OLD COURT, NEW DEAL: ROOSEVELT'S SUPREME BLUNDER

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ABSTRACT

On February 5, 1937 President Roosevelt sent Congress a proposal to “reorganize” the federal judiciary. Emboldened by his 1936 landslide victory, Roosevelt conceived a plan to turn the crippling tide of the Great Depression by packing the United States Supreme Court. Discreetly buried within the text of the “judicial reorganization” bill was a provision that would have permitted the president to appoint to the Supreme Court an additional Justice for each sitting Justice who had not retired within six months of his seventieth birthday. At the time, six of the sitting Justices was over seventy; this provision would have allowed Roosevelt to appoint six additional Justices immediately, boosting the number of Justices to fifteen.

Undoubtedly, a Congress dominated by Democrats would have appointed judges friendly to Roosevelt and his New Deal agenda. When Roosevelt launched his scheme, he was determined to force through popular New Deal legislation which had been repeatedly rejected by the Supreme Court, generally by a narrow margin. The president was generally aided in his causes by three liberal Justices: Louis Brandeis, Harlan Fiske Stone, and Benjamin Cardoza. These three generally supported the program and voted accordingly in the cases that came before the Court. Their efforts
were routinely stonewalled by four Justices: Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler; they were subsequently dubbed “The Four Horsemen” by Roosevelt and his aides.

The majority of research to date has focused on Roosevelt’s failed Court-packing cabal. Roosevelt’s biographers generally agree that his scheme robbed him of much of the political capital he had won in two elections and also hindered his all-out war on poverty. Historians of the period have generally ignored the subjects of Roosevelt’s Supreme Court ire – the Four Horsemen, who Roosevelt dismissed as geriatric zealots -- and uncritically accepted Roosevelt’s characterizations as fact.

This thesis will seek to illuminate the judicial philosophies of Justices Butler, Van Devanter, McReynolds, and Sutherland, and place the four in proper historical context. The Four Horsemen are remembered as a roadblock to better days. A collective century of service repudiates this assessment. These four men were consistent throughout their careers in their fiscal and judicial policies. In many ways the four horsemen raised Constitutional concerns at a time when unease was widely denounced and condemned. This thesis seeks to redress the historical relevance by assessing them as jurists rather than as ogres.
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INTRODUCTION

This thesis examines and reassesses the "Four Horsemen," the Supreme Court Justices who consistently voted down Franklin Roosevelt's progressive New Deal legislation. Justices Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler are consistently dismissed by historians as the least-remembered, least-productive, and generally most despised men to ever sit on the bench. This thesis will reexamine the conventional historical wisdom is valid or if these Justices have been unfairly consigned to a historical footnote as knee-jerk obstructionists to Roosevelt's creation of the modern welfare state.

The thesis is divided into eight chapters. Chapter One opens in media res, 1937, with Roosevelt's announcement of his plan to recast and enlarge the Supreme Court by packing it with an additional six Justices, thereby shifting the votes on the Supreme Court in his favor. Chapter Two examines the background during the years 1933-1937 that led to Roosevelt's dramatic attack on the Court. Chapters Three through Six examine the background of each of the Four Horsemen, their path to the Supreme Court, and their judicial decisions leading to their 1937 showdown with Roosevelt. Chapter Seven details the collapse of Roosevelt’s Court-packing plan and the reasons for its failure. The final Chapter Eight assesses the Four Horsemen, examines comparing the consistency of their judicial philosophies before and during
the Roosevelt administration, and assesses whether Roosevelt’s pejorative dismissal of their judicial record is valid.
CHAPTER ONE

1937

A radical is a man with both feet firmly planted – in the air. A conservative is a man with two good legs who has never learned to walk. A reactionary is a somnambulist walking backwards. A liberal is a man who uses his legs and hands at the command of his intelligence.

FDR memo to Felix Frankfurter

In his annual address to Congress on January 6, 1937, President Franklin D. Roosevelt emphasized that every branch of the government, the judicial no less than the legislative and executive, “must continue the task of making democracy succeed.” America entered the Roosevelt recession in 1937. By the time the dark cloud lifted in the summer of 1938, the American people had been put through another economic crisis, Roosevelt’s credibility suffered more blows, and the New Deal embarked on a policy course that threw the political landscape into still greater confusion. Roosevelt’s promised reform, embodied in a series of economic redistribution legislation, was systematically rebuffed by the Supreme Court. The economic misery inflicted on millions of Americans by the Roosevelt recession from the fall of 1937 to

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the summer of 1938 was every bit as serious as the early years of the Great Depression. Instead of diminishing, the work relief rolls of the Works Progress Administration expanded by 500 percent.\(^2\) As grim statistics of economic decline accumulated, the search for scapegoats and explanations began both inside and outside of the administration. Many businessmen and their allies in the press blamed the radical reforms of the New Deal for undermining confidence among investors and employees.

In his January 20, 1937, inaugural address President Roosevelt spoke of “one-third of the nation ill-housed, ill-clad, and ill-nourished.”\(^3\) It seemed as if he were beckoning the American people to a renewed war against poverty and injustice. But the trumpet, when sounded, was against a different adversary: the Supreme Court of the United States. The President had decided to break the Court’s opposition to his program by “packing” the Court.

On February 5, 1937, Roosevelt sent Congress a plan to reorganize the federal judiciary, ominously titled the “Judiciary Reorganization Bill.” Much to Roosevelt’s dismay, it quickly became known as the “Court Packing Plan.” While the declared purpose of the plan was to make the administration of Justice swifter and more efficient. Roosevelt was less interested in promoting judicial efficiency that in


\(^3\) Freedman, 371.
changing judicial philosophy. Smarting from what he perceived as judicial rebukes and reversals, Roosevelt had pondered how to create a philosophical turnabout on the Supreme Court, which he held responsible for frustrating and in some cases grievously wounding his New Deal. Attorney General Homer Cummings, pursuant to Roosevelt’s teeth-gnashing, proposed the plan, and after a very meager consultation with other advisors, the President accepted it.\(^4\) The advice and help of men wiser than Cummings were sought only after the plan had been announced, and embroiled the President in a firestorm of controversy that ironically fractured the political coalition that had propelled him to overwhelming reelection just months before.

Buried within the text of the plan, which required congressional approval was a provision that would have permitted the President to appoint to the Supreme Court an additional Justice for every sitting Justice who had not retired within six months of his seventieth birthday.\(^5\) Because six of the nine Justices sitting were over seventy, the provision would have allowed the President to appoint six additional Justices immediately, swelling the Court from nine Justices to fifteen in the event that none of the Justices elected retirement.

\(^4\) Freedman, 371.

In his message to Congress submitting the plan, Roosevelt offered a
disingenuous rationale for his proposal that would come back to haunt him more than
once: “The personnel of the Federal judiciary is insufficient to meet the business
before them.” In support of his “insufficiency” argument, the President pointed out
that in the preceding year, the Court had denied petitions for certiorari in 695 of the
803 cases presented for review by non-governmental litigants. “Can it be that full
Justice is achieved when the Court is forced by the sheer necessity of keeping up with
business to decline, without even an explanation, to hear 87 percent of the cases
presented by private litigants?”⁶ the President asked. The reason for this alleged failure
by the Court to meet its judicial obligations, the President opined, was the advanced
age of the Justices:

The modern tasks of judges call for the use of full
energies. Modern complexities call for also the constant
infusion of new blood in the Courts...a lowered mental
and physical vigor leads men to avoid an examination of
complicated and changed conditions. Little by little, new
facts become blurred through old glasses, fitted, as it
were, for the needs of another generation; older men,
assuming that the scene is the same as it was in the past,
cease to explore or inquire into the present or future.⁷

In short, Roosevelt painted a picture of a doddering Court falling helplessly behind in
its work, while at the same time getting to the nub of his frustration – the United States,

⁶ Cushman, 11.

⁷ Cushman, 11-14.
through the New Deal, had moved on, and septuagenarian Justices were standing in the way of progress, which the President equated with his New Deal agenda. Roosevelt petitioned for "quicker and cheaper Justice from bottom to top."

Attorney General Cummings, the draftsman of the plan to which the President had enthusiastically signed on, had produced a mass of statistics to demonstrate how the whole scheme would work in practice. At the time, Cummings' most noteworthy achievement was the building of inescapable Alcatraz Prison off the coast of California. Cummings had won favor with Roosevelt for his ability to find loopholes in legislation that permitted the President to act unilaterally without seeking Congressional approval. For example, it was Cummings, who one week after being appointed (upon the death of Thomas Walsh), advised the President to push the unilateral abandonment of the Gold Standard by Presidential fiat. The proposed "judiciary reorganization" plan affected all federal judges, including Supreme Court Justices, although there was no telling how many of the six Justices who had passed the purportedly enfeebling age of seventy would retire once the plan was put into effect. In the lower federal Courts, the age rule would affect 25 sitting judges in district and circuit Courts; if they failed to stop working, they too would be supplanted with an equal number of judges nominated by the President with Senate approval. In Cummings' view, the statute, "very simple in terms," could be pushed through Congress quickly and the new judicial appointments approved by the Senate, such that
the whole thing could be over in sixty days. As events would prove, Cummings could not have been more wrong.

Roosevelt saw the restructuring plan as a way to bring the unruly Courts in line with the aims of his administration. He stated both in a Fireside Chat and in interviews that the three branches of government were akin to horses pulling a cart. The riders of the cart were presumably the American people.

The three horses are, of course, the three branches of government - the Congress, the executive, and the Courts. Two of the horses, the Congress and the executive, are pulling in unison today; the third is not.

The President was quick to point out the error of many cartoon artists of the day:

Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as chief executive, is himself one of the three horses.

Although the proposed plan would have affected six of the nine Justices, it was really only four that the President meant to specifically target. Justices James

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McReynolds, 75, George Sutherland, 75, Willis Van Devanter, 78 and Pierce Butler, 71, were usually arranged in a seemingly formidable and almost instinctive opposition to the New Deal. They were widely accused (by New Deal supporters) of reading their own notions of economic and political policy into the Constitution. Roosevelt dubbed them the “Four Horsemen,” alluding to the Four Horsemen of the Biblical apocalypse: Strife, War, Famine, and Death.

This hyperbole observed a simple reality. With the four Justices typically voting as a bloc, one of the two “roving Justices” - Chief Justice Charles Evans Hughes or Justice Owen J. Roberts, whose jurisprudence was mixed - tipped the balance against the New Deal. The President only had to pick up one more vote from another Justice to decide a case, overruling those 5-4 decisions striking down New Deal initiatives that so irritated the President. Roosevelt felt that the scales of Justice were unfairly tipped against him and he resolved to redress the “age” problem. Chief Justice Charles Evans Hughes, who occasionally sided with the New Deal, was 75 and Justice Louis Brandeis, who was a New Deal proponent, was the most senior at 81, but they stood on different footing from the “relentless four.” Of course, Roosevelt’s judicial proposal made no distinction based on politics, though undoubtedly he would have liked to rewrite it as such.

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9 Freedman, 371.
The press didn’t hesitate to pound not only with written word, but also with the sometimes more potent weapon of cartoons. Under the caption “The Turnabout,” the *Tampa Tribune* depicted a bearded Justice (Hughes?) confronting FDR with a manifesto signed by the “Supreme Court” reading: “having decided that the duties of the President are too arduous we hereby recommend two additional Presidents.”

Roosevelt responded during his Fireside Chats, appealing:

> You who know me can have no fear that I would tolerate the destruction by any branch of the government of any part of the heritage of our freedom. You who know me will accept my solemn assurance that in a world in which democracy is under attack I seek to make American democracy work.”

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11 Shogan, 134.
CHAPTER TWO

ROOSEVELT REDUX 1933-1937

A second-class intellect, but a first-class temperament.
Justices Holmes (referring to FDR)

“The plowing under of ten million acres of cotton in August 1933 and the slaughter of six million little pigs in 1933,” wrote Secretary of Agriculture Henry Wallace, “were not acts of idealism in any sane society. They were emergency acts made necessary from the almost insane lack of world statesmanship during the period from 1920 to 1932.”¹ The fog of despair hung over the land. One out of every four American workers lacked a job. Factories that had once darkened the sky with smoke now stood ghostly and silent; families slept in tar-paper shacks and tin-lined caves and scavenged like dogs in the city dump.

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The New York City Health Department reported that over one-fifth of the pupils in public schools were suffering from malnutrition.\footnote{2} Thousands of vagabond children roamed the city streets while in the country, farmers stopped milk trucks along rural roads and poured milk into the ditch in a desperate attempt to counter the oversupply that further depressed farm prices. Mobs halted mortgage sales, ran the men from the banks and insurance companies out of town, intimidated judges, and demanded a moratorium on debts. This is the America that Franklin Roosevelt inherited.

In his inaugural address, Roosevelt cautioned:

\begin{quote}
Plenty is at our doorstep, but a generous use of it languishes in the very sight of supply...because the rulers of exchange of mankind’s goods have failed through their own stubbornness. They have no vision, and when there is no vision, the people perish. It may be that an unprecedented demand and need for undelayed action may call for a temporary departure from that normal balance of public procedure.”\footnote{3}
\end{quote}

Following his election in November 1932, Roosevelt, assessing in post-election calm the conditions of the country, could not have been anything other than awed at the

\footnote{2 Arthur Schlesinger, \textit{The Age of Roosevelt: The Coming of the New Deal} (Cambridge, Massachusetts, 1959), 3.}

\footnote{3 Schlesinger, 7-8.}
responsibility he was about to shoulder. At least thirteen million of his countrymen were in search of work. Everywhere the system of local relief was breaking down due to demand. As prices fell, the yoke of debt incurred at higher price levels was becoming everyday more intolerable. It was bankrupting the railroads and local government and exerting an unbearable strain on the whole structure of banking and credit.⁴

The day before his inauguration, Roosevelt made a ceremonial visit to the White House; after exchanging the necessary niceties, Roosevelt suggested that the outgoing President need not return his call. Herbert Hoover replied coldly, “Mr. Roosevelt, when you are in Washington for as long as I have been, you will learn that the President of the United States calls on nobody.”⁵

In truth, Roosevelt didn’t need to; he soon had enough callers to keep him busy around the clock. A second installment of the Bonus Expeditionary Force (BEF) descended on Washington, seeking their promised World War I bonuses, which had never been paid. Instead of shacks along the Anacostia and the “hospitality” of police and army forces (sent by Hoover), Roosevelt killed them with kindness. The new President offered the veterans an Army camp, three meals a day, endless supplies of coffee, and a large convention tent where leaders could orate to their hearts’ content.

⁴ Schlesinger, 440.
⁵ Schlesinger, 14
The Navy band played for the Veterans, Army doctors ministered to their ills, dentists pulled their teeth, and as a climax, Mrs. Roosevelt and the President’s close adviser Louis Howe drove out one rainy spring day in a blue convertible. While Howe dozed in the car, Mrs. Roosevelt walked through the ankle-deep mud and led the vets in singing. “Hoover sent the army,” one veteran said, “Roosevelt sent his wife.”\(^6\) In two weeks most of the veterans went affably into the Civilian Conservation Corps, and the Second BEF met a painless Waterloo. Clearly, Roosevelt was an entirely different sort of President and he had big plans for revamping the political process. While Roosevelt could easily handle the Bonus Army, he would not be so lucky signing his Washington peers up for the New Deal.

Between the Civil War and the New Deal, the Supreme Court rose to a position of enormous prestige. Its new building, completed in 1935, became a magnificent symbol of that prestige. Fathered by former Chief Justice William Howard Taft it was designed by Cass Gilbert. Three years and ten million dollars were spent on constructing the Marble Temple, which matches the Capital in scale and faces it symbolically to the front. The East wing housed palatial suites for nine Justices, but during the 1930s only three used them; the other Justices preferred to work from home.

\(^6\) Schlesinger, 14-15.
The important rooms were built to accommodate nine Justices and would have been inadequate for additional members.\textsuperscript{7}

In dealing with the federal judiciary, Roosevelt initially was more restrained and subtle than his cousin Teddy Roosevelt, who during his Bull Moose days demanded a right to recall unpopular state judges and judicial decisions. FDR came of age in a period of Court-bashing; according to some analysts, he had as a lawyer, become particularly receptive to the school of thought that considered judges to be policy-makers motivated by their own opinions and prejudices.\textsuperscript{8} Roosevelt took a direct approach, holding that the Supreme Court had always been involved in politics more or less. He viewed the Constitution and the Supreme Court as secular, not sacred institutions. Under his view of the system of separation of powers, there was no reason for the federal judiciary to have the final word in constitutional interpretation, any more than the President or Congress. Roosevelt was incredulous that the Supreme Court had consistently become what he viewed as an adversary as he quickly tried to push New Deal legislation through.

The Supreme Court decided the Gold Clause cases in 1935. The cases arose when John M. Perry tried to compel the government to pay his ten-thousand dollar bond in gold or in money that had not been devalued. The Court held, in effect, that

\textsuperscript{7} McKenna, 555.

\textsuperscript{8} McKenna, 29.
while the government was not fully honoring its obligations and was tampering with the integrity of the dollar, nevertheless control of monetary policy was a clear prerogative of the federal government. It was in this case that Justice McReynolds, speaking for the four dissenters and subsequent “Four Horsemen,” exclaimed that “the Constitution as many of us have understood it, the Constitution that has meant so much to us, has gone.” He added in the oral rendition of his opinion that Roosevelt was “Nero in his worst form.”

Other Justices responded in a less vocal manner. “We are very quiet here,” Oliver Wendell Holmes once said of the Supreme Court, “but it is the quiet of the storm center.” The Court had encountered Presidential hostility before and had been around longer than any President. The Court by 1935 had basically been created by President Warren G. Harding. Though only two of his Justices were still alive in 1935 – George Sutherland and Pierce Butler – his nominee as Chief Justice, William Howard Taft, had given the Court most of its distinctive character. The Court that Roosevelt faced showed a new solicitude for the rights of property. Moreover, it showed boldness in a field where Chief Justices Marshall and Taney had been reluctant to tread – condemning acts of Congress as unconstitutional. In the years between 1798

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9 Freedman, 256.

10 Schlesinger, 454 - 455.
and 1865, the Court had vetoed only two provisions of acts of Congress.\textsuperscript{11} Roosevelt viewed the Court's interpretation and over-zealous vetoing as an overreaching of its assigned power.

\begin{quote}
We are the only Nation in the world that has not solved that problem. We thought we were solving it, and now it has been thrown right straight in our faces. We have been relegated to the horse-and-buggy definition of interstate commerce.\textsuperscript{12}
\end{quote}

The 1935 Court was not cowed by Roosevelt’s “horse-and-buggy” warnings. “Legislation in the United States,” said Sir Wilmot Lewis of the \textit{London Times}, “is a digestive process by Congress with frequent regurgitations by the Supreme Court.”\textsuperscript{13}

The succession of judicial vetoes in critical areas of federal New Deal action – oil, railroad pensions, farm debt relief, the President’s removal power, industrial planning – seemed to express the clear determination on the part of the Court to nullify the New Deal, as articulated in the will of Roosevelt and the Congress. In so doing, the Court was vindicating liberal skepticism about judges lacking faith in the Constitution. The behavior of the Supreme Court in 1935 and 1936 touched a raw populist nerve in the American system. The traditional respect for the Constitution had always been mingled in the popular mind with an instinctive skepticism about any men, especially

\textsuperscript{11} Schlesinger, 454-455.

\textsuperscript{12} FDR Press Conference, May 31, 1935.

\textsuperscript{13} Schlesinger, 451-452.
lawyers, who claimed infallibility in interpreting the document. Virtually every forceful President in American history had come at one time or another into collision with the Court. The difference with Roosevelt was his surprising resonance among the people and his willingness to openly confront opponents to his New Deal.

The thirty-second President had won reelection in 1936 by a greater popular electoral vote than any other of his predecessors except George Washington. Moreover his triumph extended beyond his own personal success, endowing his party with an almost embarrassment of Congressional riches. Adding to the already substantial majorities in both branches of the seventy-fourth Congress, the Democrats gained twelve seats in the House of Representatives, giving them three-quarters of that body in the seventy-fifth Congress. The President’s party controlled almost 80 percent of the Senate.\textsuperscript{14} After his overwhelming electoral victory in 1936, Roosevelt plunged more deeply into the game of power politics. As a result, many of his second-term policies, including the Court-packing plan, made enemies of former allies, ended his ability to dominate Congress, and ultimately halted further New Deal initiatives. All of this became evident only in hindsight. When the Court-packing fight began, the Roosevelt presidency was at the apogee of its power.

In opposition were four men that Roosevelt had come to despise and that the rest of the nation had never heard of.

\textsuperscript{14} Shogan, 6.
CHAPTER THREE

JUSTICE WILLIS VAN DEVANTER

Mr. Justice Van Devanter is a man who plays an important role in the history of the Court, though you can't find it adequately reflected in the opinions written by him.

Justice Felix Frankfurter

Willis Van Devanter was born in Marion, Indiana on April 17, 1859. His father was a lawyer in that town, which at the time was practically on the frontier. He migrated to the Wyoming Territory as a young man after completing his education at the University of Cincinnati Law School in 1881. Wyoming at that time was not a state; it was characterized by loose Justice, frequent Indian disturbances, and the building of the Union Pacific Railroad. Van Devanter became involved in Wyoming politics, helped to amend the state's statutes in 1886, and served as city attorney for two years. In 1888 he was a representative at the territorial legislature and chaired the Judiciary Committee. Van Devanter also found time for hunting grizzly bears with the legendary Buffalo Bill (William F. Cody). For the next two decades, Van Devanter's energies were divided among the judiciary, education, and Republican Party politics. He presided as chief Justice of the Wyoming Supreme Court from 1889 to 1890. From 1896 to 1900, he was an assistant U.S. attorney general in the Interior Department,
concurrently serving as a delegate to the Republican National Committee. He also taught law at Columbian College (now George Washington University).

Van Devanter became familiar with Indian rights and land claims during his service as chief Justice of the Wyoming Territory and assistant attorney general at the Department of the Interior. He was appointed by President Theodore Roosevelt to the U.S. Court of Appeals for the Eighth Circuit. In 1903, the Eighth Circuit included Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas. Van Devanter spent seven years on the U.S. Court of Appeals before being selected for the Supreme Court in 1910 by President Taft after heavy lobbying by Senator Francis F. Warren of the Wyoming political machine. Taft appointed a whopping six Justices in just three years (1909-1912). Progressive William Jennings Bryan criticized Van Devanter’s links to railroad interests and opposed his appointment. He was confirmed by the Senate by a voice vote three days after his nomination.

At the time of his appointment, the positions of railroads as carriers in interstate commerce had just recently been fixed in United States law. The railroads connected the coasts of the country and were big business at the time. The growth of the railroads had been so exponential that the law was playing catch-up. Radio, in its infancy, was opening up new legal arenas. The commerce clause, which regulated trade and routes, was yet to be applied to the air-waves by which radio transmission was regulated. Air transportation was just beginning to send law clerks back to dusty volumes on common
law to determine the rights of landowners to the space above them. Conflicting land claims under the Federal Homestead Act were still demanding much of the Court’s time. Indian tribes, not being full citizens of the United States, were being moved about from place to place. It wouldn’t be until 1924 that Congress would grant citizenship to Native Americans born in the United States. In typical trickle-down fashion, state laws wouldn’t universally grant voting rights to Native Americans until 1948. Southwestern and far western states were frequently appealing to the Supreme Court for settlements of their boundary disputes.¹

As a member of the Court, Van Devanter lived out of the spotlight, seldom making public appearances and writing very few memorable opinions. His colleagues were glad to have him on hand to pass off the writing of opinions in unglamorous cases on public lands, admiralty, water rights, Indian claims, and corporation law. Although Van Devanter was regarded as skilled in handling procedural and jurisdictional disputes, he was one of the least productive writers on the Court during his twenty-six years of service.² In that span of time, he wrote just 356 opinions, one concurrence, and four dissents. His lack of output is generally attributed to a severe case of writer’s block, but others point out that Van Devanter, while apparently skilled in discussing


² Papers of Willis Van Devanter: Library of Congress, Manuscript Division.
cases in conference, lacked any strong overreaching judicial philosophy that might have prompted him to take a leading role in writing documents.

Van Devanter’s knowledge of Indian life and customs was reflected in his opinion in *United States v. Sandoval* (1913). The case concerned the prohibition against bringing alcoholic beverages into an Indian community. Van Devanter upheld the prohibition, citing studies of primitive Indian culture that ascribed to them an inferior intellect.\(^3\) In his best-known opinion, *Second Employers’ Liability Cases* (1912), Van Devanter wrote for the majority. The case decided that Congress may regulate the liability of common carriers by railroad to their employees under the interstate commerce clause. Van Devanter wrote,

> A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

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\(^3\) *United States v. Sandoval*, 231 U.S. 28 (1913).
Although he remained loyal to his railroad roots for the most part, in *Second Liability*, Van Devanter reflected the progressive attitude that the exercise of broad government power was justified when the interests of the working public benefited.⁴

By the 1930s, Van Devanter's desire to restrain government kept him on the Court. He had apparently decided to retire in 1932 but changed his mind because of what he regarded as the excesses of President Franklin Roosevelt and his ambitious New Deal responses to the economic hardships of the Great Depression.

On the Court, Van Devanter wrote few noteworthy opinions. His contributions came mainly in obscure legal areas that he had mastered while on the circuit Court: land claims, water rights, and jurisdictional issues. Rather than writing opinions, Van Devanter preferred to assert his influence in discussions among the Justices. He often voiced his belief that government power should be limited. He took an especially narrow view of the powers that could be asserted under the U.S. Constitution's Commerce, Tax, and Due Process Clauses. From 1918 to 1923, he joined majority opinions that found federal child labor laws and state minimum wage legislation unconstitutional.

Ironically, Van Devanter's most significant opinion marked a rare departure from his limited-government ideology. In *McGrain v. Daugherty*, 273 U.S. 135, 47 S.

⁴ *Second Employers' Liability Cases*, 223 U.S. 1 (1912).
Ct. 319, 71 L. Ed. 580 (1927), he asserted that Congress had broad powers to subpoena and conduct investigations. The opinion's impact was felt dramatically two decades later during congressional investigations of labor corruption and Communism.
CHAPTER FOUR

JUSTICE JAMES CLARK McREYNOLDS

I'll never resign (from the Court) as long as that crippled son-of-a-bitch is in the White House.

James Clark McReynolds

In the annals of U.S. Supreme Court history, James Clark McReynolds is best known for his cantankerous nature and appalling anti-Semitism. So despised was McReynolds that he inspired articles as recently as 2003 with telling titles like “Clerking for Scrooge.” A former clerk, James Knox, published a telling and acerbic memoir on McReynolds and also burned many of his former employer’s papers, seemingly more out of spite than conscientiousness or charity. McReynolds sat on the Court from 1914 to 1941, although he is noticeably absent from some official Court photographs because he refused to sit with the Jewish Justices Nathan Cardozo and Louis Brandeis on occasion. Knox’s florid memoir, which must be taken with a grain of salt, pits the bright-eyed and idealistic clerk against the disagreeable McReynolds, and passages are devoted to the Justice’s demands on his over-worked black servants.
Knox, who remains the most oft-quoted authority on McReynolds, did not come through his clerkship through the usual Harvard channels. He can best be described as a Supreme Court groupie who started one-way correspondence with Justice Holmes while Knox was a miserable high school kid in suburban Chicago. He favored other Justices with birthday salutations and became a collector of autographs. In November of 1935, he wrote letters of application to each of the 96 members of the Senate. Just in case the Senators wanted to know what he looked like, Knox included a photograph of himself taken with Justice Holmes at Beverly Farms, “to identify myself better.” Knox’s persistent correspondence with Van Devanter, whom he had been pestering since 1932, ultimately yielded his clerkship with McReynolds.¹

Born at the family plantation in Elkton, Kentucky on February 3, 1862, James McReynolds was the second son. Dr. John Oliver McReynolds, of Scotch-Irish extraction, had served as a surgeon in the Confederate Army and retired to the life of a genteel country doctor. The family belonged to the fundamentalist sect of the Disciples of Christ church. Dr. McReynolds had the nickname of “pope” from locals because of his domineering and snobbish nature.² The isolation of the mountain

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community, the political and religious conservatism of his father, and the strict moral
code to which he was subjected profoundly influenced the future Justice.

McReynolds excelled at Vanderbilt University where he graduated in 1882 as
valedictorian; he earned both the Founder’s Gold Medal and a Bachelor of Science
Degree. McReynolds then studied at the University of Virginia Law School where he
went on to graduate with distinction after just 14 months.\(^3\) He served as a secretary to
Senator Howard Jackson, D-Tenn, for two years following graduation and then moved
on to a successful law practice in Nashville. McReynolds maintained a thriving
practice from 1884 to 1903. In 1900, McReynolds was appointed Professor of
Commercial Law, Insurance, and Corporations at Vanderbilt’s law school. One of his
colleagues at the University was Horace Lurton, the man whose seat on the Supreme
Court McReynolds would later occupy.\(^4\)

In 1903 Philander C. Knox, Republican Attorney General, was looking for a
$30,000-a-year lawyer who would work for $5,000. A friend suggested McReynolds,
but warned he was a Democrat. Mr. Knox said he wanted a lawyer and not a
politician; the young Tennessean became the Assistant Attorney General.\(^5\) From 1903-

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\(^3\) Personal papers of James Clark McReynolds, University of Virginia Special Collections.

\(^4\) Michael Allan Wolf, “James Clark McReynolds,” *Biographical Encyclopedia of the Supreme

\(^5\) Proceedings in the Supreme Court of the United States in Memory of Justice McReynolds, 334
U.S. v 1947.
1907, McReynolds specialized in anti-trust law in Theodore Roosevelt's administration. He divided the next few years between private practice in New York City and service as a special federal prosecutor in the American Tobacco Company anti-trust cases. The cases, decided in 1911, determined that American Tobacco was in violation of anti-trust laws and was attempting to monopolize the business of tobacco and the restraint of trade.

He then served as Attorney General in President Wilson's cabinet in 1913 and 1914: a notably stormy and controversial residence. He was bitterly attacked by a group of Senators who charged that he maintained a cadre of special agents working to investigate Federal judges with a view to influencing their decisions. McReynolds was summarily exonerated and nominated Associate Justice of the Supreme Court by President Wilson in August 1914. Despite the allegation of supporting espionage, McReynolds was confirmed by the Senate on August 29, 1914 by a vote of 44-6.\(^6\)

In the years before the New Deal, McReynolds disagreed with the progressive-leaning majority, siding with those who supported private property interests. He dissented in *Block v. Hirsh* (in which the Court supported rent control) and *Euclid v. Ambler Realty Company* (in which the Court upheld zoning). During these pre-New Deal years, McReynolds also revealed an impatience with government regulation of business, despite his record as a strong trust-buster. In *Federal Trade Commission v.*

\(^6\) 334 U.S. v 1947.
Gratz (1921), McReynolds spoke for the majority that over-turned the FTC's complaint against a cotton bagging manufacturer:

Nothing is alleged which would justify the conclusion that the public suffered injury or that the competitors had reasonable ground for complaint. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.\(^7\)

By 1933, McReynolds had established himself as perhaps the most difficult man to work with in Washington. Justice William Howard Taft called him "selfish to the last degree" and "fuller of prejudice than any man I have ever known." He was openly anti-Semitic and refused to speak to Justice Louis Brandeis for three years, to sit near him during Court ceremonies, or to sign any opinions written by him. During the 1932 swearing-in ceremony for Justice Benjamin Cardozo, who was also Jewish, McReynolds ostentatiously read a newspaper and muttered "another one." Taft observed that McReynolds "seems to delight in making others uncomfortable." He was a confirmed misogynist and had a long list of petty dislikes that included red nail polish on women, wristwatches, and tobacco. He easily took offense at perceived wrongs and nursed his hostilities as long as possible. He was also given to venting about "un-Americans" and "political subversives."

On the positive side, Justice McReynolds was also a decorated trustbuster and scholar in trade law. While McReynolds was decidedly unlovable, he was also respected in his analysis of the New Deal. His opinions were well-constructed and for the most part void of emotional language. For many years, he was the only representative of the South on the Supreme Court; he preeminently represented the philosophy that came to be known as “Constitutional Democrat.” He resented and resisted the growing exercise of power by the Federal Government in the fields formerly reserved for the States, as embodied in Franklin Roosevelt and his New Deal.
CHAPTER FIVE

JUSTICE GEORGE SUTHERLAND

The saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

George Sutherland

George Sutherland was born March 25, 1862 in Buckinghamshire, England. Just two years later, Sutherland’s lawyer father moved his young family to the Utah Territory as part of his new commitment as a convert to the Church of Jesus Christ of Latter-day Saints. The elder Sutherland soon split from the church and George Sutherland grew up a non-believer in Mormon-dominated Utah.¹ The family left their new home in Springfield to set up a retail business, but returned a few years later to set up a permanent residence. The need to earn his own support forced George from school at age twelve. He found work as a clerk in a clothing store in Salt Lake City. A few odd jobs later, in 1879, he was able to return to the classroom, now able to pay his own way. He enrolled in the newly established Brigham Young Academy (now known

own way. He enrolled in the newly established Brigham Young Academy (now known as Brigham Young University) in Provo, but left after three years to work as a railroad agent.²

Sutherland's experience at the academy was followed by a brief but intensive period of study at the University of Michigan Law School. In March 1883 he was licensed to practice law in Michigan, but a Provo classmate, Rosamond Lee, attracted him back to Utah and they were married that same year. Sutherland then went into a three-year partnership with his father, opening Sutherland and Son law practice in Provo. As a young attorney, George defended many persons indicted under federal anti-polygamy laws and earned the respect of his Mormon neighbors. Politically, however, Sutherland joined Utah's then-Liberal party and campaigned for the end of polygamy. He ran as the Liberal candidate for mayor of Provo in 1890 but was soundly defeated. Following Wilford Woodruff's 1890 Manifesto ending the Mormon Church's open support of polygamy, Sutherland felt that the Liberal party had lost its usefulness. He promptly declared himself a Republican and was influential in organizing the GOP in Utah. Sutherland moved to Salt Lake City in 1893 to better foster the growth of his blossoming political career. From 1901 to 1905, he served as a Representative of Utah in Congress. In 1905 he was elected to the United States Senate on the Republican

Party ticket; he remained a Senator through 1917. Sutherland lost the 1916 election to the rising Mormon political machine in Utah. ³

As a legislator, Sutherland supported reform measures including the Pure Food and Drug Act, held the protectionist line in tariff debates, and led the fight for federal workers compensation legislation for employees of interstate carriers. During the 1912 split of the Republican Party, Sutherland refused to back the Bull Moose reforms although Sutherland was not opposed to reform, per se. Sutherland was in private practice in Washington, D.C. when he was elected President of the American Bar Association in 1917. During his Presidential address, Sutherland stated that “doubts should be resolved in favor of the liberty of the individual” when the choice was between individual freedom and the common good.

Supreme Court Justice John Clarke conveyed his resignation to President Warren Harding on September 4, 1922. President Harding sent Sutherland's name to the Senate on the same day. The Senate, for its own part, saw no need to disturb the course of its affairs by troubling to hold hearings, or even schedule a committee to review the nomination. Sutherland was known so thoroughly to its members, his character was so clearly fixed in the legal profession, and his nomination so long expected, that the nomination bore no surprises and stirred not a trace of opposition.

³ Wolf, 517-518.
The Senate moved to approve the nomination at once by acclamation. Within a single day, the whole business was accomplished.⁴

Sutherland’s view on public needs versus private rights was quickly called in to account in *Adkins v. Children’s Hospital* (1923). The issue before the Court was the legitimacy of an act of Congress to fix minimum wages for women and children working in Washington, D.C. The hospital was paying wages far below the statutory minimum. The statute was attacked on the grounds that it violated “the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment.” Sutherland, writing for the majority, acknowledged that this freedom was not absolute, but he could not fit this case into any of the exceptions to an individual’s “liberty of contract” recognized by the Court. Sutherland borrowed heavily from Justice Horace Peckham’s majority opinion in *Lochner v. New York* (1905), which rejected government regulation of wages and hours, and set a tone on the Court for the next dozen years. In *Adkins*, Sutherland pointed out correctly that subsequent decisions on the Supreme Court had distinguished, but never overruled *Lochner’s* elevation of freedom of contract over the state’s police power. Sutherland surmised that the act challenged in *Adkins* was “so clearly the product of a naked,

arbitrary exercise of power that it cannot be allowed to stand under the Constitution of
the United States."\textsuperscript{5}

Over the next few years, Sutherland expanded on the ideas introduced in
Adkins, applying its principles in other contexts. In Tyson & Brother v. Benton (1927),
a case concerning the validity of a New York statute that prohibited the resale of
theater tickets at a higher price, Sutherland refused to recognize that the economic
activity at issue was affected with public interest and thereby a legitimate area for state
intrusion\textsuperscript{6}. In Ribnik v. McBride (1928), a New Jersey law regulating charges by
employment agencies was summarily rejected by Sutherland in the majority opinion:

\begin{quote}
The interest of the public in a matter of employment is not different in quality and character from its interest in
the other things enumerated [the procurement of food and housing and fuel]; but in none of them is the interest
that "public interest" which the law contemplates as the basis for legislative price control.\textsuperscript{7}
\end{quote}

However, in four particular cases, Sutherland was not an unswerving opponent
of state policing power, as evidenced by his opinions in Village of Euclid v. Ambler
Realty Co. (1926), Zahn v. Board of Public Works of the City of Los Angeles (1927),
Gorrie v. Fox (1927), and Nectow v. City of Cambridge (1928). All four cases

\textsuperscript{5}Adkins v. Children's Hospital, 261 U.S. 525 (1923),

\textsuperscript{6}Tyson & Brother v. Benton, 273 U.S. 418 (1927),

\textsuperscript{7}Ribnik v. McBride (1928),
involved state and local land-use regulation, but *Euclid* was a landmark decision in the long, intricate history of Anglo-American property law. In his opinion for the majority, Sutherland provided a conceptual link between the awkward, common-law, judicially controlled system of private and public nuisance in land management to the modern, comprehensive planning schemes found in the growing number of American cities and suburbs. At issue was the height, area, and use-classification plan designed for a suburb of Cleveland. Ambler Realty asserted successfully in the federal trial Court that the local ordinance violated the due process clause and denied equal protection of the laws under the Fourteenth Amendment. Legend has it that after initially siding with the other three Horsemen, who dissented, Sutherland considered the positive effects such a regulation would have on property rights and joined with the progressives on the Court to reverse the lower Court holding.

In *Zahn* and *Gorielb*, both times for a unanimous Court, Sutherland summarily dismissed objections to local zoning and “setback” (from the street) schemes. In *Nectow*, however, Sutherland reversed the state Court’s dismissal of a challenge to a residential zoning classification that left the plaintiff with “no practical use” for his property. Sutherland concluded that there was a “serious and highly

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injurious...invasion of the property of the plaintiff.” In other words, the line between the legitimate and the illegitimate exercise of the police power, though hard to draw, had been crossed.\(^\text{10}\)

Sutherland could be equally protective of other civil liberties when the Court was faced with similar egregious invasions. *Powell v. Alabama* (1932) was the first of two cases to reach the Court involving the prosecution of the “Scottsboro Boys,” nine African American teenagers accused of raping two white women. Alabama officials had sprinted through the proceedings; a total of three trials took one day. The appointed attorneys did not consult with their clients and did little more than appear to represent them in trial. The oldest defendant was possibly 21; one of the accused was crippled, another was almost blind and all nine signed their name with an “X”. Writing for the majority, Sutherland detailed the nightmarish nature of the case:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiments, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments of counsel for the first time charged with any degree of responsibility began to represent them.\(^\text{11}\)


Sutherland’s review of the shoddy performance of the attorneys for the defense convinced him that the “defendants were not accorded their right of counsel in any substantial sense.” For these reasons, Sutherland concluded that the defendants were denied their due process rights under the Fourteenth Amendment as well as their Fifth Amendment-guaranteed right to counsel. Four years later in Grosjean v. American Press Co. (1936), Sutherland, writing for the majority, cited Powell as he spread the protective cloak of the Fourteenth Amendment around the First Amendment rights of free speech against governmental intrusion, in the process invalidating a Louisiana tax on newspapers.12

Sutherland’s patience with performance of counsel was again tried in Berger v. United States (1935), a federal prosecution for uttering counterfeit notes. In Berger, it was the prosecutor who “overstepped the bounds of... propriety and fairness.” Mixing the rhetoric of morality with the rules of sport, Sutherland advised the representative of the people that “he may prosecute with earnestness and vigor...But, while he may strike hard blows, he is not at liberty to strike foul ones.”13

However, in the area of social and economic regulation, as states explored ways to relieve the stresses caused by the severe stock market crisis after the 1929 crash, Sutherland and his fellow conservatives held the line. In 1925, an act of

13 Berger v. United States (1935).
the Oklahoma legislature had required a license for the manufacture, sale, and
distribution of ice, a license the New York Ice Company had not secured. In *New York
Ice Co. v. Leibman* (1932), predictably, the majority found that such regulation of a
nonpublic business was unreasonable and would not be tolerated under the Fourteenth
Amendment. Sutherland expressed skepticism about the ability of the state to innovate
in times of crisis and directly challenged the progressive Louis D. Brandeis’s dissent.
Brandeis wrote that the state ought to be permitted to try “novel and social economic
experiments” in a time of need. Sutherland would have none of that, and asserted that
“it is plain that unreasonable or arbitrary interference or restrictions cannot be saved
from the condemnation of that Amendment merely by calling them experimental.”
In his view, the topic of the challenged state regulation was quite mundane, “an ordinary
business,” according to Sutherland. This exchange foreshadowed the jurisprudential
conflict over the New Deal that would soon burden the Court and the nation.

In 1934, Sutherland spoke on behalf of a minority of four in *Home Building &
Loan Assn v. Blaisdell*, which challenged the constitutionality of Minnesota mortgage
foreclosure moratorium. Chief Justice Hughes wrote for the Court that “While
emergency does not create power, emergency may furnish the occasion for the exercise
of power.” Sutherland’s response was a blend of history, the framers’ intent, and
judicial precedent. He even invoked the unholy duo of *Ex parte Milligan* (1866) and

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14 *New York Ice Co. v. Liebmann* (1932).
Dred Scott v. Sanford (1857), two of the most widely assailed opinions in the chronicles of the Court, as if to strengthen the image of the conservative bloc as the last defenders of the Constitution in the face of a tyrannical majority. "The present exigency," Sutherland told the suffering nation, "is nothing new." In terms that suggested that the victims were to blame, he scolded:

The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises must be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned.\(^{15}\)

By 1933, George Sutherland had established himself as a mixed liberal, but an unyielding conservative in matters of economic regulation – the heart of the New Deal. While in private practice, Sutherland articulated a fundamentally conservative position on the role of government. His vision did not change on the Court. On the Court, Sutherland became one of the majority who, in the 1920s, distinguished themselves by repeatedly overturning progressive federal legislation. To this end, Sutherland offered his vote and voice in support of substantive due process and other judicial barriers to state government regulation and control. Much of this approach was rejected by subsequent Courts, but only after the Court-Packing Crisis of 1937.

\(^{15}\) Home Building & Loan Assn v. Blaisdell.
Sutherland was not a judicial cipher, however. He left his mark on other areas of the law, including the law of "standing" and the constitutional constraints governing foreign relations. Sutherland also forged an important link in the nationalization of the Bill of Rights by articulating the steps states must take to assure the right to counsel in capital cases. Sutherland was scholarly by disposition and, according to his mood, could be withdrawn or outgoing, hostile or friendly. He called himself a "conservative," by which he meant that he mistrusted majority rule in government, opposed legislation aimed at achieving social ends, and believed that the role of appellate Courts was to defend private rights against government encroachment. These views placed him squarely in the path of Franklin Roosevelt’s New Deal.
CHAPTER SIX

JUSTICE PIERCE BUTLER

Monolith...there are no seams the frost can get through.

Justice Oliver Wendell Holmes (describing Justice Pierce Butler)

Pierce Butler was born March 17, 1866 in a Minnesota log cabin to Irish Catholic immigrants of the Great Famine of 1848. While growing up in rural Pine Bend, Minnesota, Butler’s education was supplemented by his father’s instruction. Butler graduated without distinction from tiny Carleton College in 1887, read law and was subsequently admitted to the bar in 1887. Also in 1887, he cast his first vote for Grover Cleveland and remained a Democrat, despite later accusations of being a closet Republican, for the rest of his life.1

Butler served in low-ranking government positions for a few years before entering private practice, where he specialized as a railroad lawyer and became an

expert in rate and valuation cases. Butler even represented several railroads before the Supreme Court in the *Minnesota Rate Cases* (1913). He also represented the Canadian government in the Grand Trunk Railroad (1911) arbitration (in which William Howard Taft was the arbitrator).\(^2\) During the case, the two became friends and celebrated Taft’s 1921 nomination as Chief Justice (by President Warren G. Harding). Anticipating Associate Justice William R. Day’s imminent retirement, Chief Justice Taft began surveying replacement candidates in 1922. The leading candidate at the time was a rather shady ambulance chaser from New York, Martin T. Manton, who had emerged through the ranks purely through political connections. As an alternative candidate, Justice Willis Van Devanter actually suggested Pierce Butler, also a Democrat and a Catholic. Taft backed the suggestion whole-heartedly. Taft wanted to solidify the conservative bloc on the bench, and saw Butler as a solid sixth vote. The Chief also recognized the symbolic value of a Butler appointment. Butler was a Catholic at a time when there were no other Catholic Justices. Butler quickly started garnering support from the Midwestern and western Catholic hierarchy and the business community.

Senate progressives opposed Butler’s confirmation, principally because of his conservative economic views. Digging a little deeper, they charged that Butler lacked a judicial temperament because as a regent at the University of Minnesota during

\(^2\) Surprisingly, this is one of the few majority opinions that Justice Van Devanter delivered.
World War I, he had taken the lead in dismissing professors for “unpatriotic” views. The Senate vote on Pierce Butler’s confirmation was 61-8, with 27 abstentions.³

Butler wrote 323 majority opinions in his 17 years on the Court, averaging 19 opinions a term, only a few of which are of historical significance. During his early years as a Justice, he seldom dissented. He explained his views on dissent on the back of one of Justice Harlan Fiske Stone’s slip opinions as follows:

I voted to reverse. While this sustains your conclusions to affirm, I still think reversal would be better. But I shall in silence acquiesce. Dissents seldom aid in the right development of the law. They often do harm. For I myself say: “Lead us not into temptation.”

Consistent with this belief, Butler’s opinions purposely contain few quotable statements. One of his sons explained that Butler carefully went over each of his opinions with a blue pencil and deleted any statement he thought might be quotable.⁴

Once, after persuading Justice Oliver Wendell Holmes to acquiesce in a case being discussed in conference, Butler said, “I am glad we finally arrived at a just decision.” Holmes replied, “Hell is paved with just decisions.” To Butler, however, principle was everything and could not be sacrificed for the sake of expediency. Butler


had a system of values that orientated his life and decisions, and this system was in place long before he came to the Court. As one would expect from any lawyer of worth, he prized order, law, tradition, and freedom, but a careful analysis of his pre-Court public addresses shows that he also valued laissez-faire, patriotism, and morality.

Laissez-faire was especially important to Butler. In a pre-Court speech, he stated

Contemporaneously with the ever increasing activities of government, there is a school of thought leading towards a kind of state socialism. Too much paternalism, too much wet-nursing by the state, is destructive of individual initiative and development. An athlete should not be fed on predigested food, nor should the citizens of tomorrow be so trained that they will experience sustenance from the public ‘pap’.

It was Butler’s view that the state may not transgress “its true function” and become a vast charitable machine, furnishing employment, doling out aid, and meeting the needs of the people. Such a program would ruin the nation, “weaken character and leave the individual man and woman without the motive or hope or inspiration necessary to freedom and morality.”

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Butler was equally committed to patriotism, although he leaned less toward the flag-waving, easy patriotism of many of his contemporaries. He believed that real patriotism required bearing the burdens of taxation gladly and providing undivided allegiance to a nation. In the same aforementioned speech, he stated

Allegiance to government and protection by it are reciprocal obligations, and stripped of all sentiment, the one is the consideration for the other; that is, allegiance for protection and protection for allegiance. Because the citizen is entitled to its protection, he owes allegiance in full measure to his country.

Butler believed that this idea was implicit in the oaths taken by public officials and aliens, and although most native citizens did not take formal oaths, they owed the same loyalty. “Thus,” he concluded, “it is that all, from the highest to the lowliest of our naturalized citizens, are, by legal obligation strong and binding, held to full and faithful loyalty.”

Butler’s central value was morality, which was intimately connected with his views on patriotism and laissez-faire. “The educated man,” he told a Catholic audience in 1915, “whose character is not sound, whose conscience is not well-instructed and whose conduct is not guided by religion or morality, is a danger to the State and his fellowmen.”

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6 Thompson, 128.
If these three tenets informed Butler’s decisions on the Court, so too did tradition, which to him meant a strong commitment to precedent. Few Justices in the history of the Court have shown stronger resistance to overruling precedents. “Our decisions ought to be sufficiently definite and permanent,” he wrote in *Railroad v. Pacific Gas & Electric Co.* (1938), “to enable counsel usefully to advise clients. Generally speaking, at least, our decision of yesterday ought to be the law of today.”

Butler’s voting on the Court was exactly consistent with his personal ethos. For example, no Justice in the twentieth century voted more consistently for laissez-faire than Butler. He believed that contracts freely and fairly entered were “sacred,” and he never voted against the assertion of a contract right when the Court divided on the issue. Also believing the government had no right to regulate the hours or wages of workers, he voted accordingly every time that the issue arose during his tenure, and he was on the winning side until 1937. In *Morehead v. New York ex Rel Tipaldo* (1936), which invalidated New York’s law regulating wages for women, Butler wrote the majority opinion. Although it was one of his most important opinions, Justice Butler, in typical fashion, quoted from and echoed earlier Court opinions, thus effectively erasing his own voice from the *Morehead* decision.

Although Butler valued individual freedom, patriotism almost always prevailed when the two values were in conflict. For example, in the *United States v. Schwimmer* (1929), the Court held that a forty-nine year old pacifist was not entitled to become a
citizen of the United States because she could not in good conscience swear to bear arms in defense of the nation. Writing for the majority, Butler compared Rosika Schwimmer with pacifists and conscientious objectors who, during World War I, not only refused to bear arms, but who also refused to obey the laws and encouraged disobedience in others. Pacifists, he wrote, lack a "sense of nationalism"; they do not have the "ties of affection" to the government of the United States that are requisite for aliens seeking naturalization.\(^7\) Butler had expressed similar ideas in public addresses in 1915 and 1916. In every divided decision involving Communists, International Workers of the World, or aliens who refused to swear unqualified allegiance to the United States, Butler voted against the individual.

The 1927 case of *Buck v. Bell* is illustrative of morality as a basis for Butler's decision. The Court upheld the constitutionality of compulsory sterilization of the feeble-minded in Virginia. Holmes, who wrote the Court's opinion, quickly won the approval of his colleagues, except Butler. "I bet you Butler is struggling with his conscience as a lawyer on this decision," Holmes was quoted as saying to a fellow Justice. "He knows the law is the way that I have written it. But he is afraid of the Church. I'll lay you a bet that the Church beats the law." Butler dissented without opinion. The basis of his dissent is unclear. One might conclude that because Butler was Catholic, he thought sterilization was immoral; or, perhaps he thought that the

\(^7\) *United States v. Schwimmer*, 279 U.S. 644 (1929),
Virginia sterilization statute was unconstitutional because it deprived persons of liberty in violation of due process of law.\textsuperscript{8} Either way, it is obvious that Butler strongly disagreed with Holmes, who wrote for the Court: "It is better for all of the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."\textsuperscript{9}

Morality clearly motivated Butler as the sole dissent in \textit{Hansen v. Haff} (1934). Hansen, an unmarried alien woman, had left the United States in the company of a married man with whom she had been having sexual relations for some years. The intimate relationship continued abroad, and Hansen intended it to continue on her return to the United States until she reached the city of her residence, where she was employed as a domestic. Based on these facts (though one wonders how they were garnered in the first place) the immigration officials refused to admit her into the country because of a federal statute that excluded aliens who came to the United States "for the purpose of prostitution or for any other immoral purpose." The Court held that Hansen was entitled to readmission because her extramarital relations fell short of concubinage, and that she was not reentering the country for the purpose of having

\begin{footnotes}
\item[8] Thompson, 145.
\item[9] \textit{U.S. v Buck v Bell} (1927).
\end{footnotes}
such relations. Butler disagreed by citing Webster's definition of concubine, and concluded that the woman was indeed one. Furthermore, he countered that she had entered the country for an immoral purpose, so it made no difference whether the purpose of prostitution was dominant or subordinate.\footnote{Hansen v. Haff, 291 U.S. 559 (1934) (Dissent).}

No Justice, including Louis Brandeis, supported due process claims more than Pierce Butler. However, Butler had difficulty in expressing his dissenting views in defense of due process. In \textit{Olmstead v. United States} (1928), the Court upheld the constitutionality of wiretapping. Roy Olmstead was a suspected bootlegger. Federal agents, without judicial approval, installed wiretaps in the basement of his building (where he had an office) and in the streets near his home. Chief Justice Taft, who wrote for the majority, saw the problem in terms of law and order. The Court held that neither the Fourth nor Fifth Amendment rights of the recorded parties were violated. The use of wiretapped conversations as incriminating evidence did not violate their Fifth Amendment protection against self-incrimination because the conversations were not forcibly or illegally extracted. Instead, the conversations were voluntarily made between the parties and their associates. Moreover, the parties' Fourth Amendment rights were not infringed because mere wiretapping does not constitute a search and seizure under the meaning of the Fourth Amendment. These terms refer to an actual physical examination of one's person, papers, tangible material effects, or home - - not
their conversations. Finally, the Court concluded that while wiretapping may be unethical no Court may exclude evidence solely for moral reasons.

Butler dissented. His early experience at the criminal bar had taught him about unfair police practices and the great advantage that the state has over the individual in criminal prosecutions. In an uncharacteristic departure from dissenting without elaboration, he decided to write a dissenting opinion in *Olmstead*, but apparently not without some inner conflict. He began his dissent by saying he "sincerely regret[ted]" not being able to agree with Taft and the majority, and circumscribed his dissent accordingly:

> The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions, because they are not within the jurisdiction taken by the order.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. The Fifth Amendment prevents the use of evidence obtained through searches and seizures in violation of the rights of the accused protected by the Fourth Amendment. The single question for consideration is this: may the Government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones?
Telephones are used generally for transmission of messages concerning official, social, business and personal affairs, including communications that are private and privileged -- those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it. Wiretapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

Justice Butler concluded with the statement: “With great deference, I think [the defendants] should be given a new trial.”

One of Butler's most important due process cases was 1937's *Palko v. Connecticut*. The majority, which included liberal Justices Brandeis, Harlan Fiske Stone, Hughes, Cardozo, and Hugo Black, held that a state could try a defendant more than once for the same offense without violating due process of the law. Frank Palka (Court records had misspelled his name) had been tried for murder and given a life sentence. The Connecticut prosecutor, dissatisfied with the sentence, tried him again under a different state law. This time Palka received the death penalty. During the oral arguments in *Palko*, Butler was “very tough” on counsel and shouted at the state’s

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attorney: "What do you want? Blood?" As in *Buck v. Bell*, Butler was the only dissenter, but did not write an opinion.

During his 16 years on the bench, Butler generally validated Taft’s initial assessment as he proved every bit the reliable conservative on the High Court. Butler generally preferred freedom to equality, and he opted for order rather than freedom in the cases that came before him. There were notable exceptions, such as his broad view of the Fourth Amendment protection against unreasonable searches. He also had very low tolerance when it came to issues of morality. He tended to be a strict constructionist when it came to fiscal and economic issues. It would be this economic and fiscal conservatism which would lead Franklin Roosevelt to lump him among the “Four Horsemen” who were frustrating his New Deal.

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CHAPTER SEVEN

SO MUCH FOR THE AFTERGLOW

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

President Roosevelt, Fireside Chat, 1937

The plan that was supposed to launch the New Deal into the stratosphere instead split the Democratic Party, splintered Roosevelt’s New Deal coalition, crippled the President’s envisioned second-term legislative agenda, and left an enduring legacy of bitterness and estrangement the never disappeared between FDR and the Court. Although the Court-Packing Plan was not Roosevelt’s first attempt to redesign the judiciary, it was the most criticized. Months before FDR’s reelection and his State of the Union Address, key advisors had seen a chance to head off the Court quandary. The Washington rumor mill reported that two of the staunchest and oldest members of the Court’s right wing, Willis Van Devanter and George Sutherland, were eager to resign. All that was stopping them, allegedly, was money.
The Supreme Court was wholly dependent on the United States government to determine their post-retirement pensions. The Justices in general feared that though they were entitled to full pay on retirement, their pensions were not "vested". A hostile Congress might shrink their post-retirement pension, as miserly lawmakers had done to Justice Holmes when he left the bench in 1933. Holmes, who retired at age 90, fell victim to the subsequently enacted Economy Act; his annual pension was cut in half, from $20,000 to $10,000. The prospect of having their pensions cut in half in their retirement years literally forced elderly Justices to stay on the bench merely to survive economically. Moreover, consistent with their conservative principles, Justices Van Devanter and Sutherland did not want to lose their shelter from income tax that their status afforded them.¹

Legislation was quickly drafted by the Roosevelt administration that would confer upon the retirees the newly created position of "retired Justice," and grant them, along with some routine responsibilities, the tax immunity they were reluctant to discard.² The Justices failed to take the bait of a more lucrative retirement, leaving Roosevelt with an unchanged Court that was hostile to his agenda.

¹ The Public Salary Tax Act of 1939 provided directly and specifically for the taxation of the salaries of federal judges who took office on or before that date. Surprisingly, federal judges did not pay income tax before 1939. Their tax-exempt status was argued successfully during the Civil War, where the Supreme Court argued that their salaries were not legally subject to tax.

² Shogan, 83.
Roosevelt railed against the Court in a 1937 public address on the Justices rebuff of the “retired Justice” proposal. The President also seemed to chafe at his total lack of ability to change the composition of the Court during his first term, because no Justice retired in that time:

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the judiciary. Normally every President appoints a large number of district and circuit judges and a few members of the Supreme Court. Until my first term practically every President of the United States in our history had appointed at least one member of the Supreme Court. President Taft appointed five members and named a chief Justice; President Wilson, three; President Harding, four, including a chief Justice; President Coolidge, one; President Hoover, three including a Chief Justice.\(^3\)

Having failed to entice any of the Four Horsemen to retire with enhanced pensions, or to leave voluntarily so he could appoint more sympathetic Justices, Roosevelt opted for the nuclear option – packing the Court, thereby rendering the Four Horsemen a dwindling and ineffective minority on a dramatically enlarged and pro-New Deal Supreme Court.

The Four Horsemen were every bit as devoted as their less conservative brethren to the preservation of the Court as an independent institution. Ironically, the Court-packing plan not only did not intimidate them, it appeared to harden their

\(^3\) Fireside Chat 1937,
resolve. The announcement of the plan actually persuaded Van Devanter and Sutherland to delay their retirements. Many Court observers believed that Van Devanter, who appeared to be the most likely to retire, dug in his heels with the encouragement of his Court colleagues to stay on for the remainder of the Court’s 1936-37 term, forcing Roosevelt to either back down or push the ill-planned bill if he wanted further action that Court term.

The Four Horsemen were not isolated, as Roosevelt had hoped. In fact, the Court-packing proposal galvanized the Court, which presented a unified response to what the Justices perceived as a personal attack on their competence and judicial independence by an over-reaching President. The Court’s response came in the form of a personal letter from Chief Justice Hughes to the Chairman of the Senate Judiciary Committee, Senator Burton Wheeler, D-Montana.

Chief Justices Hughes, whose quiet leadership steadied the Court boat during this tumultuous time, advised the judiciary committee in his letter that he was only able, due to time constraints, to confer with Justices Van Devanter and Brandeis over the contents of the letter, but that all of his fellow Justices agreed in principle with his rebuttal of Roosevelt’s attacks. Some experts point out correctly, that all the Justices were in Washington at that time, unusual in and of itself, implying that either Hughes did meet with all the Justices or that he purposely chose not to. Additionally, Van Devanter only perused the final copy briefly, although he claimed all the Justices were

\footnote{Cushman, 20.}
aware that the chief was writing a letter. Justice Benjamin Cardozo claimed that he first saw the letter in the next day’s newspaper.

Undoubtedly, Chief Justice Hughes consulted with Justice Brandeis during the writing of the letter. Brandeis biographers claim that Brandeis’s wife hand couriered a letter to the Hughes’s house at the zero hour, implying that the actual author of the letter was Louis Brandeis. Either way, the real drama was that Hughes decided to address the Court-packing bill in the first place. It is virtually unheard of for a Supreme Court Justice to directly address the Senate, by letter or speech, directly, especially when the Senate is meeting to vote on legislation that directly affects the Court. In fact, Hughes’ letter is the only such case recorded in the official minutes of the Senate.

Intellectually of the first order, learned in the law, with a shrewd tactical sense and profoundly shocked by Roosevelt’s Court-packing plan, Hughes put his own reputation on the line in defense of the Court and in opposition to a proposed reorganization by Roosevelt that he found alarming. Knowing that a letter from anyone but himself with be dismissed as being overly defensive or emotionally charged, Hughes logically enumerated each point Roosevelt had listed against the Court. Allegedly, Hughes delivered the letter to Wheeler with a broad smile stating, “The baby is born.”

After the proponents of the Court-packing bill had been heard, the opponents were given the floor. Senator Wheeler led off the opposition. He read aloud Chief
Justice Hughes’ letter, which enumerated twenty points, effectively poking holes in each of the President’s claims with respect to the Court’s alleged lack of performance, which the President attributed to the assumed infirmity of the elderly Justices (prominent among the Four Horsemen).

My Dear Senator Wheeler:

In response to your inquiries, I have the honor to present the following statement with respect to the work of the Supreme Court:

1. The Supreme Court is fully abreast of its work. When we rose on March 15 (for the present recess) we had heard argument in cases in which certiorari had been granted only four weeks before, Feb. 1.
2. During the current term, which began last October and which we call October Term, 1936, we have heard argument on the merits in 150 cases (180 numbers) and we have 28 cases (30 numbers) awaiting argument. We shall be able to hear all these cases, and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.
3. This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard....
4. The statute relating to our Appellate jurisdiction is the act of Feb. 13, 1925; 43 Stat. 936. That act limits to certain cases the appeals which come to the Supreme Court as a matter of right. Review in other cases is made to depend upon the allowance by the Supreme Court of a writ of certiorari.
5. Where the appeal purports to lie as a matter of right, the rules of the Supreme Court (Rule 12) require the appellant to submit a jurisdictional statement showing that the case falls within that class of appeals and that a substantial question is involved. We examine that statement and the supporting and opposing briefs, and decide whether the Court has jurisdiction. As a result, many frivolous appeals are forthright dismissed and the way is open for appeals which disclose substantial questions.
6. The act of 1925 ... was most carefully considered by Congress.... That legislation was deemed to be essential to enable the Supreme Court to perform its proper function. No single Court of last resort, whatever the number of
judges, could dispose of all the cases which arise in this vast country and which litigants would seek to bring up if the right of appeal were unrestricted.

7. Hosts of litigants will take appeals so long as there is a tribunal accessible. In protracted litigation, the advantage is with those who command a long purse. Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar and get in the way of those that have merit....

8. If further review [of cases] is to be had by the Supreme Court it must be because of the public interest in the questions involved. The review, for example, should be for the purpose of resolving conflicts in judicial decisions between different Circuit Courts of Appeal or between Circuit Courts of Appeal and State Courts where the question is one of State law; or for the purpose of determining constitutional questions or settling the interpretation of statutes; or because of the importance of the questions of law that are involved. Review by the Supreme Court is thus in the interest of the law, not in the mere interest of the litigants.

9. It is obvious that if appeal as a matter of right is restricted to certain described cases, the question whether the review should be allowed in other cases must necessarily be confined to some tribunal for determination, and of course, with respect to review by the Supreme Court, that Court should decide.

10. Granting certiorari is not a matter of favor but of sound judicial discretion. It is not the importance of the parties or the amount of money involved that is in any sense controlling....

11. Furthermore, petitions for certiorari are granted if four Justices think they should be. A vote by a majority is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view but the petition is always granted if four so vote.

12. The work of passing upon these applications for certiorari is laborious but the Court is able to perform it adequately. Observations have been made as to the vast number of pages of records and briefs that are submitted in the course of a term. The total is imposing, but the suggested conclusion is hasty and rests on an illusory basis.

13. Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. It is only when the facts are so interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

14. This at once disposes of a vast number of factual controversies where the parties have been fully heard in the Courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves....
15. I think it safe to say that about 60 per cent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 per cent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, failing short, I believe, of 20 per cent, show substantial grounds and are granted. I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality.

16. An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.

17. 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....

18. I understand that it has been suggested that with more Justices the Court could hear cases in divisions. It is believed that such a plan would be impracticable. A large proportion of the cases we hear are important and a decision by a part of the Court would be unsatisfactory.

19. I may also call attention to the provision of Article III, Section 1, of the Constitution that the judicial power of the United States shall be vested "in one Supreme Court" and in such inferior Courts as the Congress may from time to time ordain and establish. The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate Courts.

20. On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the Justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

Associate Justice Robert Jackson, who was assistant attorney general and one of the key administration witnessed during the Senate hearings (and was later an associate Justice), later remarked that Hughes' letter, "did more than any one thing to turn the

tide in the Court struggle.” Brandeis biographer Marvin Urcfsky notes that “the reading of the Hughes’s letter marked the end of the Court-packing bill.”

Congressional opposition to the Court-Packing legislation was not confined to anti-New Deal legislators. The President failed to garner support even within his own party. Roosevelt had consulted neither his Cabinet nor Democratic Party leaders in Congress before revealing the plan to the American public. Even if he had consulted his Cabinet, at this point in his career FDR had surrounded himself in the White House for the most part with sycophants and yes-men who likely would have gone along.

Historians argue that the 1936 death of Louis McHenry Howe, "the man behind Roosevelt," affected Roosevelt’s later political career. Howe inspired legends concerning his power over the President. Making light of the name-calling, Howe responded by printing personal cards with the title, "Colonel Louis Rasputin Voltaire Talleyrand Simon Legree Howe"; playing on the many famous characters to whom he had been boldly likened. He favored The New York Times' description of him as "The President's Other I." The New York Herald Tribune stated of him, "His loyalty is not to himself, or to an abstract ideal of government, but solely to Franklin D. Roosevelt." He was in truth one of the most influential characters in the making of Franklin and Eleanor Roosevelt's political careers and perhaps most widely known under the title,

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6 Cushman, 18. It is worthy to note that this pivotal event in the short life of the Court-packing plan occurred before the Court handed down any of the decisions comprising the constitutional revolution and indeed before the Social Security cases had even been argued.
"king-maker." As one biographer states of him, "He was the 'most private' of the President's private secretaries. He talked with Roosevelt daily; no one knew what they said. On a given matter he might have immense impact - - or none at all." As Eleanor Roosevelt and her husband's advisers later recalled, Howe was most often the "no" man who relentlessly challenged the President's politics. A number of experts argue that many of the political mistakes of the Roosevelt administration in the years after Howe's death can be attributed to the absence of his incessant criticism and accurate gauging of public opinion.

Roosevelt's failure to confer with political allies was a fatal misstep. Thus, shortly after the President's announcement of the Court-packing plan on February 5, 1937, his own Vice-President, John Nance Garner, was seen outside the Senate chamber flagrantly brandishing the "thumbs-down" sign while holding his nose in distaste. Garner's lack of self-censorship could be linked to the fact that Roosevelt's public announcement was the first time the Vice President had heard of the plan. Even staunch supporter Hatton Sumner of Texas, Democratic Chairman of the House Judiciary Committee remarked on February 5th, "Boys, here's where I cash in my chips." Garner quickly presented a united front with the President in pressing for the Court-packing bill, but the damage could not be undone. On August 26, 1937, it was

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7 PBS, The American Experience.
8 Cushman, 14.
Garner who telephoned Roosevelt in Warm Spring where he was vacationing, and told him, "We're licked."

Ironically, the ultimate blow to Roosevelt's plan to pack the Court was the Court itself. On March 29, 1937, in a dramatic departure from a precedent established just months before in Tripaldo, the Court handed down its 5 to 4 decision in West Coast Hotel v. Parrish, upholding Washington State's minimum age law for women. The Tripaldo case involved the jailing of an employer for failure to pay the minimum wage prescribed by New York law to one of his female employees. Since the Supreme Court had outlawed the District of Columbia minimum-wage law in 1923, the conservatives on the Supreme Court at first tried to avoid a hearing of the New York case by denying a writ of certiorari, but Chief Justice Charles Evans Hughes insisted that the case be heard, with the support of other Justices. The new majority in Parrish consisted predictably of Brandeis, Stone, Cardozo, and Hughes, all of whom had voted to uphold similar laws in the past, but could never garner a decisive fifth vote in support. The new 5-Justice majority included and Justice Owen J. Roberts, who frequently sided with the Four Horsemen, and had voted with the 5-4 majority to strike down a similar New York law the previous term in Tripaldo.

Despite speculation at the time that Roberts had "caved" to the Court-packing pressures, the decision in West Coast Hotel was not influenced by the pendency of the Court-packing plan. The case was actually voted on by the Justices in the conference
on December 19, 1936 – long before the Court-packing plan was hatched. The vote was 4 to 4 with Roberts joining Hughes, Brandeis, and Cardozo. Justice Stone was unable to attend because of a severe bout with amoebic dysentery, which kept him away from the Court for more than three months.

All of the Justices knew how Stone would vote and Hughes decided that it would be better to delay and affirm the lower Court by a decisive 5-4 vote upon Stone’s return, rather than by an immediate vote of an equally divided Court with Stone absent and not voting. The case was therefore held until Stone could return to the Court and cast his vote. Stone did return in early February, his vote created a 5-4 majority affirming the state law. Hughes set about drafting the opinion of the Court in February, before Roosevelt announced his Court-packing plan. Roosevelt soon after announced his Court-packing scheme. Hughes decided that if the Court were to hand down the Parrish opinion so soon after the President’s announcement, it would convey a false impression that the Court was capitulating to political pressure. He therefore decided to hold the opinion for release at a later date. When the opinion was published in May, Hughes was largely unsuccessful in his attempt to convey that the Court’s decision in Parrish was earlier in time and therefore totally independent of Roosevelt’s Court-packing announcement.

Many observers incorrectly concluded that Parrish was an act of judicial obeisance to an aggressive executive. It is amply clear, however, that the Court’s
decision to abandon its historical bias toward government regulation of wages and hours, which were central tenets of the New Deal, was actually reached more than six weeks before the Court-packing plan.9 For this reason, the shibboleth that Justice Roberts caved to a Court-packing announcement and switched sides in *Parrish* as a result is belied by the fact that Roberts, who was not a member of the Four Horsemen and was much more moderate than that group, had cast his decisive vote long before anyone outside the Roosevelt inner circle even knew of the existence of the Court-packing plan.

On May 18, three months after Roosevelt’s plan for judicial reform had been submitted with such bright hopes, his Court-packing plan suffered two fatal blows. First, the Senate Judiciary Committee voted 10 to 8 to reject the plan. To make the vote even more damaging, seven members of the President’s own party were among the nay votes. A second blow, delivered on that same day, was even more hurtful. This was the announcement of the retirement of the seventy-seven year old Willis Van Devanter to be effective June 2, a day after the end of the Court term. The timing of the announcement was no accident.

The Justice first broke the news to a seventy-one year old Washington reporter, John D. Sutter, whom he had befriended. Sutter had been filing stories for the Associated Press about the Supreme Court, its decisions, and their impact. That

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9 Cushman, 18.
Tuesday morning he was asked to drop by the Justice's apartment on Connecticut Avenue before going to his office. Hurrying over by taxi, Sutter was told by Van Devanter that the Justice was just about to send the President a letter announcing his retirement, which would be released to the press soon after it reached the White House by house by special messenger. "Be sure to come and visit me on my farm," Van Devanter called out as the excited newsman went off to file one of the biggest scoops of his long career.\(^{10}\)

The departure of one of the Four Horsemen, on the same day that the Court handed down its historic 5-4 decision in *Parrish*, undercut Roosevelt's claim that he needed to overhaul a Supreme Court that was biased against his New Deal and whose membership had ossified.

With that, Franklin Roosevelt suffered a stunning and lasting defeat that derailed whatever hopes he had of expanding his domestic agenda in his second term by building on the legislative successes of his first term. He had expended valuable political capital and blundered badly. He would not regain his political footing until the outbreak of World War II in September 1939.

However, in many ways, Roosevelt had the last constitutional laugh as it related to his existing New Deal programs. Beginning in 1937, the Hughes Court

\(^{10}\) McKenna, 453-454.
upheld the critical New Deal legislation of Roosevelt's Second Hundred Days. These were the very programs that Roosevelt feared the Court was on the verge of overturning in 1937, which is why he had launched his pre-emptive Court-packing plan. For this reason, most historians see Roosevelt's Court-packing failure as a tactical defeat, not a strategic one. With respect to the Supreme Court, Roosevelt lost the immediate battle, but won the war.
CHAPTER EIGHT

ASSESSMENT

We are under a Constitution, but the Constitution is what the judges say it is.

Chief Justice Charles Evans Hughes

Within ten years of FDR’s announcement of the Court-packing plan, the Four Horsemen were all gone, replaced by ardent New Dealers, who constitutionally validated every remaining aspect of FDR’s New Deal. Willis Van Devanter retired as planned on June 1, 1937. George Sutherland followed suit January 17, 1938. Both retired to agrarian old age, living out the remainder of their days uneventfully. Pierce Butler died in office November 15, 1939. James Clark McReynolds retired January 30, 1941. Then, everyone started dying. Van Devanter died at home February 8, 1941; Sutherland followed, as he died in retirement, July 18, 1942. Ironically, the cantankerous McReynolds was the only Horseman to outlive President Roosevelt. FDR died in Warm Springs, Georgia April 12, 1945; McReynolds died August 24, 1946.
The Four Horsemen have been viewed by history as far right, reactionary, staunchly conservative apostles of laissez-faire government and Social Darwinism. That is a simplistic assessment. The Horsemen’s occasional railings against the encroachments of the modern regulatory state seem to be more instances of the Justices occasionally protesting too much rather than doctrinaire right-wing cant. Opinions in *Adkins v Children’s Hospital, Morehead v Tipaldo, Railroad Retirement Board v Alton Railroad, Ribnik v McBride, Hammer v Daggenhart*, and dissents in *Nebbia, Blaisdell, the Gold Clause Cases*, and the *Wagner Act Cases* indicate that these were not men who were fanatically devoted to property rights and callously indifferent to the commonweal\(^1\).

In recent years, a cadre of lawyers and law professors has sought, in both law review articles and books, to provide correctives for the conventional interpretation of the Supreme Court controversy and its legacy. Barry Cushman, Peter Irons, Richard Freidman, and G. Edward White have been systematically chipping away at key parts of the accepted wisdom on the constitutional issues, jurisprudence, and the nature of Court-packing, putting a new face on the controversy. Older versions tried to establish a “switch in time” theory and a “constitutional revolution of 1937.” The Supreme Court, it is true, reversed rulings in March and May 1937 on the contract clause, the commerce clause, and the due process clause. This purported abrupt about-face is

\(^1\) Cushman, 559.
attributed to the “fear of God” that Roosevelt’s Court bill put into the hearts of the sitting Justices. This notion is reminiscent of a remark made by FDR’s cousin Theodore who once boasted, “I may not know much about law, but I do know how one can put the fear of God into judges!.”

Van Devanter, Sutherland, McReynolds, and Butler are marked as classical formalists for their dismissal of New Deal programs – interpreting the law with abstract, unchanging principles, ignorant of the reality of society. Historians have seen this 1930s’ Court as one of the great battles between the conservative, reactionary formalism of the Horsemen and the progressive, liberal ideas of Justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone. This dichotomy is too facile – it minimizes the Four Horsemen and unfairly reduces them to caricatures. A more balanced assessment holds that the horsemen, joined at times by the moderates, Charles Evans Hughes and Owen Roberts, did a splendid job articulating vital principles of economic liberty—while facing enormous political pressure from a popular President. Rather than being reactionaries—horse-and-buggy conservatives—the Four Horsemen were well-regarded practitioners of the law who served ably on the Court.

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2 McKenna, xxiii-xxiv.
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