origins and Current Significance*, 20 *Geo Wash L Rev* 199, 210–11 (1960).

⁹³ In addition to Senator Tydings, those present included Burton Wheeler of Montana, Walter George of Georgia, Fredrick Van Nuys of Indiana, Edward Burke of Nebraska, Peter Gerry of Rhode Island, Harry Byrd of Virginia, Josiah Bailey of North Carolina, Bennett Champ Clark of Missouri, Tom Connally of Texas, William King of Utah, Kenneth McKellar of Tennessee, and Royal Copeland of New York. See Alsop and Catledge, *The 168 Days* at 103–04 (cited in note 69); Baker, *Back to Back* at 97–99 (cited in note 78); Wheeler and Healy, *Yankee from the West* at 322 (cited in note 78); Pusey, *Charles Evans Hughes* at 754 (cited in note 49).

⁹⁴ McKenna, *Franklin Roosevelt and the Great Constitutional War* at 330 (cited in note 70).

owing to the necessity of standing for election every two years.⁹⁵ But Chairman Sumners had lined up a comfortable majority of the House Judiciary Committee in opposition to the bill, which meant that he could “keep the bill bottled up in his committee all summer.”⁹⁶ The bill could be dislodged and brought to the floor only by a discharge petition signed by 218 members, or by suspension of the House Rules, which would require the support of two-thirds of the members.⁹⁷ Such strong-arm tactics appealed neither to Majority Leader Sam Rayburn, nor to Speaker William Bankhead,⁹⁸ who was already angry with the President for having excluded him from the discussions in which the Court-packing plan had been devised.⁹⁹ Both of these Democratic leaders believed that such tactics would seriously impair and possibly destroy the bill’s chances of passage by the Senate, and would produce so much ill will in the House that the bill’s enactment by that body would be unlikely even if the measure survived the Senate gauntlet. After strenuous efforts at persuasion they ultimately prevailed upon Roosevelt to introduce the bill first in the Senate. The formal announcement of this decision came on February 18.¹⁰⁰ And as everyone recognized, even were the bill to survive the Senate, upon its return to the House it would still face the same obstacles that concerned Bankhead and Rayburn.

⁹⁵ Shogan, *Backlash* at 24 (cited in note 69); McKenna, *Franklin Roosevelt and the Great Constitutional War* at 314, 317 (cited in note 70).

⁹⁶ Shogan, *Backlash* at 24 (cited in note 69).

⁹⁷ McKenna, *Franklin Roosevelt and the Great Constitutional War* at 316 (cited in note 70).

⁹⁸ *Id.*; Alsop and Catledge, *The 168 Days* at 88–89 (cited in note 69).

⁹⁹ McKenna, *Franklin Roosevelt and the Great Constitutional War* at 293 (cited in note 70). Professor McKenna reports that “Bankhead and Rayburn listened patiently, but they then told FDR that they would have nothing to do with his proposal [to pry the bill out of Committee with a discharge petition]. Rayburn was furious at this attempt ‘to make the House do the administration’s dirty work,’ as he put it, and in a needless battle.” *Id.* at 453.

¹⁰⁰ Shesol, *Supreme Power* at 344–45 (cited in note 32); McKenna, *Franklin Roosevelt and the Great Constitutional War* at 316 (cited in note 70).

Meanwhile, congressional Democrats seeking some sort of compromise proposal found the President intransigent on every front.¹⁰¹ On February 20th, for example, a delegation headed by Vice-President John Nance Garner, Senate Majority Leader Joseph Robinson, and Senate Judiciary Committee Chairman Henry Fountain Ashurst urged Roosevelt to agree to a compromise measure involving the addition to the Court of only two or three justices, rather than the six contemplated by the President's proposal. FDR responded to this entreaty by "laugh[ing] in their faces."¹⁰² This refusal to compromise, which was manifested very early in the struggle and persisted into June, was not unfounded in reason. For as internal Justice Department documents reveal, Roosevelt and others were well aware that any plan promising fewer than six additional appointments would not have achieved the objective of a "dependable" Court that could be relied upon to uphold New Deal legislation. A compromise on the number of additional justices simply was not in the cards.¹⁰³

By late February the relentless, highly organized, and well-informed lobbying efforts of the opposition senators¹⁰⁴ had given them ever greater reason for confidence. On February 26, Senator Arthur Capper of Kansas wrote to William Allen White, "I think the Roosevelt program in its present form is blocked. I feel quite certain that we have enough votes to upset him."¹⁰⁵ Leonard Baker reports that in late February, an agent of the opposition informed Chief Justice

¹⁰¹ Shesol, *Supreme Power* at 345–48 (cited in note 32).

¹⁰² Solomon, *FDR v the Constitution* at 126–27 (cited in note 69); Alsop and Catledge, *The 168 Days* at 178 (cited in note 69).

¹⁰³ See Barry Cushman, *Court-Packing and Compromise*, 29 Const Commen 1 (2013).

¹⁰⁴ Shesol, *Supreme Power* at 355–56 (cited in note 32); Alsop and Catledge, *The 168 Days* at 186–87 (cited in note 69).

¹⁰⁵ Senator Arthur Capper to William Allen White, Feb 26, 1937, Box 186, William Allen White MSS, Manuscript Division, Library of Congress, quoted in Baker, *Back to Back* at 192 (cited in note 78).

Hughes that thirty-seven senators were “hostile” to the bill and twenty more were “doubtful.”¹⁰⁶ Under the Senate Rules in force at the time, only thirty-three votes were necessary to prevent cloture of floor debate.¹⁰⁷ The opposition had begun by this time to formulate plans for a filibuster of the bill,¹⁰⁸ and Hughes was informed that they had the votes necessary to sustain it. At about the same time a Democratic member of the opposition informed Idaho Republican Senator William Borah—who was a leader in the movement to filibuster the bill as well as an old friend of Van Devanter’s who helped to orchestrate the Justice’s May 18 retirement announcement—that there were forty-two senators opposed to the President’s plan.¹⁰⁹ As a prominent Republican wrote not long after the Court’s conference on the *Labor Board Cases*, “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.”¹¹⁰

To be sure, there were those—including most conspicuously Roosevelt himself—who continued in the face of these developments to believe that the bill ultimately would achieve passage. Moreover, we do not know how many of the justices were made aware of this information, nor to what extent, if at all, it may have influenced their deliberations. But the postponement of the conference on the *Labor Board Cases* to February 27 certainly made it

¹⁰⁶ Baker, *Back to Back* at 93–94 (cited in note 78).

¹⁰⁷ Solomon, *FDR v the Constitution* at 220 (cited in note 69); Baker, *Back to Back* at 233 (cited in note 78).

¹⁰⁸ Patterson, *Congressional Conservatism and the New Deal* at 94–95 (cited in note 69); Baker, *Back to Back* at 151–152 (cited in note 78); Walter F. Murphy, *Congress and the Court* 59 (1962).

¹⁰⁹ McKenna, *Franklin Roosevelt and the Great Constitutional War* at 341 (cited in note 70); Ronald L. Feinman, *Twilight of Progressivism* 128 (1981); Pusey, *Charles Evans Hughes* at 760 (cited in note 49); Alsop and Catledge, *The 168 Days* at 206 (cited in note 69).

¹¹⁰ Baker, *Back to Back* at 151 (cited in note 78).

possible for the justices to learn things about the political landscape confronting the Court-packing plan that they could not have known had they taken the cases up at conference only two weeks earlier.

III. *The Social Security Cases*

The first of the *Social Security Cases* to reach the Court was *Chamberlin v Andrews*,¹¹¹ which concerned the constitutionality of New York State's unemployment compensation statute. That act imposed a flat tax of three percent on the payrolls of all industrial enterprises employing four or more persons, with the proceeds held by a common fund for the relief of the unemployed. Chamberlin alleged that the tax was for the private purpose of benefiting a particular class rather than for a public purpose, and that it violated due process and denied equal protection because it required employers who had not laid off any of their employees "to contribute to a fund to help those who have lost positions in failing or bankrupt businesses."¹¹² A divided New York Court of Appeals had held that the tax was imposed for the legitimate public purpose of relieving unemployment, and that the classification was reasonable and not arbitrary.¹¹³

Hughes presented the case to the conference on November 21. He noted that the "Reply brief admits unemployment a matter of public concern. Means this fund for a public purpose— Separate 'fund' not uncon. feature. Has element of 'relief'. Need not consider whether it will 'prevent' unemployment. [New York] C[ourt] of A[ppels] calls it a 'tax' – But says whether is not a tax or a police power tax is not controlling. I think it a 'tax.'" Having concluded that the tax was for a public purpose, Hughes next turned to the question of equal protection, asking, "May

¹¹¹ 299 US 515 (1936).

¹¹² *Chamberlin v Andrews*, 271 NY 1, 10 (1936).

¹¹³ *Id.*

employers be singled out to bear whole burden – little discretion – Is it ‘clear & hostile.’” He then ran through a list of hypothetical taxes that might single out certain elements of the population to bear their burdens. “Might all be put on real estate.” “Could be income tax alone – Occupation tax – Production tax -- if in Okla on oil.” Hughes then noted that “this is not a tax on property,” but instead on “payrolls.” At this point he invoked the authority of “*Mountain Timber*” *Co v State of Washington*.¹¹⁴ That decision had upheld a state workmen’s compensation statute that grouped industries into classes based upon the hazardousness of their work, and required employers in each such class to pay a flat percentage of their payrolls into a fund to be used to compensate employees in that class suffering workplace injuries. Hughes continued, observing that there was “no ‘clear and hostile’ discrimination” involved in the “Flat tax” “On employers.” The state “Could do that for any purpose.” Finally, the Chief Justice addressed the issue of the tax’s “flat rate without regard to hazard.” He noted that the “Difficulties to classify interese” had been “emphasized,” and concluded that a “Means test [was] not necessary its allowance is small.”¹¹⁵

Van Devanter and McReynolds had dissented without opinion in *Mountain Timber*,¹¹⁶ so it was not surprising that they took a different view. Van Devanter argued that New York’s unemployment compensation law was “In respect of beneficiaries arbitrary” and “Unequal,” and McReynolds indicated his agreement with this assessment. Sutherland added that he believed that the law was “bad because of flat rate on all.” Brandeis conceded that the New York law was a “bad act,” but insisted that it was “within power.” He observed that the “Wisconsin act [was]

¹¹⁴ 243 US 219 (1917).

¹¹⁵ Butler OT 1936 Docket Book.

¹¹⁶ 243 US at 246.

much better.”¹¹⁷ That act also created a common unemployment compensation fund, but established within it individual reserve accounts for each employer. Employers were required to pay into the fund only if they did not maintain their employment rolls intact, and then only to the extent that they laid off their employees. Moreover, the funds in each account were to be used only to compensate that employer’s own former employees.¹¹⁸ Brandeis’s expression of his admiration for the Wisconsin act was no mere random display of erudition. The statute had been drafted by his son-in-law, Paul Raushenbush, and was based on a memorandum that Brandeis himself had prepared in 1911.¹¹⁹

The conference vote in *Chamberlin* was evenly divided at 4-4, with the Four Horsemen opposing Hughes, Brandeis, Roberts, and Cardozo. The ailing Stone was absent from the conference, however,¹²⁰ so the decision of the New York Court of Appeals upholding the statute was affirmed by an equally divided Court.¹²¹ It would not be long, however, before a full Court would hear and decide *Carmichael v Southern Coal & Coke Co*,¹²² which considered the question of the constitutionality of Alabama’s unemployment compensation act. The Alabama statute was substantially similar to New York’s, and as the vote in *Chamberlin* had anticipated, the Court sustained it by a vote of 5-4. The April 17th conference vote was the same.¹²³ In his presentation to his colleagues, Hughes noted that the Alabama statute was “like [the] N.Y. Act” upheld in *Chamberlin*. It was “not essentially dif[ferent].” The Chief’s presentation of the case

¹¹⁷ Butler OT 1936 Docket Book.

¹¹⁸ See *Carmichael v Southern Coal & Coke Co*, 301 US 495, 530–31 (Sutherland, J, dissenting).

¹¹⁹ Bruce A. Murphy, *The Brandeis/Frankfurter Connection* 93–96 (1982).

¹²⁰ Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book; Stone OT 1936 Docket Book.

¹²¹ 299 US 515.

¹²² 301 US 495.

¹²³ Stone OT 1936 Docket Book; Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book.

largely recounted the decision of the Alabama Supreme Court, but he appeared to agree with that court that the excise was for a “public purpose.” Van Devanter agreed that the excise was for a “public purpose,” but argued that it was “clearly arbitrary” and denied due process and equal protection “because” it provided “no classification” among employers. Instead, it simply created a “Hodge podge.”¹²⁴ Butler records no further conference remarks, but Brandeis may again have mentioned the Wisconsin act. For Sutherland’s dissenting opinion for himself, Van Devanter, and Butler, while echoing the due process and equal protection objections to the Alabama act’s pooling feature that Van Devanter had raised at conference, praised the Wisconsin statute as “so fair, reasonable and just as to make plain its constitutional validity.”¹²⁵

*Steward Machine Co v Davis*¹²⁶ upheld Title IX of the Social Security Act, which imposed a federal payroll tax on employers, payable to the U.S. Treasury, and then provided a credit of up to 90% against the tax for moneys paid into a qualifying state unemployment compensation fund.¹²⁷ The statute’s tax-and credit scheme emulated a comparable arrangement that the Court had sustained unanimously in the 1927 decision of *Florida v Mellon*.¹²⁸ There Congress had provided a credit against the federal estate tax for inheritance taxes paid to the decedent’s state government. In 1933 Brandeis had suggested to his son-in-law, Paul Raushenbush, that a federal-state cooperative unemployment insurance program could be structured in the same way. Just as the credit for state death taxes left the states free to enact such taxes without fear of disadvantaging their residents, so the credit against the federal tax imposed by the Social Security Act might encourage states to establish programs of unemployment

¹²⁴ Butler OT 1936 Docket Book.

¹²⁵ 301 US at 531 (Sutherland, J, dissenting).

¹²⁶ 301 US 548 (1937).

¹²⁷ 301 US at 574–76.

¹²⁸ 273 US 12 (1927).

insurance without fear of placing their employers at a competitive disadvantage with employers in other states.¹²⁹

At the conference following oral argument in *Steward Machine*, the vote to uphold the statute was 5-2, with McReynolds and Butler dissenting and Van Devanter and Sutherland passing.¹³⁰ Butler records Hughes as opening the conference by asking, “What is quality of exaction is it a tax – permitted by const.? – coercing states or territories in its control. Proceeds not earmarked may be used for any pub[lic] purpose.” The value of Brandeis’s insightful counsel was confirmed when Hughes continued, “90% cr sustained by Fla v. Mellon – may be 225,000,000 = After the credit \$22,000,000 will remain – Power not affected by credit. Fits like a glove. ‘Mere fact of credit’ does not detract.” Hughes next asked, “Is this ‘tax & credit’ an invasion of state authority. State loses unless it pays.” Here again the Chief’s answer was simple: “Fla v. Mellon.”¹³¹

¹²⁹ For details on Brandeis’s involvement in the planning, drafting, and passage of the unemployment compensation provisions of the Social Security Act, see Joseph P. Lash, *Dealers and Dreamers* 244–45 (1988); Philippa Strum, *Louis D. Brandeis: Justice for the People* 386–87 (1984); Lewis J. Paper, *Brandeis* 354–57 (1983); Murphy, *The Brandeis/Frankfurter Connection* at 165–77 (cited in note 119); Melvin I. Urofsky, *A Mind of One Piece: Brandeis and American Reform* 131 (1971); David J. Danelski, *The Propriety of Brandeis’ Extrajudicial Conduct*, in Dawson, ed, *Brandeis and America* at 11, 26–27 (cited in note 63); Dawson, *Brandeis and the New Deal* at 38, 48 (cited in note 63); Thomas H. Eliot, *The Advent of Social Security*, in Katie Louchheim, ed, *The Making of the New Deal* 150, 159, 160–61 (1983); Paul Freund, *Mr. Justice Brandeis*, in Allison Dunham and Philip B. Kurland, eds, *Mr. Justice* 177, 190 (1964); *5 Letters of Louis D. Brandeis*, 520, 523, 526–27 (Melvin I. Urofsky and David W. Levy, eds, 1978); Franklin D. Roosevelt to Felix Frankfurter, June 11, 1934, in *Roosevelt and Frankfurter: Their Correspondence, 1928-1945*, 122–23 (Max Freedman, annot, 1968); Tom Corcoran and Ben Cohen to FF, June 18, 1934, *id* at 123–26.

¹³⁰ Stone OT 1936 Docket Book; Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book; Brandeis OT 1936 Docket Book. Stone records the conference as taking place on April 10, but both Butler and Roberts record it as occurring on April 17.

¹³¹ Butler OT 1936 Docket Book.

Hughes then turned to the recent precedent of *United States v Butler*,¹³² in which the Court had invalidated the 1933 Agricultural Adjustment Act's (AAA)¹³³ use of the fiscal powers to induce farmers to reduce their output. That Act had imposed an excise on the processors of agricultural commodities, the proceeds of which were dedicated to benefit payments made to individual farmers who contracted with the federal government to curtail their production of specified commodities. The receiver of an insolvent textile mill successfully challenged the excise, with the Court holding by a vote of 6-3 that the exaction was invalid because the revenue it generated was devoted to effectuating a federal program regulating agricultural production and thereby intruding on the legislative domains of the States.

Many scholars have argued that *Steward Machine* and *Helvering v Davis* implicitly repudiated *Butler*,¹³⁴ but the Chief Justice and his colleagues did not see it that way. In the “Butler Case,” Hughes observed, “AAA individuals induced to make contracts. Majority thought coercive.” But here, he argued, “The state has agreed. It is sovereign & can agree = state is helped.” At this point in his notes Justice Butler interjected his own thoughts in brackets: “[But may state agree vs. power to deal with matters reserved to states?]” Butler’s record of Hughes’s

¹³² 297 US 1 (1936).

¹³³ 48 Stat 31 (1933).

¹³⁴ Robert McCloskey, *The American Supreme Court* 118, 123 (4th ed 2005); 2 Melvin I. Urofsky and Paul Finkelman, *A March of Liberty* 695 (2002); William E. Leuchtenburg, *The Supreme Court Reborn* 142, 219 (1995); 2 Alfred H. Kelley, Winfred Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* 488–89 (7th ed 1991); David P. Currie, *The Constitution in the Supreme Court: The Second Century* 238 (1990); Wright, *The Growth of American Constitutional Law* at 205 (cited in note 63); Mason and Beaney, *The Supreme Court in a Free Society* at 147–48 (cited in note 63); Bernard Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* 22 (1957); Rodell, *Nine Men* at 250 (cited in note 63); Samuel J. Konefsky, *Chief Justice Stone and the Supreme Court* 118–19 (1945); Edward S. Corwin, *Constitutional Revolution, Ltd.* 71 (1941); Alsop and Catledge, *The 168 Days* at 143 (cited in note 69). A few scholars have contended that the decisions were in fact consistent. See, for example, Pusey, *Charles Evans Hughes* at 760 (cited in note 49).

remarks concludes with what appears to be another question: “are particular conditions fair offer of cooperation.”¹³⁵

It was Van Devanter’s turn to speak next, but the most senior Associate Justice kept his own counsel and passed. McReynolds similarly withheld his views. Brandeis next stated that “This legislation is opposite to invasion of state power.” The last justice on whose remarks Butler took notes was Sutherland, whom he records as saying that he “Agrees with most of 1 [Hughes]. State is free.” For this proposition Sutherland relied on a bit of his own handiwork, “*Mass v. Mellon*.”¹³⁶ In the 1923 case of *Massachusetts v Mellon*,¹³⁷ Sutherland had written for a unanimous Court upholding the Sheppard-Towner Maternity Act of 1921.¹³⁸ That Act created a federal grant-in-aid program under which Congress appropriated funds to be disbursed to states that established qualifying programs for the promotion of maternal and infant health. Massachusetts had contended “that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states”; “that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights”; and that “there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated.”¹³⁹ Sutherland had answered that “the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject.”¹⁴⁰ “Nor does the statute require the states to do or to yield

¹³⁵ Butler OT 1936 Docket Book.

¹³⁶ Id.

¹³⁷ 262 US 447 (1923).

¹³⁸ 44 Stat 224 (1921).

¹³⁹ 262 US at 482.

¹⁴⁰ 262 US at 480.

anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.”¹⁴¹ Yet Sutherland concluded his discussion of *Steward Machine* with remarks suggesting that he remained troubled by at least one of the Act’s features: “Am not sure does not invade power. State may not surrender or give US any part of its sovereignty.”¹⁴²

Cardozo’s opinion for the majority largely tracked the presentation that Hughes had made at conference. The tax was a valid excise,¹⁴³ and the excise in combination with the credit was “not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.”¹⁴⁴ Indeed, the state of Alabama did not “offer a suggestion that in passing the unemployment law she was affected by duress. For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled.”¹⁴⁵ Cardozo explained that “*Florida v. Mellon* supplies us with a precedent, if precedent be needed,”¹⁴⁶ and in the same paragraph he also cited *Massachusetts v Mellon* as a supportive decision.¹⁴⁷ The majority concluded that the statute did “not call for a surrender by the states of powers essential to their quasi-sovereign existence.”¹⁴⁸

Cardozo distinguished *Butler* on four grounds. First, unlike the processing tax imposed by the AAA, which the *Butler* majority had held was not a true tax, the proceeds of the payroll tax were not “earmarked for a special group.” Second, unlike the AAA’s regulation of

¹⁴¹ 262 US at 482.

¹⁴² *Butler* OT 1936 Docket Book.

¹⁴³ 301 US at 578–83.

¹⁴⁴ *Id* at 585.

¹⁴⁵ *Id* at 589 (citations omitted).

¹⁴⁶ *Id* at 589.

¹⁴⁷ *Id* at 592.

¹⁴⁸ 301 US at 593.

agricultural production without the consent of the state in which it was conducted, “[t]he unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.” Third, the state under the Social Security Act, unlike the farmer under the AAA, was not bound to “an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted.” And fourth, unlike the “coercive contracts” under the AAA, which the *Butler* majority had held were “unlawful in their aim and oppressive in their consequences,” the condition of the tax credit available under the Social Security Act was “not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.”¹⁴⁹

As they had at conference, McReynolds and Butler dissented. In an opinion consisting principally of quotations from President Franklin Pierce’s 1854 message vetoing a congressional bill granting lands to the states for the support of the indigent insane,¹⁵⁰ McReynolds insisted that the challenged portion of the Act “unduly interferes with the orderly government of the State by her own people and otherwise offends the Federal Constitution.”¹⁵¹ Butler similarly objected that “in principle and as applied to bring about and to gain control over state unemployment compensation, the statutory scheme is repugnant to the Tenth Amendment.”¹⁵²

The Constitution grants to the United States no power to pay unemployed persons or to require the states to enact laws or to raise or disburse money for that purpose. The provisions in question, if not amounting to coercion in a legal sense, are manifestly designed and intended directly to affect state action in the respects specified. And, if valid as so employed, this ‘tax and credit’ device may be made effective to enable federal authorities to induce, if not indeed to

¹⁴⁹ Id at 592–93 (citations omitted).

¹⁵⁰ 301 US at 600–09 (McReynolds, J, dissenting).

¹⁵¹ Id at 598 (McReynolds, J, dissenting).

¹⁵² 301 US at 616 (Butler, J, dissenting).

compel, state enactments for any purpose within the realm of state power and generally to control state administration of state laws.¹⁵³

“The terms of the measure make it clear,” Butler concluded, “that the tax and credit device was intended to enable federal officers virtually to control the exertion of powers of the states in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded.”¹⁵⁴

Sutherland’s separate dissenting opinion, in which he was joined by Van Devanter, faithfully reprised the comments he had made at conference. “With most of what is said in the opinion just handed down,” wrote the author of *Massachusetts v Mellon* and *Florida v Mellon*, “I concur.”¹⁵⁵

I agree that the pay roll tax levied is an excise within the power of Congress; that the devotion of not more than 90 per cent. of it to the credit of employers in states which require the payment of a similar tax under so-called unemployment-tax laws is not an unconstitutional use of the proceeds of the federal tax; that the provision making the adoption by the state of an unemployment law of a specified character a condition precedent to the credit of the tax does not render the law invalid. I agree that the states are not coerced by the federal legislation into adopting unemployment legislation. The provisions of the federal law may operate to induce the state to pass an employment law if it regards such action to be in its interest. But that is not coercion. If the act stopped here, I should accept the conclusion of the court that the legislation is not unconstitutional.¹⁵⁶

But as he had signaled at the conference, he could not overcome his doubts about the Act’s provision requiring payment of the proceeds of state taxes into the federal treasury, to be withdrawn only for unemployment compensation payments made through state agencies approved by a federal board.¹⁵⁷ These “administrative provisions of the act,” Sutherland

¹⁵³ Id at 616–17 (Butler, J, dissenting).

¹⁵⁴ Id at 618 (Butler, J, dissenting).

¹⁵⁵ 301 US at 609 (Sutherland, J, dissenting).

¹⁵⁶ Id at 609–10 (Sutherland, J, dissenting).

¹⁵⁷ Id at 612–13 (Sutherland, J, dissenting).

maintained, “invade the governmental administrative powers of the several states reserved by the Tenth Amendment.”¹⁵⁸ Therefore, he concluded, “the congressional act contemplates a surrender by the state to the federal government” of “state governmental power to administer its own unemployment law” and “the state payroll-tax funds which it has collected for the purposes of that law.”¹⁵⁹

The last of the *Social Security Cases* was *Helvering v Davis*,¹⁶⁰ which challenged the old-age pension provisions of the statute. Title VIII of the statute imposed payroll taxes on employers and employees; Title II made provision for the payment of Old Age Benefits. As with the taxes imposed by Title IX of the Act, the taxes imposed by Title VIII were paid directly into the Treasury, and were “not earmarked in any way.”¹⁶¹ Title II created an account in the Treasury to be known as the “Old-Age Reserve Account” from which future Old Age Benefits were to be paid, but the Act made no appropriation to fund that account. A shareholder of a Massachusetts corporation brought suit to restrain the company from paying the taxes and making the payroll deductions required by the Act. The company indicated that it intended to comply with the Act’s requirements unless it were restrained by an injunction. The Commissioner of Internal Revenue intervened, and argued that the shareholder had no standing to challenge the validity of the Act’s tax on employees. The District Court agreed that the tax on employees was not properly at issue, and upheld the tax on employers. The First Circuit, however, held that Title II constituted an invasion of powers reserved to the States by the Tenth Amendment, and that the invalidity of the expenditures to be made under Title II was fatal to the

¹⁵⁸ Id at 610 (Sutherland, J, dissenting).

¹⁵⁹ Id at 611 (Sutherland, J, dissenting).

¹⁶⁰ 301 US 619 (1937).

¹⁶¹ Id at 635.

taxes imposed by Title VIII. On *certiorari*, the Government waived its defense that the legal remedy was adequate, so as to bring the case within equity and secure a ruling on the merits.¹⁶²

The threshold question for the Court was whether there was jurisdiction in equity to entertain the suit for an injunction. Cardozo's opinion for the majority questioned whether the directors had violated any duty by resolving to pay the taxes, and also whether the shareholder had "standing to challenge that resolve in the absence of an adequate showing of irreparable injury." The question was further complicated, Cardozo suggested, by "the acquiescence of the company in the equitable remedy" imposed below, and by the Government's waiver of its defense to equitable jurisdiction. Cardozo concluded that "in a controversy such as this a court must refuse to give equitable relief when a cause of action in equity is neither pleaded nor proved," and therefore that the shareholder's suit for an injunction "should be dismissed upon that ground." Brandeis, Stone, and Roberts agreed with this position, but a majority of their colleagues "reached a different conclusion," apparently because the company and the Government had not challenged the equitable remedy "at every stage of the proceeding."¹⁶³

This division over the jurisdictional issue had been at the center of the conference discussion. Indeed, from Butler's notes it appears that Brandeis, Stone, and Roberts spoke only to the issue of jurisdiction in equity. Brandeis remarked that he "Can't see the propriety of passing on quest[ion]" of the Act's "validity" in this case. "Our obligation," he concluded, "is not to." Stone added that he "doubts Jur[isdiction] – parties can't by waiver give Jur[isdiction] – must be finding that directors have not violated their duty. Not 'entirely clear' as to compelling. Can't get to this [illegible]." Roberts is recorded only as agreeing with Brandeis and Stone that

¹⁶² Id at 635–39.

¹⁶³ Id at 639–40.

there was “no Jur[isdiction].” Cardozo added that there was “no cause of action – Directors have no[t] exceeded power as the Company owes tax – US indemnifies Co for tax on employers.”¹⁶⁴

The vote on the question of jurisdiction was 5-4, with Hughes and the Four Horsemen prepared to decide the merits.¹⁶⁵ Among those in the majority on the jurisdictional question, only Hughes appears to have spoken to the issue at conference. As to the “Standing of Davis to sue,” Hughes noted that “Both [parties] say there can be waiver [of the defense of an adequate remedy at law] and was,” citing “Pollock Case.” The reference was to *Pollock v Farmer’s Loan & Trust Co*,¹⁶⁶ where the Court held that it had jurisdiction to entertain a suit in equity where the defendant had waived the defense of adequate remedy at law.¹⁶⁷ The *Davis* case was “Clearly analogous,” Hughes argued. The Chief Justice invoked his own opinion in “Henrietta Mills [v. Rutherford] 281 [U.S. 121 (1930)],” which had held that the Court was without equitable jurisdiction to entertain a suit to enjoin collection of a state tax because the complaining party had an adequate remedy at law. In the final paragraph of that opinion, Hughes had written that “unless the case is one where the objection [that the plaintiff had an adequate remedy at law]

¹⁶⁴ Butler OT 1936 Docket Book.

¹⁶⁵ Stone OT 1936 Docket Book; Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book. In Brandeis OT 1936 Docket Book, the vote is obscured by a paste-over.

¹⁶⁶ 157 US 429 (1895).

¹⁶⁷ “The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained...this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

“The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits.” Id at 553–54.

may be treated as waived by the party entitled to raise it, the prohibition is not to be disregarded. There was no waiver in the present case, and, as the petitioner had an adequate remedy at law, the district court could not properly entertain the suit.”¹⁶⁸ *Henrietta Mills*, Hughes maintained in the *Davis* conference, “held remedy at law qu[estion] is wh[ether] equity is needed? Can def[initely] by waiver compel court to go on in equity. One ‘variant.’” Hughes focused on the “wages of employees,” noting that an “employee in Mass[achusetts] can compel full payment of wages,” as there was “No plain clear adequate rem[edy] at law as to wages.” Hughes urged that the Court “Should not overrule” *Pollock* and *Henrietta Mills* on this point, and should hold that the Court had “jurisdiction” “in equity.”¹⁶⁹

On the merits, the Court upheld the tax on employers and the provisions of Title II by a vote of 7-2, with only McReynolds and Butler noting dissents. Cardozo’s opinion held that the provisions of Title II were expenditures in aid of the general welfare, and that there was therefore “no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.”¹⁷⁰ The vote on the merits had been the same at conference.¹⁷¹ After discussing the jurisdictional question, Hughes began by pointing out that Title VIII imposed its tax on “all employers” rather than only on those having a certain number of employees, making the question of its constitutionality “easier [than Section] 901,” the taxing provision of Title IX upheld in *Steward Machine*. The “Only possible question” was thus the “‘way in wh[ich] [the tax was] laid’ – purpose for which laid.” “As to [the] purpose,” it was for “old age benefits.” There were “No

¹⁶⁸ 281 US at 128 (citations omitted).

¹⁶⁹ Butler OT 1936 Docket Book.

¹⁷⁰ 301 U.S. at 640-45.

¹⁷¹ Stone OT 1936 Docket Book; Butler OT 1936 Docket Book; Roberts OT 1936 Docket Book. In Brandeis OT 1936 Docket Book, the vote is obscured by a paste-over, but one can see that Hughes and Van Devanter voted to reverse and that McReynolds voted to affirm.

provisions for using [the proceeds of the tax imposed by] Title VIII for [payment of the benefits payable under] Title II.” The proceeds of the tax were “no[t] earmarked,” and it would be “Extraordinary to draw inferences for supposed relation.” Title VIII imposed a “mere excise on payroll.”¹⁷²

Van Devanter then followed, saying that he was “Not sure [whether] Title II & Title VIII [were] not so distinct” as Hughes had made them out to be, but that he believed that the “Tax [was] valid.” McReynolds indicated his preference to affirm the First Circuit, and Brandeis is recorded as speaking only to the jurisdictional issue. Sutherland spoke next, agreeing with Hughes that the tax was a valid excise. The “Tax and purpose,” he observed, “appear on face of act.” He disagreed with Hughes’s effort to dissociate Titles VIII and II, maintaining that “They are tied in as in *Butler*.” But that was of no consequence, because here, unlike in *Butler*, the “purpose is within power Congress.” These Titles were “free from [the] object[i]ons in other cases” like *Steward Machine*, because here there was “no interfere[n]ce with [the] power of the state. Congress,” he concluded, “can ‘appropriate’ for the old.” Justice Butler then signaled his view that the Circuit Court should be affirmed, after which Stone and Roberts spoke only to the jurisdictional question. Cardozo then took up the jurisdictional question as well, but added that “On [the] merits” he was “with 1 [Hughes]” and “also [with] 5 [Sutherland].”¹⁷³

One feature of this exchange is worthy of brief remark. After Hughes, Van Devanter, and Sutherland had spoken, it would have been clear to Stone, Roberts, and Cardozo—all of whom had been in the *Steward Machine* majority—that if the Court were to reach the merits, there would be a majority to uphold the Act. It would have been a simple matter for them to voice

¹⁷² Butler OT 1936 Docket Book.

¹⁷³ Id.

agreement with Hughes and Sutherland on the both the jurisdictional issue and the merits. Yet Butler records both Stone and Roberts, like Brandeis, as saying only that the case should be dismissed on jurisdictional grounds, and Cardozo stood with them on this point both at conference and in his opinion for the Court. Even when they were faced with the question of the constitutional validity of a massive new social program in the midst of a “constitutional crisis,” Butler’s conference notes depict these men as conscientiously focused on the particular features of the specific litigation before them, and as thinking and speaking about that litigation in very professional, lawyerly terms.¹⁷⁴

Finally, it bears emphasis that Butler’s notes of the conferences on *Steward Machine* and *Davis* reinforce what was said in the published opinions: that the justices in the majority did not believe that they were in any way retreating from the positions that they had taken in *United States v Butler*. In *Steward Machine*, Hughes and Sutherland agreed that, unlike the farmers who had entered into acreage reduction contracts under the AAA, the states enacting qualifying programs of unemployment compensation had acted freely and were not coerced. In *Davis*, Hughes saw the fact that the proceeds of the payroll tax were not earmarked as distinguishing the Social Security Act from the AAA. And both Hughes and Van Devanter appear to have agreed with Sutherland that the benefit payments authorized by Title II, unlike those made under the

¹⁷⁴ The image of careful and thorough deliberation that emerges from the docket book notes on the conferences in the *Social Security Cases* stands in sharp contrast with other depictions of the conference under Hughes as rushed and truncated. See, for example, Memorandum Re: No 401, *United States v Butler*, Feb 4, 1936, Box 62, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress (complaining of the conference in *United States v Butler* that “the main question in the case was decided practically without discussion”); Mason, *Harlan Fiske Stone: Pillar of the Law* at 790 (cited in note 21) (quoting Stone writing to John Bassett Moore in 1932 that he had “no hesitation in saying that I think discussion of our cases should be much fuller and freer”); Andrew Kaufman, *Cardozo* 480 (1993) (Cardozo writing shortly after joining the Court in 1932, “there is nothing like the genuine debate – the painstaking and willing interchange of views that gave my old court [the New York Court of Appeals] whatever strength it had”).

AAA, were for a public purpose within the power of Congress. Where others have seen a new doctrinal departure, these justices saw doctrinal continuity.¹⁷⁵

IV. Conclusion

The Hughes Court docket books thus shed valuable new light on each of the major sets of cases decided during the 1936 Term. For the minimum wages cases, the docket books help us to reconstruct an account of the Court’s deliberations highlighting three salient features. First, that the failure to assemble a majority to sustain the New York minimum wage statute in *Tipaldo* was attributable to Hughes’s extreme reluctance to overrule a precedent and his insistence on distinguishing the statute invalidated in *Adkins*, coupled with Roberts’s insistence that there was

¹⁷⁵ The docket book depictions of the deliberations in the *Social Security Cases* thus complement the analysis recently provided by Michele Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* 176–84 (2013). For contemporary commentary viewing the *Social Security Cases* as consistent with antecedent fiscal power precedents, see, for example, Paul Huser, Comment, *Constitutional Law—Validity of Social Security Taxes*, 16 Tex L Rev 224, 225 (1938) (distinguishing the taxes imposed in *Steward Machine* and *Butler* on the ground that the former tax, unlike the latter, was “not earmarked for any particular purpose nor set aside to be used to pay the benefits provided for by the Act, but may be used to pay the general costs of the Federal Government, as is the case generally with any internal revenue collections”); Recent Decision, *Constitutional Law—Scope of the National Spending Power—Validity of Federal Old-Age Benefit Appropriations under Social Security Act*, 37 Colum L Rev 1206, 1208 (1937) (“In basing its decision [in *Helvering*] on the general welfare clause, the Court established as a rule of law the Hamiltonian conception of the spending power, which it had already adopted in *dicta* in the A.A.A. case”); Elbert R. Gilliom, Comment, *The Federal-State System of Unemployment Compensation Under the Social Security Act*, 35 Mich L Rev 1306, 1311–13 (1937) (detailing the manner in which the Act’s unemployment compensation provisions were drafted so as to avoid constitutional pitfalls, and concluding that “the Court in [*Steward Machine*] properly distinguished the invalid AAA processing tax on the ground that since the proceeds were earmarked for the benefit of individual farmers complying with prescribed conditions, the latter was not a true tax, but part of a scheme to regulate agricultural production without the consent of the state affected”); Roger Sherman Hoar, Note, *Constitutional Law—By-Products of the Social Security Decisions*, 21 Marq L Rev 215, 215 (1937) (“Economists and experts on constitutional law were not surprised at the two unemployment compensation opinions of the United States Supreme Court rendered on May 24, 1937, for it had been expected that both the Alabama unemployment compensation law and Title IX of the Social Security Act would be sustained by a narrow margin”).

no constitutionally significant distinction to be drawn and that the New York law could not be upheld unless there were a majority prepared to overrule *Adkins*. Second, that even though the Court was not asked to overrule *Adkins* in *West Coast Hotel*, Hughes's leadership in persuading his colleagues to confront and abandon that precedent made it possible to assemble a majority to uphold the Washington statute. And third, that the uproar of popular disapproval that followed in the wake of the *Tipaldo* decision played a role in persuading Hughes that *West Coast Hotel* presented a substantial federal question meriting a notation of probable jurisdiction.

Though the docket books do not shed much new light on the doctrinal dimensions of the Court's deliberations in the *Labor Board Cases*, they do reveal that Hughes delayed the conference discussion and initial voting on those cases for two weeks, making it possible for the justices to acquire and digest information about the Court-packing plan's prospects that would have been unavailable to them had the conference been held according to the Court's ordinary course of business.

These revelations speak principally to questions of causation. What can be said of the claim that the justices wrought a "Constitutional Revolution" in the spring of 1937? Let us take each of the principal sets of cases in turn. To be sure, *West Coast Hotel* overruled *Adkins v Children's Hospital*, eliminating that strand of substantive due process from the Court's jurisprudence. But a few observations help to place the significance of that event in proper perspective. First, several of the principal precedents comprising *Lochner*-Era substantive due process had been retired well before the spring of 1937. Constitutional restrictions on maximum-hours legislation were effectively discarded in 1917, when the Court upheld a

working-hours limitation of general applicability in *Bunting v Oregon*.¹⁷⁶ Though *Lochner* would be cited as a live authority in *Adkins* six years later,¹⁷⁷ never again would it be relied upon to invalidate legislation prescribing maximum hours of work. As far as such legislation was concerned, Chief Justice William Howard Taft was accurate in his view that *Bunting* had overruled *Lochner sub silentio*.¹⁷⁸ Similarly, in 1930, the Court upheld provisions of the Railway Labor Act of 1926 that protected the rights of railway employees to organize and bargain collectively, and affirmed a lower court order requiring a railroad to reinstate employees it had discharged for engaging in lawful union activities.¹⁷⁹ This effectively overruled the 1908 decision of *Adair v United States*,¹⁸⁰ which had invalidated on due process grounds a federal statute prohibiting railroad companies from “unjustly discriminat[ing] against any employee because of his union membership,”¹⁸¹ and thereby removed due process obstacles to national collective bargaining legislation. And in the 1934 decision of *Nebbia v New York*, the justices abandoned a long line of decisions restricting price regulation to a narrow category of businesses “affected with a public interest.”¹⁸² By the time that *West Coast Hotel* was handed down, much of the “revolution” in due process jurisprudence already had occurred.

Second, the centrality of *Adkins* to *Lochner*-Era substantive due process is easily exaggerated. When Oregon’s minimum wage statute for women was challenged before the

¹⁷⁶ 243 US 426 (1917).

¹⁷⁷ 261 US at 545, 548–50.

¹⁷⁸ *Adkins v Children’s Hospital*, 261 US at 563–64 (Taft, CJ, dissenting).

¹⁷⁹ *Texas & N.O. R. Co v Brotherhood of Ry. & Steamship Clerks*, 281 US 548 (1930).

¹⁸⁰ 208 US 161 (1908). See also *Coppage v Kansas*, 236 US 1 (1915) (invalidating on due process grounds a state statute prohibiting employers from requiring employees to sign contracts promising not to join a union).

¹⁸¹ 30 Stat 424, 428 (1898).

¹⁸² 291 US 502 (1934).

Court in 1917,¹⁸³ there were five justices who believed it was constitutional. However, one of these, Justice Brandeis, had served as counsel to the State in the lower court proceedings before his appointment to the Court, and therefore had to recuse himself from participation on appeal. As a result, the Oregon Supreme Court's judgment upholding the statute was affirmed by an equally divided Court. This saved the statute from invalidation, but had no precedential effect.¹⁸⁴ By the time *Adkins* reached the Court six years later, the tribunal had undergone significant changes in personnel, and a new, bare majority to strike down the District of Columbia's statute was unconstrained by any prior decision on the issue.¹⁸⁵ When one member of that majority, Justice Joseph McKenna, was replaced by Stone in 1925, there were again five justices who believed that *Adkins* had been wrongly decided. Indeed, internal Court documents previously unavailable to the public reveal that the authority of *Adkins* appears to have survived challenges in 1925 and 1927 only because four of these justices felt bound by *stare decisis* to uphold the recent precedent.¹⁸⁶ After *Nebbia* was decided in 1934, many commentators expressed the view that a majority of the justices was poised to overrule *Adkins*,¹⁸⁷ which again survived in 1936 for the reasons discussed above. Many justices who were invested in other

¹⁸³ *Stettler v O'Hara*, 243 US 629 (1917).

¹⁸⁴ See Alexander Bickel and Benno C. Schmidt, *The Judiciary and Responsible Government, 1910-1921*, 592-603 (1984).

¹⁸⁵ See Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 Harv L Rev 545, 547-52 (1924) (surmising that there was a Court majority for sustaining minimum wage legislation until June of 1922, and that the appeal in *Adkins* might have been heard and an opinion upholding the statute rendered had the Court of Appeals of the District of Columbia not ordered rehearing and reargument after its initial decision upholding the measure).

¹⁸⁶ See Cushman, 2015 Sup Ct Rev at 381-83 (cited in note 2).

¹⁸⁷ See note 26. At least one commentator detected such a majority in 1931, when the Court upheld a statute regulating the commissions paid to agents selling fire insurance in *O'Gorman & Yong v Hartford Fire Ins Co*, 282 US 251 (1931). See Comment, 45 Harv L Rev 643, 644 (1931). See also Norman J. Macbeth, Jr, *Present Status of the Adkins Case*, 24 Ky L J 59, 64-65 (1935).

strands substantive due process were fully prepared to uphold minimum wage legislation. There were several occasions during the so-called *Lochner* Era when such legislation might have been sustained, and the fact that the prohibition on minimum wage laws was adopted and perpetuated was the consequence only of these fortuitous vicissitudes.¹⁸⁸

Third, and relatedly, the abandonment of that prohibition in *West Coast Hotel* did not signal a desertion of the larger enterprise of economic substantive due process. For the remainder of their judicial careers, Hughes and Roberts continued to cast votes to invalidate economic regulations on the ground that they deprived the regulated parties of property without due process of law,¹⁸⁹ denied them the equal protection of the laws¹⁹⁰ or the privileges or immunities of citizenship,¹⁹¹ or took their property without just compensation.¹⁹² Their views on

¹⁸⁸ See Powell, 37 Harv L Rev at 547–50 (cited in note 185) (concluding that thirty-five of forty-five judges and justices hearing challenges to minimum wage laws up to 1924 had voted to uphold the statutes).

¹⁸⁹ See *R.R. Comm'n of Tex v Rowan & Nichols Oil Co*, 310 US 573, 577 (1940) (Roberts and Hughes dissenting from opinion holding that oil proration order of Texas Railroad Commission did not deprive the company of its property without due process); *United States v Rock-Royal Co-op, Inc*, 307 US 533, 583–87 (1939) (Roberts and Hughes 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). See also *Thompson v Consolidated Gas Utilities Corp*, 300 US 55 (1937) (Hughes and Roberts join opinion invalidating gas proration order of Texas Railroad commission on the ground that it deprived the company of its property without due process).

¹⁹⁰ See *Charleston Fed Savings & Loan Association v Alderson*, 324 US 182, 192–93 (1945) (Roberts dissenting from opinion upholding tax assessments against equal protection challenge); *Hartford Steam Boiler Inspection & Ins Co v Harrison*, 301 US 459 (1937) (Hughes joining opinion invalidating Georgia statute imposing differing regulations on stock and mutual insurance companies).

¹⁹¹ See *Madden v Kentucky*, 309 US 83, 93–94 (1940) (Roberts dissenting from opinion upholding state tax against equal protection and privileges or immunities challenges).

¹⁹² See *United States v Willow Power Co*, 324 US 499, 511–15 (1945) (Roberts and Stone 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 US 386, 393 (1945) (Roberts dissenting from opinion holding that the Fifth Amendment did not require compensation of

these matters no longer prevailed, but only because Roosevelt's replacement of their former colleagues with justices who rejected such doctrinal commitments had relegated them to the Court's minority. Had Hughes and Roberts had their way, however, vestiges of economic substantive due process and its allied doctrines would have remained.

With respect to the *Labor Board Cases*, three principal points should be borne in mind. First, though many scholars¹⁹³ and some contemporary federal judges¹⁹⁴ have understood those decisions as marking reversals or substantial departures from the Court's established Commerce Clause precedents, many contemporary observers saw the opinions in those cases as fully consistent with prevailing doctrine. Those taking such a view included Solicitor General Stanley Reed;¹⁹⁵ Charles Fahy, the General Counsel to the NLRB who approved and oversaw the

riparian landowner whose property was reduced in market value but not invaded by government dredging operation).

¹⁹³ See, for example, Murphy, *The Constitution in Crisis Times* at 153–54 (cited in note 42); William H. Swindler, *2 Court and Constitution in the Twentieth Century* 99–100, 137 (1969); Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan* at 94 (cited in note 92); Cortner, *The Wagner Act Cases* at vi, 176–77, 188 (cited in note 63); Murphy, *Congress and the Court* at 65 (cited in note 108); Robert McCloskey, *The American Supreme Court* 176–77, 224 (1960); Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* at 16, 35 (cited in note 134); Mason, *Harlan Fiske Stone: Pillar of the Law* at 455, 458 (cited in note 21); Rodell, *Nine Men* at 249–50 (cited in note 63); Wright, *The Growth of American Constitutional Law* at 179, 222 (cited in note 63); Robert H. Jackson, *The Struggle for Judicial Supremacy* 191–92, 218, 235 (1941); Corwin, *Constitutional Revolution, Ltd* at 53, 72 (cited in note 134); Corwin, *Court over Constitution* at 156, n 60 (cited in note 63); Alsop and Catledge, *The 168 Days* at 143, 146 (cited in note 69).

¹⁹⁴ In the wake of the *Labor Board Cases*, the following decisions either explicitly stated or implicitly suggested that *Carter v Carter Coal Co*, 298 US 238 (1936), had been thereby overruled: *Humble Oil & Refining Co v NLRB*, 113 F2d 85, 88–89 (5th Cir 1940); *NLRB v Crowe Coal Co*, 104 F2d 633, 637–39 (8th Cir 1939); *NLRB v Kentucky Fire Brick Co*, 99 F2d 89, 91–92 (6th Cir 1938); *NLRB v Carlisle Lumber Co*, 94 F2d 138, 144 (9th Cir 1937); *NLRB v Santa Cruz Fruit Packing Co*, 91 F2d 790, 792–93 (9th Cir 1937); *Edwards v United States*, 91 F2d 767, 780 (9th Cir 1937); *Divine v Levy*, 39 F Supp 44, 48 (WD La 1941).

¹⁹⁵ Stanley Reed, *Memorandum for the Attorney General*, Apr 22, 1937, National Archives, Washington, DC, Dept of Justice 114-115-2, quoted in Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan* at 318–19 (cited in note 92) ("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 Poultry Code were aimed directly at wages, hours and labor conditions”).

Agency's litigation strategy;¹⁹⁶ many commentators in the law review literature;¹⁹⁷ and several lower federal court judges appointed by presidents of both political parties.¹⁹⁸ Second, between

¹⁹⁶ Charles Fahy, *Notes on Developments in Constitutional Law, 1936-1949*, 38 Geo L J 1, 11 (1949) ("My own view was at the time and is now that the *Labor Board Cases* constituted no departure from the past, unless the very recent past, and that indeed they were distinguishable from the *Carter Coal* case. The principles laid down in earlier cases, cited and quoted in detail in the *Labor Board Cases*, seemed directly applicable"). See also Peter Irons, *The New Deal Lawyers* 252–53, 258 (1982) (Fahy was confident that the superior draftsmanship of the NLRA would meet with the approval of Hughes and Roberts and that they would vote to uphold the statute, and "encouraged his staff to prepare their arguments on the assumption that an unfavorable decision in *Carter* would not invalidate the Wagner Act"); Leonard, *A Search for a Judicial Philosophy* at 243 (cited in note 19) (quoting Fahy as stating in a 1963 interview that "the Wagner Act should have been sustained on the basis of precedents...and I am not inclined to attribute the fact that it was sustained to anything but that it was believed to be constitutional").

¹⁹⁷ The following publications viewed the *Labor Board* decisions as resting on the established doctrine, which had formed the basis of the NLRB's legal strategy, that Congress could regulate intrastate activities situated in a "stream," "flow," or "current" of interstate commerce: Donald R. Harter, Note, *Constitutional Law: A Survey of Recent Decisions on the Commerce Clause*, 26 Cornell L Q 464, 466–67 (1941); Walter L. Daykin, *Interstate Commerce as Defined in the National Labor Relations Act*, 19 BU L Rev 586, 598 (1939); Paul H. Douglas and Joseph Hackman, *The Fair Labor Standards Act of 1938 I*, 53 Pol Sci Q 491, 493 (1938); Note, *Interstate Commerce: Jurisdiction of the National Labor Relations Board*, 26 Cal L Rev 273, 274 (1938); P.N. Cooper, Comment, *Constitutional Law – Interstate Commerce – National Labor Relations (Wagner) Act*, 11 S Cal L Rev 240, 250–52 (1938); Burton A. Finberg, Note, 17 BU L Rev 710, 721 (1937); Warren Woods and Altha Connor Wheatley, *The Wagner Act Decisions – A Charter of Liberty for Labor?*, 5 Geo Wash L Rev 846, 853–54 (1937); Jane Alvies, *The Commerce Power – From Gibbons v Ogden to the Wagner Act Cases*, 3 Ohio St L J 307, 307–08 (1937). Others, while not using the terms "stream," "flow," or "current," nevertheless emphasized the importance of the interstate transits of materials and products both to and from the plants in question. See John J. Trenam, Note, *Commerce Power since the Schechter Case*, 31 Geo L J 201, 205 (1943); D.J. Farage, *That Which "Directly" Affects Interstate Commerce*, 42 Dickinson L R 1, 8–9 (1937). Scholars taking such views therefore doubted that *A.L.A. Schechter Poultry Corp v United States*, 295 US 495 (1935), or *Carter* had been overruled. See, for example, Alvies, 3 Ohio St L J at 309, 319–20; Joseph H. Mueller, *Businesses Subject to the National Labor Relations Act*, 35 Mich L Rev 1286, 1297–98 (1937); Note, *Constitutional Law – Interstate Commerce – Constitutionality of National Labor Relations Act as Applied to Manufacturing*, 6 Brooklyn L Rev 467, 469 (1937). See also Lloyd Garrison, *Government and Labor: The Latest Phase*, 37 Colum L Rev 897, 898–99 (1937); Mason, *Harlan Fiske Stone: Pillar of the Law* at 553 (cited in note 21).

¹⁹⁸ See *United States v Wrightwood Dairy Co*, 123 F2d 100, 103 (7th Cir 1941) (*Schechter* still good law); *United States v Adler's Creamery, Inc*, 107 F2d 987, 989 (2d Cir 1939) (*Schechter* and *Carter* still good law); *Moore v Chicago Mercantile Exchange*, 90 F2d 735, 736–40 (7th Cir

1938 and 1940 the Court’s commerce power decisions proceeded along rather conventional lines of doctrinal analysis pertaining to federal legislative jurisdiction over interstate marketing and transportation. Doctrinal innovation was not necessary to sustain the statutes challenged before the Court in those years.¹⁹⁹ And third, when Congress asserted genuinely novel claims of regulatory authority over manufacturing and agriculture with the Fair Labor Standards Act (FLSA)²⁰⁰ and the 1941 amendments²⁰¹ to the Agricultural Adjustment Act of 1938,²⁰² several of the justices did not regard the *Labor Board* decisions as providing adequate constitutional foundation for those measures. Instead, they genuinely struggled with the Commerce Clause issues that those statutes raised. It was only with difficulty and reluctance that Hughes, the author of *the Labor Board* opinions, ultimately joined Stone’s opinion upholding congressional power to regulate the wages and hours of factory employees engaged in “production for interstate commerce” in *United States v Darby Lumber Co.*²⁰³ And even a Court now dominated by Roosevelt appointees required reargument and a good deal of soul-searching before a majority could be assembled to uphold federal regulation of the growth of wheat for home consumption on Roscoe Filburn’s farm.²⁰⁴ *Darby* (1941) cited the *Labor Board Cases* only once

1937) (*Schechter* and *Carter* still good law); *United States v Barr & Bloomfield Shoe Mfg Co*, 35 F Supp 75, 77–78 (Dist NH 1940) (*Schechter* and *Carter* still good law); *United States v F.W. Darby Lumber Co*, 32 F Supp 734 (SD Ga 1940) (holding that commerce power did not reach intrastate activities of production for interstate commerce); *Bagby v Cleveland Wrecking Co*, 28 F Supp 271, 272 (WD Ky 1939) (*Schechter* and *Carter* still good law); *Currin v Wallace*, 19 F Supp 211, 217 (ED NC 1937) (*Carter* still good law).

¹⁹⁹ For a detailed examination of these decisions, see Cushman, *Rethinking the New Court Deal* at 182–207 (cited in note 50).

²⁰⁰ 52 Stat 1060 (1938).

²⁰¹ 55 Stat 203 (1941).

²⁰² 52 Stat 31 (1938).

²⁰³ See Cushman, *Rethinking the New Court Deal* at 208–09 (cited in note 50).

²⁰⁴ See *id* at 212–24.

in passing;²⁰⁵ *Wickard v Filburn* (1942) did not cite them at all.²⁰⁶ The justices of the early 1940s treated the *Labor Board Cases* not as a germinal manifesto on the scope of federal power, but instead as yesterday's news.

Finally, the docket books provide extensive documentation of the Court's deliberations in the *Social Security Cases*. Here we see the justices speaking for themselves and only to one another, almost certainly without expectation that the contents of their discussion ever would be disclosed to the public. Justice Butler's notes of the conference reveal that the jurists did not regard their decisions upholding the federal statute as repudiating the positions that they had taken in *United States v Butler*, nor as in any other way marking a new departure in the constitutional law governing congressional fiscal powers. Both Van Devanter and Sutherland were in the majority in *Helvering v Davis*, and both their comments at conference and their published dissent in *Steward Machine* make clear their agreement with the majority's resolution of the fiscal power issues that the case presented. The majority applied standard taxing and spending power doctrine in utterly conventional ways. From the perspective of the seven justices of the majority, so far as the fiscal powers were concerned, there simply was no "constitutional revolution" to explain.

There can be no doubt that the period between the Wall Street Crash of 1929 and the Allied victory in World War II witnessed significant transformations in American constitutional law. Congressional power under the Commerce Clause became virtually plenary, executive authority was significantly enhanced, the remnants of economic substantive due process were retired, dormant Commerce Clause restraints on states and localities were relaxed, and the Court

²⁰⁵ 312 US 100, 119 (1941).

²⁰⁶ 317 US 111 (1942).

became more ardent in the defense of civil rights and civil liberties. None of this can be gainsaid. But thanks in part to the revelations discovered in the newly-available Hughes Court docket books, the longstanding claim that the Nation underwent a “Constitutional Revolution” in the spring of 1937 appears exceedingly weak indeed.