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# CHARLES EVANS HUGHES: THE CENTER HOLDS

WILLIAM E. LEUCHTENBURG\*

Over the course of more than two centuries, the Supreme Court “center” that has attracted the most attention has been that presided over by Charles Evans Hughes. Yet when Hughes was appointed Chief Justice of the United States in February 1930, he inherited a Court that had no center whatsoever.

For years, six conservatives—Chief Justice William Howard Taft, Edward Sanford, and the “Four Horsemen” (Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter)—had faced off against three “liberals”: Louis Brandeis, Oliver Wendell Holmes, Jr., and Harlan Fiske Stone. They were “liberals” less in the sense that they approved of social legislation than that they believed in judicial restraint. In the 1920s, the Taft Court struck down more laws than the Court had invalidated during the previous half-century, in what Roscoe Pound called a “‘carnival of unconstitutionality,’”<sup>1</sup> to the accompaniment of what became a familiar refrain: “Brandeis, Holmes, and Stone dissenting.”

Some scholars disapprove of the terms “conservative” and “liberal,” or “right, center, and left,” when applied to judges because it may suggest that they are no different from legislators; but the private correspondence of members of the Court makes clear that they thought of themselves as ideological warriors. In the fall of 1929, Taft had written one of the Four Horsemen, Justice Butler, that his most fervent hope was for “‘continued life of enough of the present membership . . . to prevent disastrous reversals of our present attitude. With Van [Devanter] and Mac [McReynolds] and Sutherland and you and Sanford, there will be five to steady the boat . . . .’”<sup>2</sup> Six counting Taft.

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1. ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 70 (1968).

2. HENRY PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 1044 (1939).

Nominated Chief Justice as Taft lay dying, Charles Evans Hughes was an ideal choice to lead the Court. He brought to the bench the prestige of the most multifaceted public career of any American in the first third of the twentieth century. He was, successively, a relentless counsel for an investigation of insurance companies in New York state in 1905; an outstanding reform governor of New York; an Associate Justice of the United States Supreme Court for, an acerbic critic acknowledged, "six stunningly liberal years";<sup>3</sup> Republican candidate for president of the United States who in 1916 came within a few thousand votes of going to the White House; secretary of state under two presidents (highlighted by a brilliant performance at the Washington arms conference); and a member of the International Court for Justice.

His experience and his outlook also appeared to equip him to bridge ideological divisions on the bench. His work as a corporation lawyer so alarmed Senate insurgents that twenty-six votes were cast against his confirmation. "Not since Jackson named Taney," Hughes's biographer has written, "had the Senate raised such a furor over the confirmation of a Chief Justice."<sup>4</sup> The venerated Nebraskan, George Norris, who chaired the Senate Judiciary Committee, asserted that "no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."<sup>5</sup> Yet Hughes had been aligned with the progressive wing of the Republican party, had taken a very broad view of the commerce power in his earlier tenure on the Court, especially in his opinion in the *Shreveport Rate Case*,<sup>6</sup> and had spoken out courageously in defense of the rights of five Socialist assemblymen who, though duly elected, had been expelled from the New York legislature.<sup>7</sup>

Hughes, in fact, was progressive enough that he soon determined that the Four Horsemen were uncongenial brethren and that he would have to look elsewhere to mass the Court. In his first two years as Chief Justice, he had two new men to gauge. The liberal trio remained essentially intact when Holmes gave way to Benjamin Cardozo. The other new judge, Owen Roberts, was more problematic. He had pleased liberals by his vigorous prosecution of

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3. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955* at 223 (1955).

4. MERLO J. PUSEY, *CHARLES EVANS HUGHES* 659 (1951).

5. MASON, *supra* note 1, at 77.

6. *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

7. DEXTER PERKINS, *CHARLES EVANS HUGHES AND AMERICAN DEMOCRATIC STATESMANSHIP* 66-70 (1956).

the Teapot Dome malefactors,<sup>8</sup> but he had also expressed some very conservative views. No one could say with confidence where he would wind up.

Hughes was appointed less than four months after the Wall Street crash, but his first important influence as Chief Justice was not on economic matters but on civil liberties, where Hughes's contribution has not had the appreciation it deserves. Though the Court had, for the first time, stated that the Fourteenth Amendment incorporated the First Amendment's right to freedom of speech in *Gitlow*<sup>9</sup> in 1925, Justice Sanford's view on incorporation in that case was dictum.<sup>10</sup> The Court had never used Sanford's reasoning to strike down state legislation until Hughes's opinion in *Stromberg*<sup>11</sup> in May 1931. Two weeks later, in *Near v. Minnesota*,<sup>12</sup> Hughes spoke for the Court once more in a landmark opinion on behalf of freedom of the press. The division of the Court in this 5–4 ruling was no less significant. The Four Horsemen constituted the quartet in dissent, while Hughes had forged a five-judge majority of himself, Brandeis, Cardozo, Roberts, and Stone.

The great challenge for Hughes, however, in building a coalition would come not in civil liberties but in responding to the legislation emerging out of the Great Depression. In the electrifying First Hundred Days of 1933, Franklin D. Roosevelt drove through fifteen measures that stretched the Constitution, as it was then understood, to its limits. The two most significant New Deal programs raised the biggest challenges. The National Industrial Recovery Act authorized regulation of prices and wages in businesses as localized as burlesque shows,<sup>13</sup> and the Agricultural Adjustment Act required farmers in ploughing their fields to limit how many acres they tilled in return for government subsidies.<sup>14</sup>

Even before any of the New Deal statutes reached the Court, though, it had to cope with emergency legislation enacted by the states. The first big test for the Court, and for Hughes, was a

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8. BURL NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920S 114–15, 144–45, 180–83 (1962).

9. *Gitlow v. New York*, 268 U.S. 652 (1925).

10. *Id.* at 666.

11. *Stromberg v. California*, 283 U.S. 359 (1931).

12. 283 U.S. 697 (1931).

13. See 15 U.S.C. § 703 (1934), *repealed by* Act of June 25, 1935, ch. 246, § 2, 49 Stat. 375.

14. See Agriculture Adjustment Act, ch. 25, 48 Stat. 31 (1933) (codified as amended at §§ 601–627 (2005)).

Minnesota law imposing a moratorium on mortgage payments.<sup>15</sup> It was hard to see how it could be upheld. The Constitution says bluntly, "No State shall . . . pass any Law impairing the Obligation of Contracts."<sup>16</sup> But Hughes also knew the circumstances in which this and similar legislation had been approved. Beleaguered, debt-ridden farmers, driven to desperation by the prospect that they would lose lands that had been in their families for generations, adopted drastic means to halt foreclosures. In Iowa, a judge was dragged from his bench and nearly lynched.<sup>17</sup> In Nebraska, four thousand farmers marched on the state legislature.<sup>18</sup> In Minnesota, thousands of angry farmers clogged the streets of the capital until the legislature did their bidding by enacting a moratorium law.<sup>19</sup> Hughes could not doubt that if the Court struck down the Minnesota act, there would be formidable consequences.

In the 1934 *Blaisdell*<sup>20</sup> case, Hughes came up with a resolution of his dilemma that was ingenious, though many found it bewildering. Both state legislatures and New Dealers hoped that the Court would find justification for questionable statutes by recognizing a national emergency. Hughes's first response to that expectation was not promising. "Emergency does not create power," he declared.<sup>21</sup> "Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."<sup>22</sup> But he quickly added, "While emergency does not create power, emergency may furnish the occasion for the exercise of power."<sup>23</sup> No one at the time or since has been able to figure out precisely what that sentence implies, but his words signaled what was to come. By a vote of 5-4, with Hughes joined by Roberts and the liberals, the Court validated the Minnesota law. The Chief Justice had apparently put together an alliance that would take a forbearing attitude toward the exercise of government power in the crisis of the Great Depression.<sup>24</sup>

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15. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 415-16 (1934).

16. U.S. CONST. art. I, § 10, cl. 1.

17. Frank D. Di Leva, *Attempt to Hang an Iowa Judge*, 32 ANNALS OF IOWA 340 (1954).

18. See LOWELL K. DYSON, *RED HARVEST: THE COMMUNIST PARTY AND AMERICAN FARMERS* 104-06 (1982).

19. CHARLES RUMFORD WALKER, *AMERICAN CITY* 66-67 (1937); MINNEAPOLIS TRIB., Mar. 23, 1933; *Threat to Confiscate Wealth in Minnesota Made by Gov. Olson to Force Relief Action*, N.Y. TIMES, Apr. 13, 1933, at 1.

20. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

21. *Id.* at 425.

22. *Id.*

23. *Id.* at 426.

24. The same alliance prevailed in the 5-4 decision in *Nebbia v. New York*, 291 U.S.

A year later, in one of the early New Deal tests, Hughes faced another dilemma and again used some prestidigitation to resolve it. In the spring of 1933, Roosevelt had shocked the financial world with a dramatic announcement: the United States was off the gold standard.<sup>25</sup> Congress followed up with a joint resolution rescinding obligations in public and private contracts.<sup>26</sup> When cases made their way to the Supreme Court, Hughes assigned all three opinions to himself.<sup>27</sup> The toughest of these involved government bonds.<sup>28</sup> The Court could hardly be expected to endorse the argument of FDR's attorneys that it was acceptable for the United States government to go back on its word. Yet an adverse decision would add enormously to the government debt. Hughes might also have sensed, if he did not know, that President Roosevelt, connected by a private wire to the chairman of the Securities and Exchange Commission, Joseph P. Kennedy, was, in the event of an unfavorable ruling, prepared to defy the Court and precipitate a constitutional crisis.<sup>29</sup>

Indignant at the notion that the United States government could refuse to honor its promises, the Chief Justice dismissed the Roosevelt administration's claim "that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge," with the terse sentence, "We do not so read the Constitution."<sup>30</sup> Hughes, Paul Freund later recalled, "scolded the government for repudiating its promise to pay in gold, in a voice that sounded like that of a Secretary of State rebuking Latin American banana republics for their repudiations."<sup>31</sup> When Hughes's words resounded through the courtroom, spectators had every reason to conclude that the government had sustained a calamitous defeat. But the Chief Justice was not through. Though the plaintiff was right in thinking that the government had behaved badly, Hughes continued,

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502 (1934), in which Roberts offered a sweeping justification for the exercise of state power. *Id.* at 523–24.

25. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940* at 50–51 (1963).

26. *See* Act of June 5, 1933, ch. 48, 48 Stat. 112.

27. *Norman v. Balt. & Ohio. R.R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Perry v. United States*, 294 U.S. 330 (1935). The three cases are referred to collectively as the "*Gold Clause Cases*."

28. *Perry*, 294 U.S. at 346.

29. Draft of message, Franklin D. Roosevelt Papers (on file with the Franklin D. Roosevelt Library, Hyde Park, N.Y., in the President's Secretary's File Supreme Court).

30. *Perry*, 294 U.S. at 350.

31. Paul A. Freund, *The Solicitor General*, in *THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK* 101 (Katie Louchheim ed., 1983).

he had not shown that he had suffered any economic damage.<sup>32</sup> Hence, the government prevailed. The ruling was 5-4, and it may only have been by his denunciation of the government's behavior that Hughes had retained Roberts.

This was the last time, though, that Hughes was able to keep Roberts. Less than two months later, in the rail pension case,<sup>33</sup> Roberts sided with the Four Horsemen in striking down an act of Congress, and he was to stay with them for more than a year thereafter. Not only did the decision appear to foredoom the pending Social Security bill, but in his opinion for the Court, Roberts took both a narrow view of the commerce power and a hardhearted attitude toward labor. If it was in the interest of efficiency and safety to get rid of superannuated employees, he said, that result could be achieved not by pensioning off workers who had spent their lives on the railroad, but, in these desperate times, by firing them.<sup>34</sup>

In a forceful dissent, which has been called "the boldest, frankest, indeed, the greatest opinion of his career,"<sup>35</sup> Hughes, whose objections may have been intensified by his recognition that his coalition had been shattered, chided Roberts for an "unwarranted" reading of the Commerce Clause that was "a departure from sound principles."<sup>36</sup> The government's authority with regard to elderly workers, he protested, was not limited to "throwing them out helpless."<sup>37</sup> Hughes concluded, "The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it be perfect. The power implies a broad discretion . . . ."<sup>38</sup>

At this juncture, something unexpected—and many thought out of character—happened. His alliance with Roberts and the three liberals that had hung together most of the time from *Stromberg* through the *Gold Clause Cases*<sup>39</sup> having dissolved, Hughes took only a few weeks to put together another combination—with Roberts and the Four Horsemen. On what the New Dealers called "Black Monday," May 27, 1935, three decisions went against the government.<sup>40</sup> Since all three were 9-0, there would seem to be

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32. *Id.* at 101; see also Perry, 294 U.S. at 357-58 (discussing damages).

33. *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935).

34. *Id.* at 367.

35. *The Court Rules Out Security*, THE NATION, May 22, 1935, at 588.

36. *R.R. Ret. Bd.*, 295 U.S. at 375 (Hughes, C.J., dissenting).

37. *Id.* at 381 (Hughes, C.J., dissenting).

38. *Id.* at 391-92 (Hughes, C.J., dissenting).

39. See *supra* note 27.

40. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Louisville Bank v.*

nothing remarkable about Hughes's position. But in speaking for the Court in *Schechter*,<sup>41</sup> Hughes was not content with killing off the National Industrial Recovery Act as an improper delegation of power but went on to obliterate it a second time as beyond the scope of the Commerce Clause. Furthermore, he gave a very restricted reading to the commerce power, drawing upon the much disparaged precedent of *E. C. Knight*<sup>42</sup> to speak of "a necessary and well-established distinction between direct and indirect effects" and quoting with approval a sweeping statement that neither manufacturing nor mining were in interstate commerce.<sup>43</sup> Deeply alarmed, Roosevelt admonished the Court for adopting a "horse and buggy" view and stepped up a search for a way to curb the Court.<sup>44</sup>

With one foundation stone of FDR's recovery program—the National Industrial Recovery Act—gone, only the other foundation stone—the Agricultural Adjustment Act ("Triple A")—remained. But at the beginning of 1936, the Court, in the *Butler*<sup>45</sup> case, struck down Triple A in a decision that commentators then and later treated with contempt. Roberts's opinion, which adopted a Hamiltonian view of the General Welfare Clause but nonetheless concluded that the law was invalid,<sup>46</sup> drew a scorching rebuke from Justice Stone, who denounced this "tortured construction of the Constitution."<sup>47</sup> Perhaps the most surprising aspect of the ruling was the vote: 6–3.

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Radford, 295 U.S. 555 (1935); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); see also WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932–1968* at 42–43 (1970) (noting the moniker and date of "Black Monday").

41. *Schechter*, 295 U.S. 495.

42. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

43. *Schechter*, 295 U.S. at 546–47.

44. For a transcript of the proceedings, including Roosevelt's provocative "horse and buggy" remarks, see Press Conference No. 209, 5 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 309, 336 (1972). For Roosevelt's explorations of ways to bring the Court to heel, see Breckinridge Long MS. Diary (June 12, 17, 1935) (on file with the Library of Congress, in the Long Papers); Letter from Franklin D. Roosevelt to Homer Cummings (July 5, 1935) (on file with the Franklin D. Roosevelt Library, Hyde Park, N.Y., in the Franklin D. Roosevelt Papers, Official File 142).

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

46. Unlike James Madison, another of the Framers, Alexander Hamilton, believed that the General Welfare Clause bestowed on Congress broad discretionary powers to spend. If Roberts had held the restrictive Madisonian view, his conclusion that the Triple A processing tax should fall would have been readily understandable. Commentators found it much more difficult to comprehend how Roberts could embrace the expansive Hamiltonian position but then decide that the government lacked the power to create a program of farm subsidies.

47. *Id.* at 87 (Stone, J., dissenting).



No one could understand how Hughes, who had taken such an expansive view of governmental power from his first days as Associate Justice, could sign on to Roberts's opinion or could align himself with the Four Horsemen.

Some thought the answer lay in Hughes's solicitude for the reputation of the Court. A story circulated that Hughes had switched his vote at the last minute in order to avoid the embarrassment of a 5-4 split on so momentous a matter. According to one account, Justice Stone chanced upon a former student shortly after the ruling was handed down. The student, a Yale Law School professor, said he would like to put a most indiscreet question to Justice Stone. "It's not contempt of court to ask a question," Stone responded. "Well, to be blunt, Mr. Justice, did Hughes change his decision in the Triple A case?" "With a twinkle in his eye," it is said, Justice Stone retorted, "While I can't answer that, if that were stated as fact, I should be unable to prove the contrary."<sup>48</sup> There is no hard evidence for the allegation, but its persistence for so long speaks to the conviction that Hughes was concerned not only with construing the Constitution, but also, indeed especially, with the fate of the Court as an institution.

The contention that Hughes's vote in *Butler* required dissection reflected, too, bafflement with Hughes's serpentine path. The Triple A decision was not the first time the Chief Justice had formed a 6-3 majority with the Four Horsemen and Roberts. That had happened a short time before in a Vermont tax case, *Colgate v. Harvey*,<sup>49</sup> where, by resorting to the long defunct Privileges and Immunities Clause,<sup>50</sup> the Court had invited a clobbering from law professors. Hughes's alliance with Roberts and the Four Horsemen continued after the *Butler* ruling in another defeat for the Roosevelt administration, *Jones v. SEC*,<sup>51</sup> that prompted an eloquent dissent from Cardozo. During this period of transition for the Chief Justice, Stone confided to Felix Frankfurter:

Just why we should be afflicted as we are just at present is another question, but I think there has never been a time in the history of the Court when there has been so little intelligible, recognizable pattern in its judicial performance as in the last few years . . . . The worst of it is that the one that you find most

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48. DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 44 (1974); see also ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 414-16 (1956).

49. *Colgate v. Harvey*, 296 U.S. 404 (1935).

50. U.S. CONST. amend. XIV, § 1.

51. *Jones v. SEC*, 298 U.S. 1 (1936).

difficult to understand [a reference to Hughes] is the one chiefly responsible.<sup>52</sup>

In May 1936, the commerce power again came within the purview of the Supreme Court in the *Carter Coal*<sup>53</sup> case. To salvage something from the Roosevelt recovery program that the Court had left in ruins, Congress had enacted a "little NRA" for the bituminous coal industry,<sup>54</sup> but the Court, in an opinion by one of the Four Horsemen, ruled it unconstitutional.<sup>55</sup> Concurring in *Carter*, Hughes agreed with Sutherland that "mining . . . is not itself commerce" and asserted that "Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly."<sup>56</sup> In another of his articulate dissents, Cardozo said of the "direct-indirect" formula, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."<sup>57</sup>

On the final day of term, the Court jolted the nation by striking down a New York state minimum wage law for women in *Tipaldo*,<sup>58</sup> with Roberts again in league with the Four Horsemen. This went too far for Hughes, but he based his dissent on such circumscribed grounds that when Stone filed a separate dissent, he aimed it as much at Hughes as at the conservative majority.<sup>59</sup> The *Tipaldo* ruling incited a furor. One of Roosevelt's Cabinet officers said, "The sacred right of liberty of contract again—the right of an immature child or a helpless woman to drive a bargain with a great corporation. If this decision does not outrage the moral sense of the country, then nothing will."<sup>60</sup>

The Chief Justice of the United States, once more in a minority, the Four Horsemen and Roberts dominant, his tribunal the target of abuse, may well have been tempted to say, with William Butler Yeats,

52. MASON, *supra* note 1, at 115. Hughes did not always line up with Roberts and the Four Horsemen. In a 5–4 ruling, striking down the Municipal Bankruptcy Act, he was with the dissenters. See *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936).

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

54. See Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, 49 Stat. 991.

55. *Id.* at 297–310 (Sutherland, J.).

56. *Id.* at 317 (Hughes, C.J., concurring).

57. *Id.* at 327 (Cardozo, J., dissenting in Nos. 636, 649, 650 and concurring in the result in No. 651).

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

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

60. Harold L. Ickes MS. Diary (June 2, 1936) (on file with the Library of Congress, in the Ickes Papers).

“The centre cannot hold.”<sup>61</sup> Harlan Fiske Stone wrote his sister:

We finished the term of Court yesterday, . . . I think in many ways one of the most disastrous in its history. . . . [T]he Court has been needlessly . . . obscurantic in its outlook. I suppose no intelligent person likes very well the way the New Deal does things, but that ought not to make us forget that ours is a nation which should have the powers ordinarily possessed by governments, and that the framers of the Constitution intended that it should have.<sup>62</sup>

On February 5, 1937, President Roosevelt struck back—with an audacious proposal to add as many as six Justices to the Supreme Court.<sup>63</sup> His message outlining the plan asserted that change was necessary because federal courts had not kept abreast of their dockets, a circumstance, he said, that “brings forward the question of aged or infirm judges—a subject of delicacy and yet one which required frank discussion.”<sup>64</sup> Some judges, he went on, “are often unable to perceive their own infirmities.”<sup>65</sup> Those words stung, but so large were the Democratic majorities in both houses of Congress that, despite a boisterous outcry, the measure was expected to pass.<sup>66</sup>

Hughes understood that the President’s scheme was the most serious assault ever aimed at the Court, and, after several weeks of silence, he found an opportunity to employ the immense prestige of his office as a counterweight. When Senator Burton K. Wheeler of Montana led off testimony for the opposition before the Senate Judiciary Committee, he noted that the Roosevelt administration had repeatedly charged that the Court was behind in its work, so Wheeler said that he had gone “to the only source in this country that could know exactly what the facts were.”<sup>67</sup> He then startled the audience in

61. William Butler Yeats, *The Second Coming*, in *THE NORTON ANTHOLOGY OF MODERN POETRY* 158 (Richard Ellmann & Robert O’Clair eds., 2d ed. 1988).

62. MASON, *supra* note 48, at 425–26.

63. *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, vol. VI 51–59 (Samuel I. Rosenman ed., 1941).

64. *Id.* at 53–54.

65. *Id.*

66. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 135–36 (1995).

67. There are conflicting versions of the episode. See *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 304–05 (David J. Danelski & Joseph S. Tulchin eds., 1973); PUSEY, *supra* note 4, at 755; BURTON K. WHEELER, *YANKEE FROM THE WEST* 327, 330 (1962); Memorandum of telephone conversation of Chief Justice Hughes with Senator William H. King at his residence (Mar. 19, 1937, at 8:45 a.m.) (on file with the Library of Congress, in the Charles Evans Hughes Papers, Box 6); Memorandum of

the chamber by announcing, "I have here now a letter by the Chief Justice. . . ., Mr. Charles Evans Hughes, . . . written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it."<sup>68</sup> As Wheeler concluded that sentence, one reporter noted that "a loud ripple of excitement ran through the hearing room."<sup>69</sup>

In his letter, Hughes declared, "The Supreme Court is fully abreast of its work. . . . There is no congestion of cases upon our calendar. . . .," and "[t]his gratifying condition has obtained for several years."<sup>70</sup> Increasing the number of judges would mean "more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide," and hence would not expedite litigation.<sup>71</sup> The administration's notion that an enlarged Court might hear cases in divisions he deemed "impracticable" and unconstitutional.<sup>72</sup> Because of "shortness of time," he had "not been able to consult" with all of the members of the Court, but, he said, his statement did have the endorsement of the two senior judges, and he was "confident that it is in accord with the views of the justices."<sup>73</sup>

Though Hughes's bold stroke elicited reproach as an inappropriate advisory opinion and because he did not, in fact, have the support of the entire bench,<sup>74</sup> it was undeniably effective. A former Ohio Congressman denounced the Chief Justice for "sub rosa judicial log rolling,"<sup>75</sup> and Frankfurter accused him of being Jesuitical, pretending "withdrawal from considerations of policy, while trying to shape them";<sup>76</sup> but Hughes's statement demolished FDR's crowded

telephone conversation of Chief Justice Hughes with Senator Burton K. Wheeler at his office in the Senate Office Building (Mar. 19, 1937, at 9:50 a.m.) (on file with the Library of Congress, in the Charles Evans Hughes Papers, Box 6).

68. *Reorganization of the Federal Judiciary: Hearings on S1392 before the Senate Comm. on the Judiciary, 75th Cong. 487 (1937)* [hereinafter *Reorganization of the Federal Judiciary*] (statement of Sen. Burton K. Wheeler) (reading from letter from Charles Evans Hughes, United States Supreme Court, to Sen. Burton K. Wheeler (Mar. 21, 1937)).

69. Joseph Alsop Jr., *Hughes Opposes Extra Justices As Impairing Court's Efficiency; Brandeis, Van Devanter Concur*, N.Y. HERALD TRIB., Mar. 23, 1937, at 1.

70. *Reorganization of the Federal Judiciary*, *supra* note 68, at 488.

71. *Id.* at 491.

72. *See id.*

73. *Id.*

74. *See* MASON, *supra* note 1, at 451-52; Marquis W. Childs, *The Supreme Court Today*, HARPER'S MONTHLY MAG., May 1938, at 587-88; Raymond Clapper MS. Diary (May 10, 1938) (on file with the Library of Congress, the Clapper Papers).

75. *Young to Meet Morgan, Debate Court Change: Former Congressman Backs F.D.R. Proposal as Bar Refuses Poll*, CLEV. PRESS, Mar. 30, 1937, at 3 (quoting Stephen M. Young).

76. Letter from Felix Frankfurter to Louis Brandeis (Mar. 31, 1937) (on file with the

dockets rationale. The Democratic national chairman, James Farley, later wrote that the document had had a "staggering" impact,<sup>77</sup> and Robert Jackson, who as assistant attorney general had presented the most cogent argument for Court-packing, went so far as to say that Hughes's letter "did more than any one thing to turn the tide of the Court struggle."<sup>78</sup>

One week later, Hughes dealt another hard blow to FDR's Court-packing ambitions by speaking for the Court in upholding a minimum wage law from the state of Washington, which was little different, in fact not as well drawn, as the New York statute that had been struck down less than ten months before in *Tipaldo*.<sup>79</sup> This time, in the most famous switch in American history, Roberts joined Hughes and the three liberals in a 5-4 majority that was to prove enduring.

For decades, scholars have debated why Roberts switched—and even whether he switched—and the debate is not over yet. We have long recognized that FDR's Court-packing scheme could not have been responsible because the vote on *West Coast Hotel v. Parrish*<sup>80</sup> had been taken before the President revealed his plan, though the plan may well have affected some of Roberts's later votes. Several explanations have been offered, with one of the most abiding that at some point Hughes must have taken Roberts aside and told him that, for the sake of the Court as an institution, he had to abandon the Four Horsemen. At a symposium on the Court-packing crisis in which I participated with Justice William O. Douglas in the 1960s, Fred Rodell of Yale Law School remarked, "It was generally understood at the time that Hughes gave Roberts a third degree of the sort that would not be tolerated today."<sup>81</sup>

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Library of Congress, in the Frankfurter Papers, Box 28); Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 at 392 (Max Freedman ed., 1967); see also Letter from Felix Frankfurter to C. C. Burlingham (June 9, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 at 401-02 (Max Freedman ed., 1967) (condemning Hughes's letter to Sen. Wheeler).

77. JAMES A. FARLEY, JIM FARLEY'S STORY: THE ROOSEVELT YEARS 78 (1948).

78. Robert Jackson Columbia Oral History Collection; THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 306 n.50 (David J. Danelski & Joseph S. Tulchin eds., 1973). But see Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 1 J. SUP. CT. HIST. 76 (1997) (offering a contrary view on the significance of the Hughes letter). Jackson's contention is unquestionably an overstatement.

79. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

80. *Id.*

81. Fred Rodell, Remarks at the Marist College Symposium on the Court-Packing Plan (Oct. 14, 1967).

We have no documentation of such an episode, though it is unlikely that if it occurred we would have, but we do know that Hughes and Roberts had what may very well have been a meaningful get-together in the summer of 1936 following the *Tipaldo* uproar. In her oral history memoir, Secretary of Labor Frances Perkins reports what her girlhood chum, Mrs. Roberts, relayed to her.<sup>82</sup> The Hugheses, her “very close friend” confided, phoned the Robertses that summer to say that they were planning to visit Pennsylvania and were eager to see the picturesque farming country where the Robertses had a home—a palpable bid for an invitation to spend the night, which quickly came. After lunch the first day, Hughes and Roberts went off for a walk. Perkins continues:

Says Mrs. Roberts to me, “All I know is that they walked up and down that terrace for hours. I said to myself, ‘Owen is no walker. His feet will drop off. What in the world is the Chief Justice talking to him about so much? Why don’t they stop this?’ Twice I called them to come in and have tea, but they said, ‘Just a minute,’ and kept right on talking and talking, and walking up and down on that terrace, which is far enough from the house to be completely out of earshot, and yet it isn’t actually down in the pasture where the cattle are.”

They had a pleasant dinner. Right after dinner Mr. Justice Roberts said to the Chief Justice, “I want to show you some old Pennsylvania court records that I’ve got . . .” So he took him into his library which was at the end of the house, a long way from the drawing room and living room. . . . Mrs. Roberts said:

They were in there all evening. Much use we had of them. Much conversation we had out of those men. Mrs. Hughes and I talked to each other about the children, the servants, gardens, the weather, Washington gossip. We got to the end of our rope, but those two men still stayed in there. They came out finally and we had a little chat. The next morning the Chief Justice and Owen went in and talked again in the library.<sup>83</sup>

What they said to one another over these many hours at a critical moment for the Court, subjected to savage condemnation for several of its decisions and with rumors brewing about reprisals Roosevelt was hatching, we have no way of knowing. But if Hughes did win

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82. See Frances Perkins, Columbia Oral History Collection 71–74.

83. *Id.*

Roberts over, he may well be regarded as the architect of what has been called the Constitutional Revolution of 1937.

Contemporary observers noted that it was much easier for Roberts to change his mind about a state law than it would be for him to accept the vast augmentation of national power under the New Deal, but just two weeks after *West Coast Hotel* he again joined with Hughes and the three liberals to validate the far-reaching National Labor Relations Act.<sup>84</sup> Hughes took on the Wagner Act opinions himself. One of the leading surveys of constitutional law has concluded, "The holding and its reasoning were totally new in American constitutional law, and made clear the commitment of the Court to a new jurisprudence."<sup>85</sup> But Hughes, wedded to stare decisis and the importance of doctrinal stability, never acknowledged that the Court had switched. He said of *Schechter* and *Carter* merely that "[t]hese cases are not controlling here."<sup>86</sup> He even cited the Tenth Amendment as a barrier to the exercise of federal authority.<sup>87</sup> One of the closest students of Hughes's opinions, Samuel Hendel, has written of the Chief Justice:

Having sedulously sought to protect the precedents of the Court, sometimes at the risk of offending logic, he witnessed and often participated in the shattering of one precedent after another. He stood thus as a kind of heroic and, in a sense, tragic figure, torn between the old and the new, seeking at first to stem the tide but then relentlessly caught up and moving with it.<sup>88</sup>

*West Coast Hotel* and the Wagner Act rulings, especially *NLRB v. Jones and Laughlin*, set the pattern for the rest of the spring. Not once was a New Deal law or a state regulatory statute struck down. In May, the Court, with Hughes and Roberts in the majority, validated the Social Security Act<sup>89</sup> in a manner that illuminates

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84. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

85. SWINDLER, *supra* note 40, at 434.

86. *Jones & Laughlin Steel Corp.*, 301 U.S. at 40-41.

87. *Id.* at 29-30 (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549, 550, 554 (1935)).

88. SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 279 (1951).

89. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

Hughes as a tactician. Roberts and the three liberals wanted to dismiss the challenge to the constitutionality of the Social Security legislation for lack of standing, but Hughes allied himself with the Four Horsemen so that the whole country would recognize that the Court was now willing to sustain social legislation.<sup>90</sup> When, almost simultaneously, one of the Four Horsemen, Willis Van Devanter, announced he was retiring, thereby further undercutting the rationale for Court-packing, a number of observers attributed his action to Hughes's influence. The British ambassador wrote Foreign Secretary Anthony Eden that he perceived "the shadow of a very majestic figure moving behind the scenes," and one editor wrote another, "Don't you suppose that Charles the Baptist persuaded Van Devanter to withdraw?"<sup>91</sup> Two months later, in part because of the "switch in time,"<sup>92</sup> the Senate buried FDR's Court-packing plan. The Court had changed, but it had survived.

What can we learn about the center from this brief foray into the experience of the 1930s?

First, it can be awfully hard to say precisely what is meant by "the center," and hence that conception ought to be treated circumspectly. Virtually every taxonomy of the Court in the 1930s, including my own, places Hughes and Roberts in the center. But neither man had a cohesive centrist position. Rather, each oscillated from one side to the other. To say that they were in the center has no analytical bite. It is only descriptive, and even the description requires scrutiny.

Second, in appreciating the importance of the center so celebrated today in the era of Sandra Day O'Connor, we should not lose sight of the fact that it is not the center that leads the Court toward abandoning the old shibboleths but the liberals—in the 1930s, not Charles Evans Hughes but Harlan Fiske Stone.

Third, before embracing the new dispensation, Hughes, as well as Roberts, did a good deal of mischief and can even be assigned a role in bringing on the 1937 crisis. One commentator, John P. Frank, has written:

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90. *Inside the Court*, ST. LOUIS STAR-TIMES (on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 7).

91. Letter from R. C. Lindsay to Anthony Eden (May 28, 1937) (on file with the Public Record Office, London, No. 477, F.O. 371, 20668 (A4108/542/45)); Letter from Frank Buxton to William Allen White (June 8, 1937) (on file with the Library of Congress, in the White Papers, Box 189).

92. As the prospects for FDR's bill diminished in the wake of the change in Supreme Court attitudes in the spring of 1937, Washingtonians circulated a quip that many historians have adopted: "A switch in time saved nine."



Once in the Court fight, Hughes' handling of it was superb . . . . At the same time, the great blot on Hughes' record is that he ever allowed the court fight situation to arise. In retrospect, it was madness to suppose that a people being led out of the worst depression of our history would stand to have their recovery blocked by a set of legalisms, and all the more so when the legalisms appealed, not to some basic tradition of American liberty, but to feeble precedents and bad logic. Hughes' role in the *Carter Coal* case . . . and in the AAA case were both profound failures of judgment. . . . Under pressure, he beat his retreat. Why did he not take his eventual ground in the first place?<sup>93</sup>

In June, after the Court's term had ended, the conservative, thoughtful editor of the *Boston Herald* wrote Frankfurter: "The President, I assume, will not escape from the conflict unscathed. The Chief, however, is going to carry more scars than the President when the Macaulay of a generation or two from now reviews the episode."<sup>94</sup>

Fourth, the center does, nonetheless, play a useful role in accommodating jurisprudence to new ways of thinking. The support of the center on the Supreme Court is vital not merely to provide votes, but also to legitimate changes in doctrine. To borrow from the Justices' lyric in the 1931 musical comedy *Of Thee I Sing*, "Only we can take a law and make it legal."<sup>95</sup> Alpheus T. Mason wrote, with respect to the Constitutional Revolution of 1937:

The idea of Chief Justice Hughes heading a revolution staggers the imagination. It is irony beyond belief that he, a jurist whose primary value was stability, should have sanctioned a constitutional transformation which, in terms of scope and speed of execution, is unprecedented in the annals of the Supreme Court.<sup>96</sup>

But he did.

Fifth, and finally, quite apart from doctrinal considerations, the center may be instrumental in safeguarding the Court as an institution. Certainly Hughes won plaudits for that contribution. The

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93. John P. Frank, *Book Reviews*, 1 J. PUB. L. 138, 148, 151 (1952) (reviewing PUSEY, *supra* note 4).

94. Letter from Frank Buxton to Felix Frankfurter (June 7, 1937) (on file with the Library of Congress, in the Frankfurter Papers, Box 38).

95. GEORGE S. KAUFMAN & MORRIE RYSKIND, WITH LYRICS BY IRA GERSHWIN, *OF THEE I SING* 100 (George Jean Nathan ed., Alfred A. Knopf 1932) (1931).

96. MASON, *supra* note 1, at 124-25.

Chief Justice's critic, John P. Frank, acknowledged: "What every aspect of Hughes' activities in 1937 exemplifies is a flair, useful in a crisis, for skilled public relations. . . . His letter, yes, but his opinions and his guidance of general strategy saved whatever was saved for his faction."<sup>97</sup> After the Court-packing plan was shelved, a Midwestern journalist reflected, "More than one observer believes the real hero, or villain, to be the quiet, bewhiskered Chief Justice of the United States, Charles Evans Hughes, who outmaneuvered the President."<sup>98</sup> Afterward, then-Attorney General Bob Jackson told the President, "'The old man put it over on you . . . .'"<sup>99</sup> Roosevelt had no comeback.

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97. Frank, *supra* note 93, at 147.

98. F. H. Sterbenz, *The World Scene*, CLEV. PRESS, July 24, 1937, at 4.

99. EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 117 (1958).

