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## A Thrice-Told Tale, or Felix the Cat

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# A THRICE-TOLD TALE, OR FELIX THE CAT

Michael Ariens\*

*Few legal scholars would dispute the constitutional, historical, and political importance of the events of 1937, when the Supreme Court, faced with President Franklin Delano Roosevelt's plan to reorganize the federal judiciary, ultimately approved a sweeping interpretation of governmental authority to implement socioeconomic legislation. The course of events, although frequently canvassed, has yielded conflicting interpretations of the actions and motivations of the Justices who took part in the fabled "switch in time that saved nine." In this Article, Professor Ariens argues that Felix Frankfurter played a pivotal role in disseminating a particular history of the events of 1937. Reversing his own privately expressed position of dismay at the Court's actions in 1937, Frankfurter, in a memorial tribute to Justice Owen Roberts in 1955, revised the history of the events of 1937, a history that placed the Court above the fray of politics in its decisionmaking. Professor Ariens argues that the events of 1954-1959, the era of Brown v. Board of Education, played an integral part in shaping Frankfurter's revised history of 1937 and led to its widespread acceptance. Professor Ariens draws, from the interrelationship of these two constitutional events, telling lessons about post-War legal thought and the evolution of constitutional history.*

"You could precisely quantify the influence of Shakespeare on T.S. Eliot."

"But my thesis isn't about that," said Persse. "It's about the influence of T.S. Eliot on Shakespeare."

"That sounds rather Irish, if I may say so," said Dempsey, with a loud guffaw. His little eyes looked anxiously around for support.

DAVID LODGE, SMALL WORLD<sup>1</sup>

## I.

Much of the future of American law depends on how the events of 1937 are interpreted.

DONALD H. GJERDINGEN, THE POLITICS OF THE  
COASE THEOREM AND ITS RELATIONSHIP TO  
MODERN LEGAL THOUGHT<sup>2</sup>

Influence runs against, as well as with, time. Our appreciation of the constitutional crisis of 1937 depends as much on the events oc-

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\* Professor, St. Mary's University School of Law. Thanks to Don Gjerdingen and Steve Smith for their comments and suggestions on an earlier draft, and to Rich Friedman for his comments and suggestions on a later draft. Many thanks to my research assistant Connie Liem for her excellent help, and to Dean Barbara Bader Aldave for financially supporting this research.

<sup>1</sup> DAVID LODGE, *SMALL WORLD* 60 (paperback ed. 1986).

<sup>2</sup> Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 *BUFF. L. REV.* 871, 917 (1986).

curing after that crisis as on the events leading to it. The "lesson" learned from President Franklin Delano Roosevelt's "Court-Packing Plan" and from the "switch in time that saved nine" depends on the particular instructional manual from which one reads.

The manual I intend to present focuses on the importance of Felix Frankfurter. In discussing the historical understanding of the Justices of the Supreme Court, Professor John Henry Schlegel wrote, "there is the problem of Felix Frankfurter."<sup>3</sup> Justice Frankfurter remains a problem if one wants to understand twentieth-century legal history. His influence as a law professor and intellectual activist, his influence as a member of the Court, and his influence directing the work of other constitutional scholars must be taken into account when assessing constitutional histories. In this Article, I suggest that Justice Felix Frankfurter tried to coordinate history to protect the integrity of the Court as he saw it, and that he succeeded.

The Court's power to invalidate state and federal legislative action has always been based on the assumption that the Court exercises judgment rather than will.<sup>4</sup> Although the legislative and executive branches were intended to be political branches and were allowed, within their constitutional power, to impose their will in law, the judiciary was to stand athwart the political process, to exercise judgment in deciding cases, and to ensure the supremacy of the Constitution. Politics was about power and required a willingness to compromise; as a result, politicians were to be subject to regular elections. Judging was about protecting the liberty of persons and institutions from the abuses of political power and required adherence to (constitutional) principle; therefore, once appointed, federal judges were to remain in office "during good Behaviour."<sup>5</sup> These distinguishing characteristics necessitated the claims of both judicial independence from politics and judicial nonintervention in politics.

<sup>3</sup> John H. Schlegel, *The Line Between History and Casenote*, 22 LAW & SOC'Y REV. 969, 974 (1988).

<sup>4</sup> See THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment . . ."); see also *Court-Packing Plan*, in THE OXFORD HISTORY OF THE SUPREME COURT OF THE UNITED STATES 203, 204 (Kermit L. Hall ed., 1992) [hereinafter OXFORD HISTORY OF THE SUPREME COURT] ("[The Court-Packing Plan] reinforced the American people's understanding that law and politics should be separated, and that although the Supreme Court was not wholly above politics, it must not be converted into a political institution.")

<sup>5</sup> U.S. CONST. art. III, § 1. Alexander Hamilton defended the life-tenure provision as follows:

[A]s liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

THE FEDERALIST No. 78, *supra* note 4, at 466.

The Court's authority to interpret the Constitution was thus linked to the Court's separation from politics. For post-World War II constitutional scholars, the most widely known event suggesting that the Court was engulfed in politics was the "switch" by Justice Owen Roberts during the spring of 1937, a switch that many believed was the result of President Franklin Delano Roosevelt's "court-packing" plan.<sup>6</sup> By severing the link between FDR's plan and Justice Roberts's actions in 1937, Felix Frankfurter protected the Court's position as primary interpreter of the Constitution. Reestablishing the Court's authority was again crucial during the last half of the 1950s, when the Court's legitimacy as an authoritative constitutional interpreter was at risk as a result of its *Brown* decisions.<sup>7</sup> Understanding the constitutional crisis of 1937 and its particular relevance to the challenge of *Brown* in the 1950s requires another look at the machinations of Felix Frankfurter. In this manual, Frankfurter plays two roles — one as Supreme Court Justice, and a second as guardian of the Court's virtue.

For Felix Frankfurter, the Supreme Court was a temple, a sacred place.<sup>8</sup> It was sacred because the Court decided cases (and interpreted the Constitution) according to the rule of law. The covenant between the Court and "the people" required the Court to decide cases based on reason and judgment rather than on personal preference or will. As long as the Court upheld its part of this covenant, it remained a revered institution dutifully undertaking its arduous responsibilities. If, however, politics were to intrude into the Court, this intrusion would lead to the Court's "desecration." Politics could infect the Court from without or from within, but no matter what the source, the result would be the same. As both a devoted worshipper and one of its high priests, Justice Frankfurter tended the Court's garden of law from the wilderness of politics. From 1954 to 1959, Justice Frankfurter's challenge was particularly acute; the Court was saddled with the heavy burden of proving that its decisions in *Brown* were the result of an exercise of judgment rather than will, and Justice Frankfurter's version of the events of 1937 helped to ease that burden.

In 1937, the Supreme Court faced a crisis involving its authority to interpret the Constitution. The crisis ended only after it appeared that the wall separating law from politics had crumbled. That resolution caused Frankfurter to lash out privately at the intrusion of

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<sup>6</sup> See *infra* pp. 627–28.

<sup>7</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregated public schooling violates the Fourteenth Amendment's Equal Protection Clause). On May 31, 1955, the Court announced the desegregation of segregated public schools "with all deliberate speed." *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

<sup>8</sup> See *infra* p. 667.

politics into the Supreme Court. In a March 30, 1937, letter to FDR, Frankfurter wrote: "And now, with the shift by Roberts, even a blind man ought to see that the Court is in politics, and understand how the Constitution is 'judicially' construed. It is a deep object lesson — a lurid demonstration — of the relation of men to the 'meaning' of the Constitution."<sup>9</sup>

Nearly a generation later, Frankfurter, by then a Justice of the Supreme Court, had a new tale to tell. In a memorial tribute to Justice Owen J. Roberts published in the December 1955 issue of the *University of Pennsylvania Law Review*,<sup>10</sup> Justice Frankfurter successfully sowed the seeds of a revisionist history of the "switch in time that saved nine."<sup>11</sup> Justice Frankfurter's revisionist history permitted defenders of the Supreme Court to claim that Justice Roberts had not altered his stance in 1937 as a result of FDR's court-packing plan.<sup>12</sup> Frankfurter's new story presented Justice Roberts's abrupt shift in the spring of 1937 as one based on constitutional principle, and certainly not on politics. Consequently, the American people, and their public officials, could continue to entrust the Court with the power of judicial review, because the Court's independent assessment of the constitutionality of state and federal law was necessary to the proper functioning of the American democratic experiment.<sup>13</sup>

<sup>9</sup> Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-45, at 392 (Max Freedman ed., 1967) [hereinafter ROOSEVELT AND FRANKFURTER].

<sup>10</sup> See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

<sup>11</sup> Professor Philip Bobbitt and Roosevelt biographer Kenneth S. Davis credit this phrase to Harvard Law School Professor Thomas Reed Powell. See PHILIP BOBBITT, CONSTITUTIONAL FATE 39 (1982); KENNETH S. DAVIS, FDR: INTO THE STORM 1937-40, at 81 (1993). Neither cites Powell's use of this phrase. At least three other variations exist. Joseph Alsop takes credit for the phrase "a switch in time saves nine." JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 135 (1938). Leonard Baker credits Abe Fortas with the quip "the switch in time that serves nine." LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 174 (1967) (citing *High Court Assailed at Labor Institute*, N.Y. TIMES, June 15, 1937, at 19). Professor Gerald Gunther and *The Oxford Dictionary of American Legal Quotations* quote the phrase as "[t]he switch in time that saved the Nine." GERALD GUNTHER, CONSTITUTIONAL LAW 457 (12th ed. 1991) [hereinafter GUNTHER, TWELFTH EDITION]; THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 393 (Fred R. Shapiro ed., 1993). Neither identifies the author of the quip.

<sup>12</sup> On February 5, 1937, President Franklin Delano Roosevelt announced a bill to reorganize the federal judiciary. See Franklin D. Roosevelt, The 342d Press Conference (Feb. 5, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONSTITUTION PREVAILS 1937, at 35, 49-50 (1941) [hereinafter PUBLIC PAPERS: THE CONSTITUTION PREVAILS]. Roosevelt's proposed legislation was attacked by its opponents as a "court-packing" plan.

<sup>13</sup> As Hamilton wrote in *The Federalist*:

[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental

Justice Frankfurter's new story took hold among a generation of legal scholars deeply committed to the law/politics divide and came at a time when the threat to that divide was particularly acute. For those scholars, after the crisis of 1937, "the problems for all of us became: How can we defend a judicial veto in areas where we thought it helpful in American life — civil liberties area, personal freedom, First Amendment — and at the same time condemn it in the areas where we considered it unhelpful?"<sup>14</sup> These problems were made more acute by the *Brown* decisions, decisions in which a "legal justification [was needed] for what [Justice Frankfurter] agreed was a 'congenial' political solution."<sup>15</sup>

I suggest the following can be learned from this Article: first, Felix Frankfurter had a major impact on the course of American law and understanding that impact is necessary in order to comprehend twentieth-century legal history; second, Justice Frankfurter's revisionist history of Justice Roberts's actions in 1937 was only incidentally a

law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, . . . the Constitution ought to be preferred to the statute . . . .

THE FEDERALIST No. 78, *supra* note 4, at 467.

<sup>14</sup> Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 924 (1993) (quoting an interview of Herbert Wechsler sometime between 1978 and 1982 (citations omitted)).

<sup>15</sup> Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1919 (1991).

Part of the fissure between legal progressives in the late 1950s involved the justification of *Brown*. See *infra* pp. 669–74. Initially, most legal scholars defended the Court's decision in *Brown* as a proper "legal" interpretation of the Constitution. After the criticisms of *Brown* by Judge Learned Hand and, more importantly, Professor Herbert Wechsler in their successive Holmes lectures, however, scholars have since grounded defenses of *Brown* on either the Court's or the Constitution's "moral" authority rather than its "legal" authority. See MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY 6 (1993) (stating that *Brown* represents "an activist decision striking down legislative action, with what many believed was questionable justification in conventional legal terms but with social and moral import that found wide approval in the liberal community (and, of course, not only there)"); ALPHEUS T. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 178 (1962) ("[The Supreme Court's] decisions, based on reason and authority, have a moral force far exceeding that of the purse or sword."); see also Tushnet & Lezin, *supra*, at 1919 (asserting that Justice Frankfurter's difficulty with *Brown* was that, "if Congress did not 'manifest' an intent to 'outlaw segregation,' where could the Court find its authority to hold segregation unconstitutional?").

On Wechsler's lecture, one commentator has stated:

I have always found it more than slightly repellent that [Wechsler's lecture], which depends for its entire intellectual enterprise on the proposition that the pursuit of human equality is not a neutral principle of law, and hence is an insufficient basis for ordering the end of *de jure* racial segregation of schools, is the second most frequently cited law review article of all time.

Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042, 1056 n.36 (1993) (reviewing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992)).

defense of Justice Roberts — this history was primarily an effort to protect the Court's authority to interpret the Constitution at a time when *Brown* threatened to compromise that authority; and third, the crisis of 1937 was a turning point in our legal history, but possibly for reasons other than those suggested by Professors Ackerman<sup>16</sup> and Gjerdingen.<sup>17</sup> The constitutional crisis of 1937 remains important less because of what really happened and more because the subsequent explanations and analyses of the crisis tell us much about our desire to shape the past for use in the present. These differing stories of the Supreme Court in 1937 also tell us something about the attractions and dangers of our fascination with the rule of law.

After a brief summary of the events leading up to and culminating in the constitutional crisis of 1937, I examine the reactions of scholars to those events. The initial history of the crisis was that Justice Roberts "switched" in response to FDR's court-packing plan. This belief was predominant until the publication in early 1956 of Justice Frankfurter's revisionist history of Roberts's actions. This revisionist history, which claimed that Justice Roberts' votes were based on principle, not politics, was accepted by most legal scholars. A crucial reason that Justice Frankfurter presented his revisionist history, and that most legal scholars accepted it, was the need to preserve the role of the Court as a principled decisionmaker, a need that was particularly acute because of *Brown*, which raised the issue of the Court's authority in a manner reminiscent of the crisis of a generation before.

## II.

The story of the 1937 Court fight is a twice-told tale.

WALTER F. MURPHY, CONGRESS AND THE COURT<sup>18</sup>

### A.

Although in 1934 and early 1935 the Supreme Court alternately pleased both friend and foe of the New Deal,<sup>19</sup> the Court set its course

<sup>16</sup> See BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40, 47-50, 105-30 (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*]. See generally BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 6-22 (1984) (discussing the realist legacy of the New Deal). Professor Ackerman suggests that the events of 1937 encompass one of three instances of constitutional politics in America, a revolution that "ends in the constitutional triumph of the activist welfare state." ACKERMAN, *WE THE PEOPLE*, *supra*, at 40.

<sup>17</sup> See Donald H. Gjerdingen, *The Future of Legal Scholarship and the Search for a Modern Theory of Law*, 35 *BUFF. L. REV.* 381, 441-45, 460-73 (1986); Donald H. Gjerdingen, *The Future of Our Past: The Legal Mind and the Legacy of Classical Common-Law Thought*, 68 *IND. L.J.* 743, 764-68 (1993); Gjerdingen, *supra* note 2, at 893-904, 917-33. Professor Gjerdingen believes that "the events of 1937 represent a change from an unqualified transactional justice system to a distributive justice system." *Id.* at 875.

<sup>18</sup> WALTER F. MURPHY, *CONGRESS AND THE COURT* 57 (1962).

<sup>19</sup> Compare *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 302, 316 (1935) (upholding the

in firm opposition to the New Deal with a series of decisions in May 1935. In *Railroad Retirement Board v. Alton Railroad Co.*,<sup>20</sup> the Court, in an opinion by Justice Roberts, held unconstitutional the Railroad Retirement Act, which required railroads to create pension plans for their employees.<sup>21</sup> Three weeks later, on May 27, 1935, a day New Dealers would remember as "Black Monday," the Supreme Court unanimously held unconstitutional two Acts of Congress and a presidential executive order. In *Louisville Joint Stock Land Bank v. Radford*<sup>22</sup> the Court, in an opinion by Justice Brandeis, struck down the Frazier-Lemke Farm-Mortgage Act of 1934, concluding that the Act deprived mortgagees of their property without due process of law.<sup>23</sup> The Court next announced its decision in *Humphrey's Executor v. United States*.<sup>24</sup> In *Humphrey's Executor*, the Court held unconstitutional FDR's decision to fire William Humphrey as a commissioner of the Federal Trade Commission.<sup>25</sup> Finally, in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>26</sup> the "Sick Chicken" case, the Court concluded that the National Industrial Recovery Act violated the Commerce Clause, because the Act was an attempt by Congress to regulate intrastate commerce.<sup>27</sup> The Court then recessed for the summer. President Roosevelt responded initially by attacking the Court,<sup>28</sup> but shortly thereafter he stopped speaking publicly about the Court's decisions.

The Supreme Court's 1935 Term brought more confrontation. Early in the Term, the Court held unconstitutional the Agricultural Adjustment Act of 1933 as beyond Congress's spending power.<sup>29</sup> May,

repudiation by the administration of the contractual duty to repay debts in gold) *with* *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430-33 (1935) (declaring unconstitutional the "hot oil" provision of the National Industrial Recovery Act of 1933). The Court also upheld several state statutes that regulated economic matters. *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502, 538-39 (1934) (allowing New York to fix the price of milk); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-48 (1934) (rejecting a Contracts Clause challenge to a Minnesota law that temporarily halted mortgage foreclosures).

<sup>20</sup> 295 U.S. 330 (1935).

<sup>21</sup> *See id.* at 374.

<sup>22</sup> 295 U.S. 555 (1935).

<sup>23</sup> *See id.* at 601-02.

<sup>24</sup> 295 U.S. 602 (1935).

<sup>25</sup> *See id.* at 632.

<sup>26</sup> 295 U.S. 495 (1935).

<sup>27</sup> *See id.* at 550-51.

<sup>28</sup> This was FDR's famous "horse-and-buggy" press conference of May 31, 1935. *See* Franklin D. Roosevelt, The 209th Press Conference (May 31, 1935), in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE COURT DISAPPROVES 1935, at 221 (1938) [hereinafter PUBLIC PAPERS: THE COURT DISAPPROVES] ("We have been relegated to the horse-and-buggy definition of interstate commerce.")

<sup>29</sup> *See* *United States v. Butler*, 297 U.S. 1, 77-78 (1936). Shortly thereafter, however, in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936), the Court upheld the constitution-



however, was once again the cruelest month for FDR. In *Carter v. Carter Coal Co.*,<sup>30</sup> five members of the Court held unconstitutional the Bituminous Coal Conservation Act of 1935, which set minimum prices for the sale of coal, gave employees a right to bargain collectively, and created a structure to implement area-wide wage and hour terms.<sup>31</sup> One week later, the Court, in *Morehead v. New York ex rel. Tipaldo*,<sup>32</sup> held unconstitutional New York's minimum wage statute, relying in part on precedent.<sup>33</sup> Joining the "Four Horsemen"<sup>34</sup> (Justices Butler, McReynolds, Sutherland, and Van Devanter) in the majority was Justice Roberts. Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo dissented.<sup>35</sup> *Morehead* involved a state law, not New Deal legislation. However, several years earlier, FDR had recommended that a number of governors consider and adopt a minimum wage law based on the New York statute.<sup>36</sup> The Court's *Morehead* decision thus constitutionally blocked any such action.

### B.

A month after the opening of the Court's 1936 Term, Roosevelt was reelected, winning 523 electoral votes to Alf Landon's 8, and receiving over sixty percent of the popular vote.<sup>37</sup> On February 5, 1937, shortly after reinauguration, Roosevelt announced his proposed

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ality of the Tennessee Valley Authority, *see id.* at 330. Justice Roberts joined Justice Brandeis's concurring opinion. *See id.* at 341 (Brandeis, J., concurring).

<sup>30</sup> 298 U.S. 238 (1936).

<sup>31</sup> *See id.* at 315-17. In a separate opinion, Chief Justice Hughes concurred in holding the labor provisions unconstitutional and dissented with respect to the minimum price provisions. *See id.* at 317 (separate opinion of Hughes, C.J.). Justice Cardozo's dissent was joined by Justices Brandeis and Stone. *See id.* at 324 (Cardozo, J. dissenting in Nos. 636, 649 and 650, and concurring in the result in No. 651).

<sup>32</sup> 298 U.S. 587 (1936).

<sup>33</sup> *See id.* at 617-18. The Court relied on *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), which struck down the District of Columbia's minimum wage law as an unconstitutional violation of the Due Process Clause of the Fifth Amendment, *see id.* at 561-62.

<sup>34</sup> *See Four Horsemen*, in OXFORD HISTORY OF THE SUPREME COURT, *supra* note 4, at 309 (noting, in reference to the four Justices consistently opposed to New Deal legislation, that they "evoked the legendary Four Horsemen of the Apocalypse").

<sup>35</sup> *See Morehead*, 298 U.S. at 618 (Hughes, C.J., dissenting); *id.* at 631 (Stone, J., dissenting).

<sup>36</sup> *See* Telegram from Franklin D. Roosevelt to 13 State Governors (Apr. 12, 1933), in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE YEAR OF CRISIS 1933, at 133 (1938) [hereinafter PUBLIC PAPERS: THE YEAR OF CRISIS]. The state of New York undertook the effort to create minimum wage legislation that would withstand a constitutional attack during FDR's term as governor, and the legislation passed in March 1933. *See* JOSEPH P. LASH, DEALERS AND DREAMERS 47-53 (1988). It was written as a model minimum wage statute for the National Consumers League by Benjamin Cohen, with the editorial guidance of then-Professor Frankfurter. *See id.* at 52.

<sup>37</sup> Roosevelt garnered 27,752,869 votes to Landon's 16,674,665 votes. All other candidates received a total of 1,200,982 votes. *See* 2 THE DEMOCRATIC EXPERIENCE: AN AMERICAN HISTORY 384 (Carl N. Degler ed., 4th ed. 1979).

legislation to reorganize the federal judiciary.<sup>38</sup> Part of this plan was a proposal to nominate to any federal court one additional judge for each sitting judge over the age of seventy. The President's proposal, ostensibly, was to reduce the overloaded docket of the Supreme Court.<sup>39</sup> Six members of the Supreme Court were over seventy, and not surprisingly, the plan gave the President the opportunity to nominate a maximum of six additional Justices to the Supreme Court.

The Senate finally voted down FDR's amended legislation on July 22, 1937.<sup>40</sup> In the interim, President Roosevelt signed a bill guaranteeing retired Justices a pension that could not be decreased; Senator Burton Wheeler, a member of the Senate Judiciary Committee, managed to arrange the signing of a letter by Chief Justice Hughes, to which Justices Brandeis and Van Devanter assented, declaring that the Court was up to date in its work; Justice Van Devanter resigned on May 18, 1937; on the same day, the Senate Judiciary Committee voted 10-8 to report to the Senate that such a bill should "never again be presented to the free representatives of the free people of America,"<sup>41</sup> Vice-President John Nance Garner left Washington for Texas while Congress was in session for the first time in over thirty years of governmental service; and in June, Joe Robinson of Arkansas — Senate majority leader, chief congressional proponent of FDR's plan, and heir apparent to Van Devanter's vacated seat — died of a heart attack during the fight for passage of an amended court reorganization plan.<sup>42</sup>

During this period, two other events stood out. The events were a pair of decisions by the Supreme Court, both decided by a vote of 5-4. On March 29, 1937, in *West Coast Hotel Co. v. Parrish*,<sup>43</sup> the Court held constitutional the state of Washington's minimum wage act.<sup>44</sup> Two weeks later, in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>45</sup> the Court upheld the National Labor Relations Act.<sup>46</sup>

<sup>38</sup> See Roosevelt, *supra* note 12, at 35, 45-50. The court reorganization plan was developed by Attorney General Homer Cummings, who met secretly with FDR. The origins of FDR's court reorganization plan have been masterfully detailed in William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

<sup>39</sup> See Roosevelt, *supra* note 12, at 35-44.

<sup>40</sup> See William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 687-89.

<sup>41</sup> *Id.* at 675 (quoting SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 711, 75th Cong., 1st Sess. I, 23 (1937)).

<sup>42</sup> See *id.* at 674, 685.

<sup>43</sup> 300 U.S. 379 (1937).

<sup>44</sup> See *id.* at 399-400.

<sup>45</sup> 301 U.S. 1 (1937).

<sup>46</sup> See *id.* at 30. A third event, another decision by the Court, is also noteworthy. On May 24, 1937, the Court — again by a vote of 5-4, again with Justice Roberts silently in the majority — upheld the Social Security Act in the *Social Security Cases*. See *Helvering v. Davis*, 301 U.S. 619, 640-45 (1937); *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 583, 585 (1937).

## C.

The opinion in *West Coast Hotel* was read from the bench by Chief Justice Hughes. Only ten months before, a majority of the Court had held in *Morehead* that state minimum wage acts violated the Due Process Clause of the Fourteenth Amendment.<sup>47</sup> Because the composition of the Court remained the same, these conflicting decisions were possible only because Justice Roberts concluded that Washington's minimum wage law, unlike New York's, was constitutional. Two weeks later, the Court determined in *Jones & Laughlin Steel* that Congress acted pursuant to its constitutionally granted power to regulate commerce among the several states by regulating the terms and conditions of employment of manufacturing employees.<sup>48</sup> This decision seemed implicitly to overrule *Carter v. Carter Coal Co.*,<sup>49</sup> which was decided less than one year earlier. The Court, again per Chief Justice Hughes, largely ignored *Carter*, neither distinguishing nor overruling its interpretation of the Commerce Clause. Justice Roberts was again the only member of the Court to join fully with the majority in both *Carter* and *Jones & Laughlin Steel*. In neither *West Coast Hotel* nor *Jones & Laughlin Steel* did Justice Roberts write an opinion explaining the abrupt shift in his voting posture.

## III.

And now, with the shift by Roberts, even a blind man ought to see that the Court is in politics, and understand how the Constitution is "judicially" construed. It is a deep object lesson — a lurid demonstration — of the relation of men to the "meaning" of the Constitution.

FELIX FRANKFURTER TO FRANKLIN DELANO ROOSEVELT,  
MARCH 30, 1937<sup>50</sup>

Frankfurter's private reaction (publicly he remained silent, as he had about FDR's plan) to the Court's decisions was immediate and unsparing. In addition to his letter to FDR written the day after *West Coast Hotel* was decided, Frankfurter wrote to Justice Harlan Fiske Stone: "Roberts' somersault [is] incapable of being attributed to a single factor relevant to the professed judicial process. Everything

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The decisions in the *Social Security Cases*, broadly interpreting Congress's general welfare power, were clearly a departure from the 1936 decision of *United States v. Butler*. See *United States v. Butler*, 297 U.S. 1, 68 (1936) (opinion of Roberts, J.) (holding unconstitutional a federal statute subsidizing farmers to reduce their acreage and crops with funds exacted through a tax on processors of agricultural commodities).

<sup>47</sup> See *supra* p. 627.

<sup>48</sup> See *Jones & Laughlin Steel*, 301 U.S. at 30-31.

<sup>49</sup> 298 U.S. 238 (1936).

<sup>50</sup> Letter from Felix Frankfurter to Franklin D. Roosevelt, *supra* note 9, at 392.

that he now subscribes to he rejected not only on June first last, but as late as October twelfth when New York's petition for a rehearing was denied . . . ."<sup>51</sup> Two days later, replying to Justice Brandeis's letter, which speculated that "[o]verruling Adkins' Case must give you some satisfaction,"<sup>52</sup> Frankfurter responded, "[i]t is characteristically kind of you to think of the aspects of the Washington minimum wage case that would give me some satisfaction, but, unhappily, it is one of life's bitter-sweets and the bitter far outweighs the sweet."<sup>53</sup> A day after *Jones & Laughlin Steel* was decided, Frankfurter wrote to Charles Wyzanski that "[t]o me it is all painful beyond words, the poignant grief of one whose life has been dedicated to faith in the disinterestedness of a tribunal and its freedom from responsiveness to the most obvious immediacies of politics . . . ."<sup>54</sup>

#### A.

There were two immediate chronicles of the constitutional crisis of 1937: *The 168 Days* by Joseph Alsop and Turner Catledge,<sup>55</sup> and *The Supreme Court Crisis* by Merlo Pusey.<sup>56</sup> Alsop and Catledge's book, published in 1938, is notable for its sympathy toward Roosevelt's court-reorganization legislation. The moral of their book is that, although the proposed legislation may have been defeated, "A Switch in Time Saves Nine."<sup>57</sup> For Alsop and Catledge, the minimum wage and *Jones & Laughlin Steel* decisions of the Supreme Court resulted less from the President's court-packing plan than from the Court's bending to the political will of a newly and resoundingly reelected President.<sup>58</sup>

Pusey's work, on the other hand, which was supported by the American Bar Association and distributed to thousands of lawyers, is a bill of complaints against President Roosevelt. Pusey argues that an independent judiciary is the only institution that can protect the United States from a "dictatorial regime,"<sup>59</sup> and that the court-packing

<sup>51</sup> Letter from Felix Frankfurter to Harlan F. Stone (Mar. 30, 1937), in LIVA BAKER, FELIX FRANKFURTER 189-90 (1969).

<sup>52</sup> Letter from Louis D. Brandeis to Felix Frankfurter (Mar. 29, 1937), in "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 594 (Melvin I. Urofsky & David W. Levy eds., 1991) [hereinafter HALF BROTHER, HALF SON].

<sup>53</sup> Letter from Felix Frankfurter to Louis D. Brandeis, (Mar. 31, 1937), in HALF BROTHER, HALF SON, *supra* note 52, at 594 n.1.

<sup>54</sup> MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 272 (1982) (quoting Letter from Felix Frankfurter to Charles Wyzanski (Apr. 13, 1937)).

<sup>55</sup> ALSOP & CATLEDGE, *supra* note 11.

<sup>56</sup> MERLO J. PUSEY, THE SUPREME COURT CRISIS (1937).

<sup>57</sup> ALSOP & CATLEDGE, *supra* note 11, at 135.

<sup>58</sup> *See id.* at 20-21, 135-40.

<sup>59</sup> PUSEY, *supra* note 56, at 48.

plan was an attack on the Court's independence.<sup>60</sup> Because his work was published as an "instant history" in June 1937, however, Pusey was unable to construct a legal defense of the Supreme Court's *West Coast Hotel* and *Jones and Laughlin Steel* decisions. Instead, Pusey was left parroting the reasoning of Chief Justice Hughes's opinions.<sup>61</sup> Pusey concluded, with respect to the decision in *West Coast Hotel*, "[i]t is difficult to believe that their decision would have been different if the President had not asked power to pack the Court."<sup>62</sup> Pusey apparently was at a loss to explain the votes of Justice Roberts and Chief Justice Hughes in favor of the National Labor Relations Act.<sup>63</sup> "Were [Chief Justice Hughes and Justice Roberts] intimidated by the Administration's assault upon the Court? Did they adjust their convictions in the hope of saving the Court from the ignominy of being packed? These questions doubtless will never be answered."<sup>64</sup> One answer, however, was that to ask these questions reinforced the necessity of an independent judiciary. Pusey was unwilling to accept the conclusion that politics affected the Court's decisions, but he was nevertheless unable to provide constitutionally based reasons for the Court's change of mind.

## B.

Notwithstanding Pusey's opinions, for more than a decade and a half, most studies of the constitutional crisis of 1937 concluded that politics, in the form of FDR's reelection and his Court reorganization plan, caused the Court to alter its voting pattern. The historians Charles and Mary Beard ironically noted that the Court's decisions in *West Coast Hotel* and *Jones & Laughlin Steel* "[t]o mere laymen . . . looked like a reversal of opinion."<sup>65</sup> Before taking a seat on the Supreme Court, Robert H. Jackson authored *The Struggle for Judicial*

<sup>60</sup> See *id.* at 44-46.

<sup>61</sup> Pusey would later become Hughes's biographer. See MERLO J. PUSEY, CHARLES EVANS HUGHES (2 vols. 1951).

<sup>62</sup> PUSEY, *supra* note 56, at 51. Pusey based this conclusion solely on Hughes's statement that, unlike counsel for Elsie Parrish in *West Coast Hotel*, counsel for New York in *Morehead* asked only that the Court distinguish *Morehead* from *Adkins* rather than reconsider *Adkins*. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 389 (1937); PUSEY, *supra* note 56, at 49. This was disingenuous on Chief Justice Hughes's part, because counsel for New York in *Morehead* had asked for reconsideration of *Adkins* in its petition for certiorari, and counsel for Parrish had largely urged the Court to distinguish rather than overrule both *Adkins* and *Morehead*. See Appellee's Brief on the Law at 3-4, *West Coast Hotel* (No. 293), reprinted in 33 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 91 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

<sup>63</sup> See PUSEY, *supra* note 56, at 52-53.

<sup>64</sup> *Id.* at 53.

<sup>65</sup> 1 CHARLES A. BEARD & MARY R. BEARD, AMERICA IN MIDPASSAGE 359 (1939).

*Supremacy: A Study of a Crisis in American Power Politics*,<sup>66</sup> an examination of the crisis of 1937. He observed that “[the Justices of the Supreme Court] confessed legal error and saved themselves from political humiliation. They subdued the rebellion against their constitutional dogma by joining it.”<sup>67</sup> Max Lerner was slightly more equivocal. He explained in 1942 that “[t]here are some who maintain that Justices Hughes and Roberts had already made up their minds to retreat before the President announced his Court plan. We shall never know for certain what went on between the Justices during the Saturday sessions at which they discussed their coming decisions.”<sup>68</sup>

In the same year, Professor Benjamin F. Wright assayed the conclusion that the court-packing plan caused the “switch in time.”<sup>69</sup> The great political scientist Edward S. Corwin also concluded that politics rather than law had influenced the Court’s *West Coast Hotel* and *Jones & Laughlin Steel* decisions.<sup>70</sup> However, like Alsop and Cattlege, Corwin also believed that Roosevelt’s reelection was more responsible for the change of heart by Justices Hughes and Roberts than Roosevelt’s Court reorganization plan.<sup>71</sup> Carl Swisher concluded, “the feeling of the public, and probably of the bar as well, was that Justice Roberts had deemed it expedient to change his position because of the movement to reorganize the Court.”<sup>72</sup> Robert Stern wrote in the *Harvard Law Review* that the Court’s sudden reversal was not attributable “to anything inherent in the cases themselves,”<sup>73</sup> and argued that the consensus was that Justice Roberts and Chief Justice Hughes altered their votes to save the “independent” judiciary from legislative restructuring.<sup>74</sup>

In 1948, C. Herman Pritchett, amazed by the Court’s *West Coast Hotel* decision, declared that “the Court itself began to prove the truth of Mr. Dooley’s conclusion that that estimable body generally, if be-

<sup>66</sup> See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* at xviii (1941). Jackson was FDR’s Attorney General in 1940 and 1941 before his appointment to the Supreme Court, and in 1937, as Solicitor General, he ardently supported FDR’s court-packing plan.

<sup>67</sup> *Id.* at vi.

<sup>68</sup> Max Lerner, *The Great Constitutional War*, 18 VA. Q. REV. 530, 540 (1942).

<sup>69</sup> See BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 202 & n.3 (1942).

<sup>70</sup> See EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 73 (1941).

<sup>71</sup> *See id.*

<sup>72</sup> CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 946 (1943); *see also* CARL B. SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 225–27 (1946) (describing the assessment of the Court’s “switch in time” as a reaction to FDR’s court-reorganization plan).

<sup>73</sup> Robert L. Stern, *The Commerce Clause and the National Economy, 1933–46*, 59 HARV. L. REV. 645, 681 (1946).

<sup>74</sup> *See id.* at 682.

latedly, 'follows th' illiction returns.'"<sup>75</sup> Four years later, the constitutional historian and judicial biographer Alpheus T. Mason also concluded that politics had led to the reversal.<sup>76</sup> In 1953, Harvard-educated Australian lawyer and legal scholar Edward McWhinney wrote that Justice Roberts had "switch[ed]" in 1937.<sup>77</sup> Yet even as the political explanation of the Court's actions in 1937 became the standardized version of events, Felix Frankfurter privately laid the groundwork for a wholly different account of those events,<sup>78</sup> an account more in keeping with the post-World War II legal academy's faith in the principled, disinterested judge.

Against the predominant view, Pusey largely maintained a lonely vigil.<sup>79</sup> As the hand-picked<sup>80</sup> biographer of Chief Justice Hughes, he

<sup>75</sup> C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at 8-9 (1948).

<sup>76</sup> See Alpheus T. Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 *YALE L.J.* 791, 816 (1952); see also ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 627 (1946) (arguing that concern over proposals for reform of the federal judiciary prompted the Court to rule in favor of the administration in its 1937 decisions).

<sup>77</sup> Edward McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals*, 31 *CANADIAN B. REV.* 595, 613 (1953).

<sup>78</sup> After McWhinney's article was published, Justice Frankfurter wrote to Professor Paul Freund of the Harvard Law School, asking "Am I wrong in having the impression that Edward McWhinney is something of a protege of yours?" Letter from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (Oct. 18, 1953), *microformed on Felix Frankfurter Papers*, Harvard Law School Library, at Part III, Reel 15 (Univ. Publications of Am., Inc.) [hereinafter *Harvard Frankfurter Papers*]; *Felix Frankfurter Papers*, Library of Congress, at Container 56 (Library of Congress Manuscript Div.) [hereinafter *Library of Congress Frankfurter Papers*]. In this letter, as in the Roberts memorandum, Frankfurter only discusses the "switch" regarding the minimum wage cases. Frankfurter then first privately expressed to Freund part of the claim that he would make publicly less than three years later: "The fact is that Roberts did not switch. He was prepared in *Tipaldo* to make a majority overruling *Adkins*. He was not prepared to distinguish *Adkins*. Because there was no majority for overruling *Adkins* he was in the majority in the *Morehead* case on the basis of which *Morehead* was decided." *Id.* at 1. Frankfurter then quoted Hughes' remark in *West Coast Hotel* that the issue in the *Morehead* case was whether to distinguish rather than overrule *Adkins*. See *id.*

For a discussion of Freund's particular influence as a constitutional scholar, see pp. 659-62 below.

<sup>79</sup> Pusey was joined in part only by Samuel Hendel and Charles Curtis. Hendel's book was published shortly before Pusey's in 1951; Curtis's book was published in 1947. See CHARLES P. CURTIS, JR., *LIONS UNDER THE THRONE* 159, 174 (1947) (concluding that Justice Roberts "quite simply reverted to his former attitude in the *Nebbia* case three years before," but also concluding that some "shift" in Justice Roberts's positions took place in the minimum wage, *Jones & Laughlin Steel*, and *Social Security Cases*); SAMUEL HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* 252-53, 264-65 (1951) (conceding that in *West Coast Hotel* Chief Justice Hughes and Justice Roberts switched in part to defeat the court-packing plan, but arguing that Hughes's decision in *Jones & Laughlin Steel* was not a shift in position).

<sup>80</sup> Alpheus T. Mason was critical of Pusey's closeness to his biographical subject. See Alpheus T. Mason, *Charles Evans Hughes: An Appeal to the Bar of History*, 6 *VAND. L. REV.* 1, 18-19 (1952) ("Mr. Hughes repudiated autobiography as smacking of 'apologia'; he distrusted independent research as running the risk of 'misrepresentation.' Conscious of both these pitfalls,

argued that the Court had not switched in response to Roosevelt's plan. Regarding *West Coast Hotel*, Pusey quoted Hughes's *Biographical Notes*: "The President's proposal had not the slightest effect on our decision."<sup>81</sup> The questions Pusey found unanswerable in 1937 were answered in 1951. To deflect the charge that Justice Roberts "switched" his vote in the *Jones & Laughlin Steel* case, Pusey again quoted the *Biographical Notes*: "[A]s to Justice Roberts, I feel that I am able to say with definiteness that his view in favor of [the *Jones & Laughlin Steel* decision] would have been the same if the President's bill had never been proposed. The Court acted with complete independence."<sup>82</sup> Because there was nothing other than Chief Justice Hughes's bald assertions<sup>83</sup> to support the claim that the Court had not reacted to Roosevelt's plan, Pusey was alone in his vigil.

This changed with the publication of Justice Felix Frankfurter's tribute to the late Justice Owen Roberts.

#### IV.

Frankfurter when the Diaries resume in 1943 (the Diary for 1937 has not been recovered) . . . .

#### JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER<sup>84</sup>

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he chose his biographer and worked closely with him over a period of several years."). When Mason published his biography of Harlan Fiske Stone, Pusey criticized Mason's lack of "objectivity" in assessing the Hughes Court. See Merlo J. Pusey, *A Great Man of the Law Portrayed: In a New Life of Chief Justice Stone a Chapter of American History Unrolls*, N.Y. TIMES, Nov. 11, 1956, § 7, at 1 (reviewing ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956)).

<sup>81</sup> 2 PUSEY, *supra* note 61, at 757 (quoting Charles E. Hughes, *Biographical Notes*, ch. XXIII, at 31); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 312 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter AUTOBIOGRAPHICAL NOTES OF HUGHES]. Chief Justice Hughes's *Biographical Notes* were published in 1973. See AUTOBIOGRAPHICAL NOTES OF HUGHES, *supra*.

<sup>82</sup> AUTOBIOGRAPHICAL NOTES OF HUGHES, *supra* note 81, at 313; 2 PUSEY, *supra* note 61, at 768 (quoting Charles E. Hughes, *Biographical Notes*, ch. XXIII, at 33).

<sup>83</sup> In a 1983 article, Pusey wrote that he had "confidential[ly]" interviewed Justice Roberts on May 31, 1946, at which time Justice Roberts convinced him that "his chief objective at that time had been to avoid making a decision on the vital issue of state minimum-wage legislation against the background of New York's disingenuous arguments." Merlo J. Pusey, *Justice Roberts' 1937 Turnaround*, 1983 Y.B. SUP. CT. HIST. SOC'Y 102, 106. Probably because the interview was confidential, Pusey did not cite this interview in his Hughes biography, but it may be considered additional, albeit biased, evidence for his conclusions. Pusey apparently did not ask Roberts to explain his votes in *Jones & Laughlin Steel* and the *Social Security Cases*. In the same article, Pusey also noted that Justice Roberts's "initial, semifacetious reply" to Pusey's question about a shift was: "Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it." *Id.*

<sup>84</sup> JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 141 (1975).



In the December 1955<sup>85</sup> issue of the *University of Pennsylvania Law Review*, Justice Frankfurter wrote a seven-page tribute to his former colleague, Justice Roberts.<sup>86</sup> Frankfurter's tribute had two purposes: first, to honor a former colleague, and second, to tell "[t]he truth about the so-called 'switch' of Roberts in connection with the *Minimum Wage* cases . . . ."<sup>87</sup> Frankfurter accomplished his first purpose in little more than two pages; the remainder of the tribute consisted of his attempt to resolve the second issue.

#### A.

"It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations," began Frankfurter's defense.<sup>88</sup> Frankfurter took special offense when prominent politicians and academic scholars repeatedly claimed that Justice Roberts's votes changed as a result of Roosevelt's Court reorganization plan. This charge was false, and Frankfurter was going to refute it with "indisputable facts."<sup>89</sup> What were these indisputable facts?

Frankfurter made three arguments to refute this charge. First, timing was everything. To understand Justice Roberts's votes, a crit-

<sup>85</sup> The correspondence between Justice Frankfurter and the editors of the *University of Pennsylvania Law Review* indicates that the issue was actually published in late January or early February of 1956. See Library of Congress Frankfurter Papers, *supra* note 78, at Container 181.

<sup>86</sup> See Frankfurter, *supra* note 10. Roberts, a graduate of the University of Pennsylvania Law School, was a prominent lawyer in Philadelphia. See Erwin R. Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332, 332-33 (1955). He gained national attention for his work as special counsel investigating the Teapot Dome scandal. See *id.* In 1930, President Hoover appointed him to the Court. After resigning from the Court at age seventy in 1945, Roberts returned to private practice and a life as a gentleman farmer. He became Dean of the University of Pennsylvania Law School in 1948. See *id.* at 349. The sole published biography of Roberts is CHARLES A. LEONARD, *A SEARCH FOR A JUDICIAL PHILOSOPHY* (1971).

Justice Roberts died on May 17, 1955, a year to the day after *Brown* was decided, and two weeks before the remedy in *Brown* was handed down. In a 1944 letter, Roberts made Frankfurter his "judicial executor." See Letter from Justice Owen J. Roberts to Justice Felix Frankfurter (Oct. 12, 1944), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3. Roberts's purpose in making Frankfurter his judicial executor was apparently to halt any "joint expression" from the Court and any "memorial ceremony." It does not appear to have been Frankfurter's "duty" to protect Roberts's reputation as a jurist after Roberts's death, and there is no mention in this letter of any explanation by Roberts of his actions in 1937.

<sup>87</sup> Frankfurter, *supra* note 10, at 314.

<sup>88</sup> *Id.* at 313. In the next sentence, Frankfurter noted an unnamed Senator's allusion to "the famous switch of Mr. Justice Roberts." *Id.* Frankfurter was referring to Senator Paul Douglas, whose statement appeared in the April 13, 1955 issue of the Congressional Record. See Clipping of April 13, 1955 Congressional Record (84th Cong., 1st Sess., at 363), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3.

<sup>89</sup> Frankfurter, *supra* note 10, at 313.

ical investigator needed to look at the interstices of the United States Reports. On November 23, 1936, two and one-half months before Roosevelt's Court plan was publicly announced, an evenly divided Supreme Court affirmed a New York Court of Appeals decision that had upheld the constitutionality of the New York Unemployment Insurance Law.<sup>90</sup> Because Justice Stone was ill and thus absent from the bench at that time, the fourth vote for to sustain the act must have come from Justice Roberts.<sup>91</sup> Because "[t]he constitutional outlook represented by [that case] would reflect the attitude of a Justice towards the issues involved in the *Adkins* case,"<sup>92</sup> Justice Roberts's vote on this date foreshadowed his vote in *West Coast Hotel v. Parrish*. Looking *only* at the United States Reports, therefore, it was apparent to any scholar of the Court that Justice Roberts's decision in *West Coast Hotel* was not influenced by Roosevelt's court-reorganization legislation.<sup>93</sup>

<sup>90</sup> See *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515, 515 (1936) (per curiam).

<sup>91</sup> See Frankfurter, *supra* note 10, at 316.

<sup>92</sup> *Id.*

<sup>93</sup> The timing argument was unavailable with respect to *Jones & Laughlin Steel* and the *Social Security Cases*, because the votes in those cases took place after FDR's announcement of his Court reorganization plan. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), was argued on February 10-11, 1937; the *Social Security Cases*, *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 549 (1937); and *Helvering v. Davis*, 301 U.S. 619 (1937), were argued on April 8-9 and May 5 of that year.

A similar timing argument regarding *West Coast Hotel* was made by then-Dean of Harvard Law School, Erwin Griswold, in his tribute to Roberts in the same issue of the *University of Pennsylvania Law Review*. See Griswold, *supra* note 86, at 341-42. Dean Griswold wrote:

The story is written quite clearly in the public record, but there has been much misunderstanding about it, and it is widely said that Roberts, frightened by the President's Court-packing plan, flopped over from a vote against minimum wage legislation in 1936 to one in favor of such statutes in 1937. No one could say this with any understanding of Roberts.

*Id.* at 340.

Griswold's tribute had its own effect. In a 1991 review of Griswold's memoirs, the estimable federal courts scholar Charles Alan Wright wrote:

The article [Griswold's tribute to Roberts] is completely convincing that neither the Court-packing plan nor the outcome of the 1936 election played a part in Roberts's vote to strike down a New York minimum wage statute in *Morehead* . . . and to uphold a Washington statute in *West Coast Hotel Co. v. Parrish* . . . .

Charles A. Wright, "A Man May Live Greatly in the Law", 70 TEX. L. REV. 505, 516 n.78 (1991) (citations omitted) (reviewing ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER (1992)).

For his part, Dean Griswold's "public record" is the declaration that Justice Roberts voted with the majority in *Morehead* because counsel for New York did not request overruling *Adkins*, and the statutes were not distinguishable. Although not cited by Griswold, Pusey had previously made this assertion publicly in his biography of Hughes. See 2 PUSEY, *supra* note 61, at 700-01. Pusey's biography is, however, cited by Griswold elsewhere in his tribute. See Griswold, *supra* note 86, at 343. In response to my request, Dean Griswold wrote that he does not recall ever speaking to Justice Roberts about his votes in *Morehead* and *West Coast Hotel* and that a thorough knowledge of Justice Roberts and the beginning of the *Morehead* opinion (which

Second, Frankfurter cited Justice Roberts's majority opinion in the 1934 case of *Nebbia v. New York*<sup>94</sup> as evidence that Justice Roberts opposed the "constitutional philosophy" of the four dissenters in *West Coast Hotel*.<sup>95</sup> In Frankfurter's view, Justice Roberts's opinion in *Nebbia* "undermined the foundations of *Adkins*"<sup>96</sup> and allowed Chief Justice Hughes to rely "heavily" on *Nebbia* in writing the majority's opinion in *West Coast Hotel*.<sup>97</sup> Frankfurter suggests that the reader can deduce the outcome in *West Coast Hotel* from *Nebbia*'s logic; under this reasoning, Justice Roberts's *Nebbia* opinion refutes any notion that Justice Roberts "switched" in *West Coast Hotel*.

Frankfurter's final and most important argument for Justice Roberts's principled decisionmaking, however, was found in a memorandum given to Frankfurter by Roberts, and made public for the first time in the tribute.<sup>98</sup> Roberts prepared this memorandum at Frank-

insisted that the petition for certiorari asked to distinguish *Adkins*, not assess its constitutionality) makes it obvious that this was the price of Justice Roberts's vote. See Letter from Erwin N. Griswold, former Dean, Harvard Law School, to Michael Ariens, Professor (Mar. 10, 1993) (on file at the Harvard Law School Library). But the majority's opinion in *Morehead* went well beyond the confines of its first sentence, and nothing in the public record indicates that Justice Roberts disagreed with any part of the *Morehead* opinion. Additionally, New York counsel did request that the Court consider overruling *Adkins*. See *infra* note 105. With all deference, I am not convinced by Dean Griswold's explanation of Justice Roberts's views, especially because Griswold concludes his letter to me by citing Frankfurter's tribute as further evidence. See Letter from Erwin N. Griswold to Michael Ariens, *supra*.

The editors of the *University of Pennsylvania Law Review*, however, made special mention of the fact that Griswold's tribute exonerating Roberts was written without knowledge of the Frankfurter tribute. See Griswold, *supra* note 86, at 340 n.\*. However, Frankfurter may have been aware of Griswold's tribute before he penned his own tribute to Roberts. A November 28, 1955 letter from Curtis Reitz to Frankfurter notes that all but Frankfurter's "introductory remarks and Mr. Justice Roberts' own memorandum" had been received and edited for publication. The letter then goes on to state, "I am somewhat apprehensive that further editing may be required in order to avoid any unintentional impression that may arise from Dean Griswold's treatment of the criticism that Roberts 'switched' votes under political pressure." Letter from Curtis R. Reitz, Editor, *University of Pennsylvania Law Review*, to Justice Felix Frankfurter (Nov. 28, 1955), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 181. Frankfurter responded on November 30, 1955, by writing, "Your reference to Dean Griswold's treatment of the 'switching' judge naturally interests me. Do you suppose you could let me see what Dean Griswold has written? It might save you further editing." Letter from Justice Felix Frankfurter to Curtis R. Reitz, Editor, *University of Pennsylvania Law Review* (Nov. 30, 1955), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 181. I have been unable to locate any response to this request in the Frankfurter Papers.

<sup>94</sup> 291 U.S. 502 (1934). Because this case was decided by a vote of 5-4, Justice Roberts's affirmative vote was decisive.

<sup>95</sup> See Frankfurter, *supra* note 10, at 316-17.

<sup>96</sup> *Id.* at 317.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 314 n.\*. In his interview with Merlo Pusey on May 31, 1946, Justice Roberts apparently made no mention of having given Justice Frankfurter six months previously any memorandum concerning his decision in *West Coast Hotel*. See Pusey, *supra* note 83, at 106-07.

furter's request, which, according to Frankfurter, "took not a little persuasion."<sup>99</sup> Frankfurter stated that Roberts gave him the memorandum on November 9, 1945, after Roberts had resigned from the Court.<sup>100</sup> For Frankfurter, Roberts's memorandum confirmed the "independent" timing defense of Roberts's vote in *West Coast Hotel*. Roberts's memorandum gave the following account: during the week of October 5, 1936, Justice Roberts voted to grant certiorari in *West Coast Hotel*, and shortly after the case was argued on December 16 and 17, 1936, Justice Roberts voted to affirm the lower court's decision and uphold the constitutionality of Washington's minimum wage statute. As Justice Stone was ill and not voting, the Court held over the case until his return, because a decision by an evenly divided Court was thought an "unfortunate outcome."<sup>101</sup> When the case was again taken up on February 6, 1937, Justice Stone's vote to affirm broke the tie, and the opinion was then assigned by Chief Justice Hughes to himself. It was announced on March 29, 1937.<sup>102</sup>

One difficulty with both the timing and the *Nebbia* defenses of Justice Roberts's "switch" is that neither sufficiently explains why Justice Roberts voted to hold a state minimum wage statute unconstitutional in *Morehead* in May 1936 and voted to hold a nearly identical statute constitutional ten months later in *West Coast Hotel*. The statements in Roberts's memorandum have become the standard revised version of the reasons "synthesizing" the differing decisions: because counsel for the state of New York in *Morehead* asked only that the Court distinguish<sup>103</sup> the *Adkins*<sup>104</sup> precedent, and not overrule it, Justice Roberts felt compelled to follow *Adkins*. Simply put, it was the fault of timid and disingenuous counsel for the state of New York, who failed to urge the overruling of *Adkins*.<sup>105</sup> As the memo-

<sup>99</sup> Frankfurter, *supra* note 10, at 314.

<sup>100</sup> *See id.* at 314 n.\*.

<sup>101</sup> *Id.* at 315.

<sup>102</sup> *See id.* at 314-15.

<sup>103</sup> Ironically, it was Frankfurter and Ben Cohen who strongly urged that the statute at issue in *Morehead* be drafted in such a way that it would be distinguishable from the *Adkins* precedent. *See LASH, supra* note 36, at 15-16, 47-50.

<sup>104</sup> *Adkins* held that a District of Columbia law that mandated a minimum wage violated the Due Process Clause of the Fifth Amendment. *See Adkins v. Children's Hosp.*, 261 U.S. 525, 559 (1923). Arguing on behalf of the constitutionality of the law was then-Professor Felix Frankfurter. Justice Brandeis did not participate in the decision because his daughter Elizabeth was the secretary of the District of Columbia wage board. *See LASH, supra* note 36, at 38.

<sup>105</sup> Merlo Pusey made this argument in 1951 in his biography of Charles Evans Hughes. Without citing any source, Pusey wrote: "The time was ripe for a bold assault upon *Adkins v. Children's Hospital*. But counsel for New York missed his opportunity. Meekly accepting the *Adkins* ruling, he asked the court only to differentiate the two statutes. Roberts thought that reasoning was disingenuous and voted with the conservatives." 2 PUSEY, *supra* note 61, at 701; *see also* Pusey, *supra* note 83, at 106 (stating that Roberts convinced him that "his chief objective at that time had been to avoid making a decision on the vital issue of state minimum-wage

randum noted, Justice Roberts had told his brethren, when the petition for certiorari in *Morehead* was discussed in conference, that he intended to follow precedent because New York did not urge overruling in *Adkins*.

When the Court met in October 1936 to consider whether to grant certiorari to cases filed with the Court over the summer, the Roberts memorandum states that four members of the majority in *Morehead* "voted to dismiss the appeal in the *Parrish* case."<sup>106</sup> The memorandum also states that Roberts voted to note probable jurisdiction, although "I am not sure that I gave my reason."<sup>107</sup> Because "the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it," Roberts wrote, "for the first time, I was confronted with the necessity of facing the soundness of the *Adkins* case."<sup>108</sup> Although Roberts confessed error in not separately

legislation against the background of New York's disingenuous arguments"). Frankfurter was aware of the argument that New York counsel was disingenuous, because he reviewed the Hughes biography for the *New York Times* and, as his papers indicate, he underlined in his own review copy the second sentence quoted above. See Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 39.

But in 1938, Frankfurter destroyed this argument:

An examination of the contents of the petition for certiorari affords a conclusive answer to the views of the majority. It shows that the petitioner took the broad position that the statute was constitutional irrespective of anything decided in the *Adkins* case. And such statements as the sixth reason relied upon for the allowance of the writ, that "The circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in light of the New York Act and conditions deemed to be remedied thereby," raised the argumentative claim that the *Adkins* case should no longer be followed, expressed as euphemistically as the tactful language of advocacy would naturally convey it.

Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 634 n.127 (1938). Fisher later became Justice Frankfurter's first Supreme Court law clerk.

<sup>106</sup> Frankfurter, *supra* note 10, at 315.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* Roberts's claim seems suspect, however, even at first blush. In his 1938 article, Frankfurter himself suggested that these "technical barriers of appellate practice" to considering the constitutionality of state minimum wage acts in *Morehead* were inapposite. With respect to Justice Roberts, left unnamed in this article, Frankfurter wrote:

That a Justice who found technical barriers of appellate practice against even considering whether the specific objections to minimum wage legislation made by the *Adkins* case had been met by a later statute should, within less than a year, make the majority necessary for overruling the *Adkins* case, cannot have many parallels in the history of the Supreme Court. But, within less than a year, the *Adkins* case was overruled.

Frankfurter & Fisher, *supra* note 105, at 635-36.

Furthermore, Professor Richard Friedman informed me that, as of October 12, 1936, the Court possessed only the jurisdictional statement of West Coast Hotel, the petitioner. When the petition was granted, no papers from either Parrish's counsel or the State of Washington requesting that *Adkins* or *Morehead* be overruled were before the Court. See Amended Statement as to Jurisdiction at 13-14, *West Coast Hotel* (No. 293), reprinted in 33 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 62, at 90-91. Interestingly, the memorandum itself seems to acknowledge that Justice Roberts could not have known that the authority of *Adkins* was being

concurring the previous year in the *Morehead* case,<sup>109</sup> he concluded that "[t]hese facts make it evident that no action taken by the President in the interim had any causal relation to my action in the *Parrish* case."<sup>110</sup>

And there you have it.

### B.

The problem, of course, is that Justice Frankfurter does not deliver the promised "indisputable facts," whether by looking at the interstices of the United States Reports, by citing Roberts's opinion in *Nebbia*, or by making public Roberts's memorandum. Viewed critically,<sup>111</sup> Justice Frankfurter's revisionist history raises more questions than it answers. These facts do not lead to the conclusion that in the spring

assailed when he voted to hear the case. See Frankfurter, *supra* note 10, at 315 ("During the conferences [from October 5, 1937 to October 10, 1937] the jurisdictional statement in the *Parrish* case was considered . . .").

<sup>109</sup> See Frankfurter, *supra* note 10, at 314-15. Justice Roberts's memorandum suggests that his decision to make a majority in *Morehead*, and thus hold the New York law unconstitutional, was based completely on precedent. In response to a circulated dissent, Justice Butler's revised draft of the majority opinion in *Morehead* rested on more than the precedent in *Adkins* and sought to sustain *Adkins* in principle. See Frankfurter, *supra* note 10, at 314-15. Thus, in hindsight, Justice Roberts believed he should have concurred separately. See *id.* at 315. Charles Curtis made a similar argument, suggesting that the vote in *West Coast Hotel* was probably taken shortly after oral argument in mid-December and before the President's announcement. If this is true, he writes, "the [court-packing] plan had nothing to do with the decision." CURTIS, *supra* note 79, at 161. But cf. Frankfurter & Fisher, *supra* note 105, at 634-36 & n.127 (noting with barely controlled fury that the sixth reason given by the petitioner in *Morehead* for granting the writ was to reconsider the holding in *Adkins*).

<sup>110</sup> Frankfurter, *supra* note 10, at 315. Interestingly, Justice Roberts's language in this memorandum mimics the language used by Chief Justice Hughes in his *Biographical Notes*. See AUTOBIOGRAPHICAL NOTES OF HUGHES, *supra* note 81, at 312. This mimicry is especially interesting because Justice Frankfurter's handwritten comments in his copy of the Pusey biography also note Roberts's failure to state his reasons for voting in *Morehead* as he did. See MERLO J. PUSEY, CHARLES EVANS HUGHES (1951) (Frankfurter's personal copy), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 39 ("He shouldn't have suppressed his own views by silence.").

<sup>111</sup> An insightful evaluation of the Roberts memorandum is found in BOBBITT, cited above in note 11, at 39-40. A less helpful analysis is David Burner, *Owen J. Roberts, in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 2253, 2261-62 (Leon Friedman ed., 1980), in which the author misleadingly states that "Justice [Roberts] remembered having been quite prepared to overrule *Adkins* outright . . ." *Id.* at 2261. The memorandum reads: "I said I saw no reason to grant the writ [in *Morehead*] unless the Court were prepared to re-examine and overrule the *Adkins* case." Frankfurter, *supra* note 10, at 314. Thus, Roberts does not say he was ready to overrule *Adkins*, but uses the more lawyerly construction that he believed the Court should not hear the case unless it was prepared to overrule *Adkins*. Because in Roberts's view the petition for certiorari urged the Court to distinguish the statute in *Adkins* from the statute in *Morehead*, he may have been implying that *Adkins* should not be disturbed.

of 1936 Roberts was "prepared to overrule the *Adkins* decision."<sup>112</sup> Aside from the memorandum, Frankfurter offered little evidence that was not available in 1937, when Frankfurter himself was among the most fervent of those who believed that Roberts had "switched" for political reasons.

1. — One reason the timing defense fails is that all of Roberts's crucial votes occurred after the overwhelming reelection of Roosevelt. *W.H.H. Chamberlin, Inc. v. Andrews* was decided on November 23, 1936, and the date of the initial vote in *West Coast Hotel* was December 19, 1936.<sup>113</sup> Also damaging to the timing defense is the fact that the Court denied New York's petition to rehear *Morehead* on October 12, 1936, the same day the Court announced that certiorari was granted in *West Coast Hotel*.<sup>114</sup>

Instead of vindicating Roberts, the timing defense suggests (but doesn't prove) the opposite: because the Washington Supreme Court had upheld the constitutionality of its state minimum wage statute, Roberts's vote to grant certiorari in *West Coast Hotel* and his vote to deny rehearing in *Morehead* seemed to foreshadow, before the election, another decision that would strike down a state minimum wage law. The possibility that Roberts's vote to grant certiorari in *West Coast Hotel* might be so understood seems more plausible given the two misstatements in the memorandum:<sup>115</sup> first, because *West Coast Hotel*'s jurisdictional statement was the only document before the Court as of October 10, 1936, the constitutionality of the holding in *Adkins* could not have been assailed before the petition was granted; and second, the question at conference was not whether to *dismiss* the case based on the *Adkins* and *Morehead* precedents, but whether to *reverse* it. As Frankfurter acknowledges in a footnote to his tribute,

<sup>112</sup> Frankfurter, *supra* note 10, at 314.

<sup>113</sup> Perhaps even more importantly, the second vote in *West Coast Hotel* was taken on February 6, 1937, one day after FDR's announcement of his bill to reorganize the federal courts. The opinion was not issued until March 29, 1937. *See id.* at 315. Although the claim was that Justice Roberts's initial vote in *West Coast Hotel* occurred before the announcement of the plan, FDR's announcement almost certainly had a significant effect on the opinion ultimately written by Chief Justice Hughes for the majority.

<sup>114</sup> In the spring of 1937, Frankfurter was well aware of this counterargument, having made it himself. *See* Letter from Felix Frankfurter to Harlan F. Stone, *supra* note 51, at 189-90 ("Roberts' somersault [is] incapable of being attributed to a single factor relevant to the professed judicial process. Everything that he now subscribes to he rejected not only on June first last, but as late as October twelfth when New York's petition for a rehearing was denied."). By 1955, only the interstice of the Reports noting the Court's order in *Chamberlin* was important.

<sup>115</sup> *See* Frankfurter, *supra* note 10, at 315. As Professor Bobbitt notes, "since the Washington Supreme Court had sustained the minimum wage statute, Roberts's vote to note probable jurisdiction would appear to have an opposite import to the one he remembered." BOBBITT, *supra* note 11, at 40. At the end of the memorandum, the manner in which *West Coast Hotel* came before the Court is accurately remembered. *See* Frankfurter, *supra* note 10, at 315.

because the Washington Supreme Court had upheld the constitutionality of the act, "[e]vidently [Roberts] meant [*West Coast Hotel*] should be reversed summarily . . . ."<sup>116</sup>

2. — *West Coast Hotel* radically narrowed the Court's role in assessing state economic regulation against due process constraints. It also overruled *Morehead*, a case decided only ten months previously. Because Justice Roberts joined the majority in both cases but wrote an opinion in neither, Justice Frankfurter sought evidence of Roberts's principled acceptance of this new "standard of review" in his other opinions. The most logical choice was Roberts's majority opinion in *Nebbia v. New York*,<sup>117</sup> which Justice Frankfurter relied on for his second argument for the revised history.

Roberts's vote was necessary for a majority in *Nebbia*, and Justice Frankfurter used the *Nebbia* opinion as evidence of a change in Roberts's "judicial philosophy" well before FDR announced his court-reorganization plan. But to defend Justice Roberts's vote in *West Coast Hotel* by citing his opinion three years earlier in *Nebbia* is terribly misleading. Even Hughes did not think that *Nebbia* announced a change in judicial philosophy. As Pusey notes, "*Nebbia v. New York* is sometimes said to reflect a sharp breaking away from the doctrine of the Oklahoma ice case. Chief Justice Hughes did not so regard it."<sup>118</sup> More importantly, to accept *Nebbia* as the crucial substantive due process case requires one to ignore both Roberts's language in *Nebbia* and the events of the intervening years.

The *Nebbia* opinion looked both forward and backward. It looked forward by dispensing with labels or catch-phrases to decide the case.<sup>119</sup> It looked backward, however, by reaffirming the Court's authority substantively to review state economic legislation through the Due Process Clause.<sup>120</sup> The Court held in *Nebbia* that a New York law creating a Milk Control Board with the power to fix the minimum and maximum price of milk did not violate the Due Process

<sup>116</sup> Frankfurter, *supra* note 10, at 315 n.\* (emphasis added). Curiously, in the Felix Frankfurter Papers, it is clear from a review of several drafts of the tribute that this footnote was added after the initial drafting of the tribute. See Felix Frankfurter, undated draft of *Mr. Justice Roberts, microformed on Library of Congress Frankfurter Papers, supra* note 78, at Container 181, at 7.

<sup>117</sup> 291 U.S. 502 (1934).

<sup>118</sup> 2 PUSEY, *supra* note 61, at 700. In his Holmes Lectures, Judge Learned Hand agreed with Chief Justice Hughes. "The decision of a bare majority in 1934 that a state may fix the price of milk was taken by some people as a *coup de grace* of the old doctrine, though it really should not have been so taken . . ." LEARNED HAND, *THE BILL OF RIGHTS* 43 (1958) (footnote omitted).

<sup>119</sup> See *Nebbia*, 291 U.S. at 536 (asserting that due process decisions must rest on the circumstances of each case, rather than on whether a business is "affected with a public interest" or "clothed with a public use").

<sup>120</sup> See *id.* at 539 (holding that price control "is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt").



Clause.<sup>121</sup> While upholding New York's action, however, Justice Roberts repeatedly emphasized, at no fewer than six places in his opinion, the constitutional boundaries on state laws that regulate business: The law can be neither "arbitrary" nor "unreasonable."<sup>122</sup> Determining whether the regulation is reasonable "depends upon the relevant facts."<sup>123</sup> Justice Roberts attempted at length to explain why the New York law was reasonable, and thus constitutional. The striking element of Roberts's opinion in *Nebbia* is not its holding, then, but its reaffirmation of the Court's role. Important constitutional limitations on state action that regulates economic relations remain that the Court must police. But although Justice Roberts's opinion was "modern" in the sense that it discarded the "affected with a public interest" doctrine, the opinion also made it clear that the Court's role in deciding economic substantive due process cases had been altered only in degree, not in kind. The result is that Justice Roberts's opinion in *Nebbia* is strikingly different in both force and tone from Chief Justice Hughes's language in *West Coast Hotel*, in which he wrote that "[t]he adoption of [minimum wage laws] by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide."<sup>124</sup> It is the conclusory statements in *West Coast Hotel*, and not Roberts's opinion in *Nebbia*, that indicate the real change in judicial role.

Indications of a shift in 1934 were premature. Cases decided after *Nebbia* and before *West Coast Hotel* show that demanding substantive review remained the norm in cases involving socioeconomic legislation. *Morehead*, the next substantive due process case after *Nebbia*, was also the only substantive due process case that the Court decided between 1934 and 1937. In *Morehead*, Justice Roberts voted to strike down the minimum wage law.<sup>125</sup> Further, the Court's decision in

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<sup>121</sup> See *id.*

<sup>122</sup> *Id.* at 521, 525, 530, 536, 537, 539.

<sup>123</sup> *Id.* at 525.

<sup>124</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

<sup>125</sup> The *Morehead* dissenters cited *Nebbia* as precedent for their position, see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 625 (1936) (Hughes, C.J., dissenting), but Roberts apparently was able to reconcile the "judicial philosophy" behind the two cases. That *Nebbia* did not indicate a change in philosophical position by Roberts may be reflected in *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936), decided one week before *Morehead*. The federal statute at issue in *Ashton* was originally passed in 1934 to aid a large number of debt-stricken local governmental entities. See *id.* at 527. Justice Roberts joined Justice McReynolds's majority opinion, which concluded that Congress's power to establish uniform laws on bankruptcy did not extend to including bankruptcy protections to a political subdivision of a state. See *id.* at 527, 530. Justice McReynolds reached this conclusion because he believed that any other conclusion would violate the principles of federalism, even though state consent was necessary for the subdivision to utilize the bankruptcy law. See *id.* at 531.

*Nebbia* did not resolve all of the legal questions about the constitutionality of the New York law. One year after *Nebbia* was decided, a unanimous Court gutted the statute upheld in *Nebbia* by concluding that its application to interstate sales of milk violated the Commerce Clause.<sup>126</sup>

During the October 1935 Term, the Supreme Court decided two more cases involving the constitutionality of the amended New York Milk Control Act. Justice Roberts wrote both decisions.<sup>127</sup> In both cases, milk producers claimed that the amended Act violated the Equal Protection Clause. In the first case, *Borden's Farm Products Co. v. Ten Eyck*,<sup>128</sup> Justice Roberts concluded that the State's decision to permit the sale of unadvertised milk for up to one cent per quart less than the price of advertised milk did not violate the Equal Protection Clause as applied to dealers, such as Borden's, that had a well-advertised trade name.<sup>129</sup> Justices Van Devanter, McReynolds, Sutherland, and Butler dissented.<sup>130</sup> Shortly after announcing the *Borden's Farm* decision, Justice Roberts announced the Court's decision in *Mayflower Farms, Inc. v. Ten Eyck*.<sup>131</sup> The Court held that another provision of the amended Milk Control Act, which prohibited unadvertised dealers who began selling milk after the date of the original Milk Control Act from receiving the price differential benefit upheld in *Borden's Farm*, was arbitrary and unreasonable and thus violated the Equal Protection Clause.<sup>132</sup> This time, Justice Cardozo dissented, joined by Justices Brandeis and Stone.<sup>133</sup>

Roberts's opinions in these two cases suggest that *Nebbia* did not signal a change in his view of the Court's role in assessing economic legislation challenged on the basis of the Fourteenth Amendment.

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In a rare occurrence, possibly foreshadowing *Morehead*, Chief Justice Hughes joined the dissenting opinion of Justice Cardozo.

<sup>126</sup> See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935).

<sup>127</sup> See *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 270-74 (1936); *Borden's Farm Prod. Co. v. Ten Eyck*, 297 U.S. 251, 256-64 (1936). The Supreme Court had also twice visited the milk-control law after deciding *Nebbia* and before deciding these two cases. See *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 203-13 (1934) (holding that a complaint that alleged a violation of the Due Process and Equal Protection Clauses stated a cause of action and remanding for findings of fact and conclusions of law); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 168-72 (1934) (holding unanimously that a bill of complaint requesting an injunction against enforcement of the act failed to state a cause of action). In *Borden's Farm v. Baldwin*, Roberts voted with the majority. Concurring in the result were Justices Stone and Cardozo.

<sup>128</sup> 297 U.S. 251 (1936).

<sup>129</sup> See *id.* at 261.

<sup>130</sup> See *id.* at 264-65 (McReynolds, J., dissenting).

<sup>131</sup> 297 U.S. 266 (1936).

<sup>132</sup> See *id.* at 274.

<sup>133</sup> See *id.* at 274-78 (Cardozo, J., dissenting).

*Mayflower Farms* evidences Justice Roberts's continued willingness in early 1936 to use the constitutional boundaries reiterated in *Nebbia* to strike down state economic legislation. In *Mayflower Farms*, as in *Nebbia*, the judge's role was to determine whether the regulation was "arbitrary" or "unreasonable" after properly weighing the relevant facts and circumstances in the case before him.<sup>134</sup> Justice Roberts was able to distinguish the *Borden's Farm* and *Mayflower Farms* cases because, as he had written in *Nebbia*, "a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."<sup>135</sup> Only two years before *Nebbia*, in *New State Ice Co. v. Liebmann*,<sup>136</sup> the Supreme Court, in an opinion joined by Justice Roberts, had held unconstitutional an Oklahoma statute regulating entry into the ice-making and selling business upon a showing of business necessity.<sup>137</sup> *Nebbia* was the only substantive due process case decided after *New State Ice* and before *Morehead*. *Nebbia* did not mark a turn in the Court's economic substantive due process cases; one can more easily draw a line connecting *New State Ice* and *Morehead* than connecting *Nebbia* and *West Coast Hotel*.

3. — Frankfurter's last piece of evidence, the Roberts memorandum, proved crucial in providing support for the revisionist history. Not only did this document reveal the previously private deliberations of Roberts, but it also bolstered the timing defense and allowed Frankfurter to argue that Roberts's change in "judicial philosophy" came before the announcement of FDR's court-packing plan.

The relevance of the proof found in the memorandum, however, is difficult to determine. First, I have several reservations concerning the existence of this memorandum. This exculpatory memorandum seems out of place given Roberts's self-effacing character,<sup>138</sup> particu-

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<sup>134</sup> See *id.* at 272; *Nebbia v. New York*, 291 U.S. 502, 525 (1934); see also Letter from Owen J. Roberts to Felix Frankfurter (May 20, 1930), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3 ("It seems to me that in every case, when all of the facts and circumstances are clearly understood and properly weighed, there is a position that must be eternally right.").

<sup>135</sup> *Nebbia*, 291 U.S. at 525.

<sup>136</sup> 285 U.S. 262 (1932).

<sup>137</sup> See *id.* at 278. In *New State Ice*, Chief Justice Hughes and Justice Roberts joined Justices Van Devanter, McReynolds, Sutherland, and Butler in the majority. Justice Brandeis, joined by Justice Stone, dissented. Justice Cardozo did not vote in the case. See also *Heiner v. Donnan*, 285 U.S. 312, 322 (1932) (holding violative of the Due Process Clause of the Fifth Amendment a federal tax provision declaring gifts made within two years of donor's death as made in contemplation of death). The decision in *Heiner* was announced on the same day as *New State Ice*, and the vote was identical.

<sup>138</sup> See Frankfurter, *supra* note 10, at 312 ("Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo" (quoting Roberts)).

larly given his attempt, in his "judicial executor" letter to Frankfurter, to avoid any encomiums or justifications of his work as a Supreme Court Justice.<sup>139</sup> It also seems odd that the memorandum would have been "given" to Frankfurter by Roberts on November 9, 1945, three months after he had resigned and returned to Pennsylvania.<sup>140</sup> The accuracy of this date seems even more implausible given that the Supreme Court was in session. Further, the Court's inability to agree on the contents of a letter that would recognize Roberts's service, and Roberts's disgust with some members of the Court, make it unlikely that Roberts would have traveled to the Court from Pennsylvania to "give" Frankfurter this memorandum.<sup>141</sup> Furthermore, Roberts's cor-

<sup>139</sup> I realize that this argument, based on my evaluation of Roberts's character, is the flipside of the argument made by Griswold. See Griswold, *supra* note 86, at 347-49. Clearly, Roberts wanted nothing to do with memorial tributes. In addition to his "judicial executor" letter of 1944, see *supra* note 86, Roberts wrote Frankfurter in November 1947 the following on the back of an invitation to a memorial tribute to McReynolds:

Think of the lying and hypocrisy [sic] that will be exhibited! I think I shall have nausea from 11 to 4 on November 12th. I once reposed a trust in you [sic] I do not say you betrayed that trust. I do say that, at the lowest, you miserably failed. I shiver when I think that what is to happen to HFS [Harlan Fiske Stone] and J.C. McR. [McReynolds] may happen to me. Shall I depend on you to forfeit it, or shall I write to the efficient Marshal of the Court?

Note from Justice Owen Roberts to Justice Felix Frankfurter (Nov. 1947), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3.

<sup>140</sup> Professor Friedman suggested to me that the genesis of the Roberts memorandum is related to the disastrous attempt by Chief Justice Stone to write a valedictory letter on behalf of the members of the Court to Roberts upon Roberts's resignation. The second paragraph of the draft of this letter contained as the final sentence, "You have made fidelity to principle your guide to decision." Draft Letter from Chief Justice Harlan Fiske Stone to Justice Owen J. Roberts (no date), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 4. Justice Black refused to accept this sentence, which outraged Frankfurter. See Letter from Justice Felix Frankfurter to Chief Justice Harlan Fiske Stone (Aug. 20, 1945), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 4. As a result, no letter was sent. Frankfurter later sent a copy of the letters and Frankfurter's own file about this affair to Paul Freund for Freund's history of the Hughes and Stone Courts. See Letter from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (July 16, 1958) (on file at the Harvard Law School Library).

I disagree with Professor Friedman for several reasons. First, Frankfurter's correspondence to Freund in 1958 suggested that this episode showed why he denigrated Stone. It was not given to Freund to defend Roberts. See *id.* Second, Frankfurter believed that this episode was another example of Black's unfitness to serve on the Supreme Court. Nothing in Frankfurter's 1945 diary mentions the Roberts valedictory letter episode, but there is a note in that diary concerning Black's refusal to recuse himself in the *Jewell Ridge* case, decided in favor of the union because of Black's vote. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 161 (1945). Black's former law partner had represented the union before the Court. See LASH, *supra* note 84, at 263-64. Third, there is neither a direct nor an indirect attack on either Black or Stone in the Roberts tribute, which I would have expected if there were a connection between the memorandum and the failed letter episode. Finally, there is no statement in the tribute along the lines of, "He made fidelity to principle his guide to decision."

<sup>141</sup> Professor Philip Kurland, Frankfurter's clerk during the October 1945 Term, has informed

respondence with Frankfurter mentions no meeting between the two from October 1945 through January 1946.<sup>142</sup> Additionally, Frankfurter's correspondence with the editors of the *University of Pennsylvania Law Review* makes it clear that the draft tribute sent to the law review contained no information explaining the creation of the memorandum. Only after an editor, prompted by some members of the faculty, wrote Frankfurter that there was some "feeling that some readers may be confused over when and why the memorandum was written,"<sup>143</sup> did Frankfurter add the information about the date of the memorandum.<sup>144</sup> Finally, the original memorandum is apparently lost. Roberts destroyed his papers; thus, a copy is not available

me that, to his knowledge, Roberts did not visit the Court during that Term. Telephone Interview with Philip B. Kurland, Professor Emeritus, University of Chicago Law School (Dec. 3, 1993).

<sup>142</sup> Further, I have found no memorandum from Roberts to Frankfurter of any sort dated November 9, 1945, in the Felix Frankfurter Papers. Because that date fell on a Friday, it is possible that Roberts traveled to Washington on that date to spend the weekend and met with Frankfurter. The Frankfurter Papers contain letters from Roberts to Frankfurter dated July 16, 1945, July 28, 1945, August 6, 1945, August 30, 1945, October 2, 1945, December 26, 1945 (2 letters), and January 12, 1946. None of these letters refers to any memorandum in any way. See Letters from Justice Owen J. Roberts to Justice Felix Frankfurter (July 16, 1945; July 28, 1945; Aug. 6, 1945; Aug. 30, 1945; Oct. 2, 1945; Dec. 26, 1945 (two letters); Jan. 12, 1946), *microformed on* Harvard Felix Frankfurter Papers, *supra* note 78, at Part III, Reel 3. In a letter written to Justice Frankfurter and dated January 12, 1946, Roberts notes:

I've been to Washington quite often on Clemency Board and [??] and [??] Board business; more often than not I go down on an early train and return the same day. Once or twice I've spent the night at Elizabeth's house, but I've been on such a full schedule that I've had no chance to see my friends. I'm looking forward to better luck in the coming months.

Letter from Justice Owen J. Roberts to Justice Felix Frankfurter (Jan. 12, 1946), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3. This indicates, but does not prove, that Roberts and Frankfurter had not seen each other for some time before the date of the letter. It does appear, from the October 2, 1945, letter, that Frankfurter had visited Roberts at Roberts's farmhouse at some time in September 1945, as he occasionally did before returning to Washington for the opening of the Court's Term. See Letter from Justice Owen J. Roberts to Justice Felix Frankfurter (Oct. 2, 1945), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3.

<sup>143</sup> Letter from Arthur W. Leibold, Jr., Article Editor, *University of Pennsylvania Law Review*, to Justice Felix Frankfurter (Jan. 18, 1956), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 181. Indeed, Leibold erroneously thought that the memorandum had been written by Roberts "shortly before he died with the express purpose that it be published." *Id.*

<sup>144</sup> See Letter from Justice Felix Frankfurter to Arthur W. Leibold, Jr., Article Editor, *University of Pennsylvania Law Review* (Jan. 20, 1956), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 181. Frankfurter's response was, in pertinent part:

The members of your Faculty are quite right and I am obliged to them for bringing me to an explicit statement of the history and the date of the memorandum. I should have done it in my original draft, but in an irrelevant kind of way I had a little feeling against cluttering up a little piece like the one I wrote with the usual footnote apparatus.

*Id.* The date was, of course, not the only footnote in the tribute.

through that collection.<sup>145</sup> In the mid-1960s, historian John Chambers searched the Frankfurter Papers inconclusively for the original or a copy of the memorandum.<sup>146</sup> I have been unable to find the original memorandum or a copy in my searches through the Frankfurter Papers. No one with whom I have spoken remembers ever seeing the original memorandum.<sup>147</sup> The absence of the memorandum obviously

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<sup>145</sup> See LEONARD, *supra* note 86, at 184.

<sup>146</sup> See John W. Chambers, *The Big Switch: Justice Roberts and the Minimum Wage Cases*, 10 LABOR HIST. 44, 64 n.96 (1969). This footnote suggests that Chambers located the memorandum. The language is quite vague, however, and on close inspection, it appears that at most what he found was a copy of something that seemed to be the memorandum. When I located this note, I called the Library of Congress and asked them to send the document to me. They were unable to find any such document in either set of Frankfurter papers. My research assistant, Connie Liem, later traveled to the Library of Congress in an attempt to locate this document. Again, with the assistance of the Library of Congress staff, no such document was found. I have looked via microfilm through both sets of papers for this document without success. I have found, however, a typescript copy of unsigned, undated material in the draft of the tribute that is identical to the published memorandum. See Felix Frankfurter, *Mr. Justice Roberts 6-8* (no date) (unpublished draft), *microformed on Library of Congress Frankfurter Papers*, *supra* note 78, at Container 181.

<sup>147</sup> I have spoken with Judge Thomas O'Neill, at the time a clerk to Justice Harold Burton, who apparently acted as an initial intermediary between Frankfurter and the *University of Pennsylvania Law Review*, and he has no recollection of seeing the memorandum. Telephone Interview with Judge Thomas O'Neill (May 24, 1993). The editor-in-chief of the *University of Pennsylvania Law Review* at the time, Curtis Reitz, now a Professor at his alma mater, also has no recollection of ever seeing the Roberts memorandum, although he did recall that Frankfurter was anxious to get the information it contained into print. Telephone Interview with Curtis Reitz, Professor, University of Pennsylvania Law School (May 27, 1993). Article editor Arthur Leibold, whose January 18, 1956, letter to Frankfurter led to Frankfurter's footnote explaining the circumstances surrounding the creation of the memorandum, also has no recollection of ever seeing the memorandum. Telephone Interview with Arthur W. Leibold, Jr., Dechert, Price & Rhoads, Washington, D.C. (June 1, 1993). Harvard Law School Professor Andrew Kaufman, one of Frankfurter's two clerks during the October 1955 Term, did not work on the tribute and thus does not recall seeing the Roberts memorandum. He does recall, however, that Frankfurter worked on the tribute privately. Telephone Interview with Andrew Kaufman, Professor, Harvard Law School (June 3, 1993). Frankfurter's other clerk for that year, New York Law School Dean Harry A. Wellington, does not recall ever seeing the memorandum or working on the tribute. Telephone Interview with Harry A. Wellington, Dean, New York Law School (June 8, 1993). Professor Philip Kurland, Frankfurter's clerk during the October 1945 Term, did not see the memorandum, although he further explained that this information was not the type of information that Frankfurter would share with his clerks. Telephone Interview with Philip B. Kurland, Professor Emeritus, University of Chicago Law School (Dec. 3, 1993). Professor Richard D. Friedman, who has replaced the late Paul Freund as the author of a history of the Hughes Court in the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, has stated that he has not located the Roberts memorandum in Freund's files on the Hughes Court. Telephone Interview with Richard D. Friedman, Professor, University of Michigan Law School (June 15, 1993).

The only possible note from Roberts to Frankfurter I have found that *might* relate to a "switch" is a handwritten note by Roberts which states in its entirety, "I do realize it, and often wonder why the hell I did it just to please the Chief!" Note from Justice Owen J. Roberts to Justice Felix Frankfurter (no date), *microformed on Library of Congress Frankfurter Papers*, *supra* note 78, at Container 97. On the other side of this note is a handwritten note by

prevents independent analysis of Roberts's views. The memorandum's absence from the Frankfurter Papers also strikes me as odd, because Frankfurter seemed at an early date to keep thorough records, even of things that had much less historic importance.

Second, even if Roberts authored the memorandum printed in Frankfurter's tribute, several factors cast doubt on the accuracy of its contents. The tribute itself indicates that the memorandum was written more than eight years after the crisis of 1937, after Roberts had resigned from the bench, and after repeated requests from Frankfurter. The memorandum was to be made public at Frankfurter's discretion (likely only after Roberts's death), and contained two disturbing factual errors.<sup>148</sup> If the memorandum was written in 1945, only three of Roberts's colleagues were alive — Hughes, McReynolds, and Stone — and by September 1948, Roberts was the sole survivor of the 1937 Court: therefore, no one was alive to question Roberts's actions as detailed in the memorandum. In 1951, Hughes's "principled" explanation of the voting in *West Coast Hotel* was also publicly available.<sup>149</sup>

Frankfurter: "[To] O.J.R. I hope you now realize what a door you opened in your — shall I say — much-discussed *Butler* decision as to scope of 'general welfare.'" *Id.* The cataloguers estimated that this message was written in November 1940. Professor Friedman directed my attention to another version of this statement by Roberts; it can be found as a liner note located at page 66 of Volume 297 of a set of the United States Reports owned by Frankfurter and kept in his home study. That page of the Reports contains a broad statement, written by Roberts, of Congress's general welfare power in the case of *United States v. Butler*, 297 U.S. 1 (1936), in which the Court declared unconstitutional the Agricultural Adjustment Act of 1933 as beyond Congress's power to spend for the general welfare, *see id.* at 74–75. In Frankfurter's handwriting appears the identical colloquy as quoted above. *See id.* at 66 (Felix Frankfurter's personal copy in the possession of Andrew Kaufman, Professor, Harvard Law School; copy on file at the Harvard Law School Library). If anything, these notes appear to support the belief that in 1936 Roberts was more firmly opposed to a broad interpretation of Congress's powers, and thus to New Deal measures, than previously believed. It also supports the belief that Hughes influenced the writing of *Butler* in a way that would later lead to a more congenial reception by the Court to New Deal legislation. The dictum was used in 1937 by the new Court majority in the *Social Security Cases* to construe Congress's power in a broad fashion. *See Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 592–93 (1937).

<sup>148</sup> The Roberts memorandum erroneously indicates that the Washington Supreme Court in *West Coast Hotel* had held that the minimum wage statute was unconstitutional. *See Frankfurter, supra* note 10, at 315. At the end of the memorandum, however, this error is corrected; Roberts noted that the Supreme Court *affirmed* the lower court's decision in *West Coast Hotel*. *See id.* The initial draft of the tribute did not contain Frankfurter's note on this mistake. *See id.* at 315 n.\*. The note was added to the tribute when Frankfurter edited it. *See Frankfurter, supra* note 146, at 7. The Roberts memorandum also erroneously states that the constitutional validity of the holding in *Adkins* was assailed in the papers before the Court when probable jurisdiction was noted. *See Frankfurter, supra* note 10, at 315. The only document before the Court when it granted probable jurisdiction was the jurisdictional statement of the hotel, which wanted the Court to decide based on *Adkins* and *Morehead*, not to overrule them. *See Amended Statement as to Jurisdiction* at 13–14, *West Coast Hotel* (No. 293), *supra* note 108, at 90–91.

<sup>149</sup> Part of the typed version of Hughes's *Biographical Notes*, including Hughes's defense of

Third, and maybe even more perplexing, is what the memorandum does not contain, namely, an explanation for some of Roberts's other votes in spring 1937.<sup>150</sup> The memorandum does not speak of the reasons for Roberts's votes with the majority in *Jones & Laughlin Steel* and the *Social Security Cases*.<sup>151</sup> As discussed above,<sup>152</sup> the former, which broadly interpreted Congress's Commerce Clause power, effectively overruled the 1936 case *Carter v. Carter Coal Co.*,<sup>153</sup>

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his and Roberts's actions in deciding *West Coast Hotel* and *Jones & Laughlin Steel*, can be found in the Frankfurter Papers. See Charles E. Hughes, Biographical Notes 26–28 (manuscript), microformed on Library of Congress Frankfurter Papers, *supra* note 78, at Container 216.

<sup>150</sup> This lacuna in the memorandum was noted in a letter by Professor Wallace Mendelson, who corresponded with Frankfurter after publication of the Roberts tribute. Mendelson had previously accepted the original history, as evidenced in a 1951 book review of Hendel's biography of Hughes. Mendelson wrote, "I remember (with the author) Hughes' letter to the Senate, backed by a timely switch of position on the bench. That the letter and switch (along with that of Mr. Justice Roberts) pretty certainly saved nine, is now generally conceded — and one would have to be more naïve than is permissible to suppose that Hughes intended otherwise." Wallace Mendelson, Book Review, 45 AM. POL. SCI. REV. 570, 570 (1951) (reviewing SAMUEL HENDEL, CHARLES EVAN HUGHES AND THE SUPREME COURT (1951)). After publication of the Roberts tribute, Mendelson wrote Frankfurter, "[D]oesn't [Roberts's] concern to be understood in the Minimum Wage cases imply a confession of 'guilt' for 'switching' in the Commerce Clause cases?" Letter from Wallace Mendelson, Professor, University of Tennessee, to Justice Felix Frankfurter (Mar. 15, 1956), microformed on Library of Congress Frankfurter Papers, *supra* note 78, at Container 209. Frankfurter responded by explaining that his tribute was intended to show that Roberts had not "switched" because of Roosevelt's court plan and by claiming that the Commerce Clause decisions were not a reflection of a change in position caused by the court-packing plan. See Letter from Justice Felix Frankfurter to Wallace Mendelson, Professor (Mar. 19, 1956), microformed on Library of Congress Frankfurter Papers, *supra* note 78, at Container 209. Six weeks later Frankfurter wrote another letter to Mendelson. He stated, "Roberts was specifically charged with having changed his position on a specific issue, *i.e.*, the validity of minimum wage legislation in the *West Coast* case, allegedly in response to the President's 'Court-packing' plan. It is that specific, and what I would regard dishonorable, change [sic] that I was repelling." Letter from Justice Felix Frankfurter to Wallace Mendelson, Professor (May 4, 1956), microformed on Library of Congress Frankfurter Papers, *supra* note 78, at Container 209.

That Roberts would be accused of a "switch" with regard to a state law, and not with regard to New Deal legislation, is not sensible, and in fact, Roberts and Hughes were accused by scholars and others of switching with regard to both state and federal legislation. In his tribute to Roberts, Griswold argued that Roberts's votes in *Jones & Laughlin Steel* and the *Social Security Cases* were "fully explicable simply as a natural development of his views." Griswold, *supra* note 86, at 345. Even Hughes, in his *Biographical Notes*, argues that the Court remained independent from political considerations in both *West Coast Hotel* and *Jones & Laughlin Steel*. See AUTOBIOGRAPHICAL NOTES OF HUGHES, *supra* note 81, at 312–13; see also PUSEY, *supra* note 56, at 51–53 (discussing the change in position of Hughes and Roberts in *West Coast Hotel* and *Jones & Laughlin Steel*). Frankfurter's focus on the narrowness of the criticism in his explanation to Mendelson is thus wholly unsatisfactory.

<sup>151</sup> See *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937). The court-packing plan was still alive in Congress when these cases were decided on May 24, 1937.

<sup>152</sup> See *supra* p. 629.

<sup>153</sup> 298 U.S. 238 (1936).



in which Roberts had voted with the majority. The latter cases distinguished into oblivion the opinion written by Roberts one year before in *United States v. Butler*.<sup>154</sup> Additionally, the memorandum never explains why Roberts failed to write a separate opinion in *Morehead*. It offers instead a mea culpa. (Did the press of work cause him to fall behind in his opinion-writing duties?)

### C.

Frankfurter's handwritten comments, as well as his silence, in his copy of Pusey's biography of Hughes cast further doubt on the significance, if not existence, of the memorandum. These notes make no reference to the existence of the memorandum, and Frankfurter's hand-written comments are in fact quite critical of Roberts's actions. Frankfurter underlined the following sentence in Pusey's biography, which concerned *Morehead*: "But counsel for New York missed his opportunity."<sup>155</sup> Frankfurter noted, "Too dogmatic. Serious question whether to call for overruling rather than differentiating."<sup>156</sup> On the same page, after underlining the sentence, "[*Morehead*'s] reactionary tone was very distasteful to Roberts," Frankfurter wrote further, "He shouldn't have suppressed his own views by silence."<sup>157</sup> At the point at which Pusey discussed the *West Coast Hotel* decision, Frankfurter offered in the margin an explanation he used four years later in his tribute to Roberts. Frankfurter's handwritten comment was, "In *West Coast Hotel* [the] issue of overruling *Adkins* had to be faced [and] Roberts had been ready to do that, but . . . wasn't asked in *Tipaldo*."<sup>158</sup> From this note, it seems possible to conclude that Frankfurter had discussed the minimum wage cases with Roberts. It remains unclear, however, whether the liner notes were supposed to become part of the effort to set the record straight, or whether they were notes designed to present a plausible explanation of Roberts's actions. Further, it seems odd that, in his personal copy of Pusey's biography, Frankfurter's liner notes made no mention of a memorandum that should have been in his possession for nearly six years. Instead of marginalia criticizing Roberts's actions, a sympathetic reader armed with a memorandum from Roberts himself probably would have either ignored Pusey's interpretation or noted agreement with Pusey's sympathetic treatment of Roberts. After all, Frankfurter be-

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<sup>154</sup> 297 U.S. 1 (1936). This last "switch" has largely been ignored. *But see* Griswold, *supra* note 86, at 345 (concluding that Roberts's votes in the *Jones & Laughlin Steel* and the *Social Security Cases* were "a natural development of his views").

<sup>155</sup> MERLO J. PUSEY, CHARLES EVANS HUGHES 701 (1951) (Frankfurter's personal copy), microformed on Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 39.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

lieved in late 1955 that the memorandum from Roberts explained Roberts's differing decisions in *Morehead* and *West Coast Hotel* as based on the requests by counsel to distinguish or to overrule *Adkins*.

Frankfurter's published review of Pusey's biography made no mention of the court-packing fight;<sup>159</sup> it did, however, note that application of the Constitution "is not a mechanical exercise, but a profound task of statecraft exercised by judges set apart from the turbulence of politics."<sup>160</sup> This review, along with Frankfurter's private notes, shows Frankfurter's strong concern for the proper role of the Court. The notes may also suggest Frankfurter's willingness to revise history to preserve the sanctity of the Court.

## V.

And the print spilled on Justice Roberts' "switch in time," a matter of great import to frankfurterians, has similarly needlessly polluted our rivers and streams.

### JOHN H. SCHLEGEL, THE LINE BETWEEN HISTORY AND CASENOTE<sup>161</sup>

What is most important about Frankfurter's tribute is its effect: his revised history of the constitutional crisis of 1937 became the accepted history in legal academia. This new version allowed legal academics to conclude that the decisions of Justice Roberts in the spring of 1937 were the product of legal reflection, not political pressure. How the revised history became the accepted history is the subject of this Part; why it became the accepted history is the subject of Part VI. This Part describes the manner in which Frankfurter's history became the accepted history through law review articles and books, constitutional law casebooks, the works of Paul Freund, political scientists, and Frankfurter's biographers.

## A.

The virtually unanimous acceptance by legal academics of Frankfurter's explanation, and the swiftness of its acceptance within the legal academy, are worth recounting in detail. One reason for the rapid acceptance of the revised history was the prominent position of its author in legal academia. This prominence, in turn, secured broad dissemination of Frankfurter's writing. The tribute was not only

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<sup>159</sup> See Felix Frankfurter, *The Impact of Charles Evans Hughes*, N.Y. TIMES, Nov. 18, 1951, § 7, at 1, 51 (reviewing MERLO J. PUSEY, CHARLES EVAN HUGHES (1951)), reprinted in OF LAW AND MEN 144, 144-50 (Philip Elman ed., 1956).

<sup>160</sup> *Id.* at 149.

<sup>161</sup> Schlegel, *supra* note 3, at 975.

published in the *University of Pennsylvania Law Review*, but it was also included in *Of Law and Men*,<sup>162</sup> a compilation of Frankfurter's writings published in 1956.

From there, Frankfurter's revised history of the constitutional crisis of 1937 spread quickly throughout legal academia. Citing Frankfurter, Bernard Schwartz suggested in a 1957 book that the Court's opinion in *West Coast Hotel* was decided on constitutional and not political grounds, and that the same decision would have been handed down even without the presence of FDR's plan.<sup>163</sup> In 1959, the first law review article to cite Frankfurter's tribute adopted Frankfurter's claim: "The probable truth, while not subject to categorical demonstration, is that the change in the course of decisions, evident by the spring of 1937, was not induced by the threat of 'packing,' but was instead the product of a number of factors coinciding at that time."<sup>164</sup> In a lecture given in 1960, Professor Herbert Wechsler cited Frankfurter's tribute for the proposition that Roberts's vote in *West Coast Hotel* was "falsely publicized."<sup>165</sup> A 1963 book edited by Alan Westin, a professor of government at Columbia, reprinted Frankfurter's tribute and added that for Frankfurter "[t]o have known 'what really happened' while many historians and political scientists were weaving elaborate myths about the Court's switch in 1937 must have been a heavy burden."<sup>166</sup> In 1965, Harvard Law School Professor Arthur Sutherland cited Frankfurter and concluded that Roberts's vote in *West Coast Hotel* was unrelated to the court-packing plan and that Roberts's vote in *Jones & Laughlin Steel* "need not be ascribed to personal or institutional panic. Persuasion sometimes comes, after a while, from the logic of events."<sup>167</sup> In an exhaustive history of the court-packing plan, Leonard Baker concluded that the question of Roberts's reasons for changing his vote was "without a positive answer."<sup>168</sup> Amazingly, even Frankfurter's bitter rival William O. Doug-

<sup>162</sup> Frankfurter, *supra* note 10, reprinted in *OF LAW AND MEN*, *supra* note 159, at 204, 204-12.

<sup>163</sup> See BERNARD SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 20 & n.38 (1957).

<sup>164</sup> Robert B. McKay, *The Supreme Court and Its Lawyer Critics*, 28 *FORDHAM L. REV.* 615, 628 (1959) (footnote omitted).

<sup>165</sup> Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 *U. PA. L. REV.* 465, 465 (1961) (footnote omitted). The reason for Wechsler's aside was that this article was originally given as the Owen J. Roberts Memorial Lecture.

<sup>166</sup> ALAN F. WESTIN, *AN AUTOBIOGRAPHY OF THE SUPREME COURT* 241 (1963). Westin dedicated the book, "To Mr. Justice Felix Frankfurter — scholar of the Constitution, wherever he sits." *Id.* at vii.

<sup>167</sup> ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 499 (1965).

<sup>168</sup> BAKER, *supra* note 11, at 177. Baker would later author a dual biography of Louis D. Brandeis and Frankfurter. See LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* (1984); see also BAKER, *supra* note 51, at 189 (concluding that the switch likely resulted from "the rising clamor against the Court"); WILLIAM F. SWINDLER, *COURT AND*

las vouched for Frankfurter's revised history. In his autobiography *Go East, Young Man*, Douglas defends Roberts from claims that Roberts switched.<sup>169</sup> Citing Frankfurter's tribute, and relying on the timing of Roberts's initial vote in *West Coast Hotel*, in late-December 1936, Douglas triumphantly concluded, "Thus do journalists and others on the sidelines often jump to wrong conclusions."<sup>170</sup>

This revised history has largely filtered down to the present. A number of articles in the *Journal of Supreme Court History* conclude that there was no "switch" in 1937.<sup>171</sup> In a recent article, Harvard Law School Professor Emeritus Benjamin Kaplan cited Frankfurter's tribute for the proposition that "Roberts' role in this [switch] has perhaps been too harshly criticized."<sup>172</sup> Professor David Currie, author of a recent two-volume history of constitutional law in the Supreme Court, wholly adopts the revised history.<sup>173</sup> Currie cites Frank-

CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968, at 79 (1970) ("Whether Hughes had engineered this turn of events as a matter of basic professional conviction or as a matter of political opportunism — and in the nature of the circumstances, there was an inevitable admixture of these — the fact was that he had carried the thing off with brilliance and aplomb."). Swindler neither cites Frankfurter's tribute nor discusses at all Roberts's role in the constitutional revolution of 1937. *See id.*

<sup>169</sup> *See* WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* 325-26 (1974). Douglas's defense of Roberts's actions in 1937 stands in stark contrast to his refusal in 1945 to join a valedictory letter to Roberts upon his retirement as long as the letter contained the sentence, "You have made fidelity to principle your guide to decision." *See supra* note 140.

<sup>170</sup> DOUGLAS, *supra* note 169, at 326. Douglas expends a great deal of effort attacking Frankfurter for telling Douglas that he opposed the plan while writing letters to FDR in support of it. *See id.* at 324. Douglas's defense of Roberts is predicated in part on attacking Frankfurter. "The only prevaricator was Frankfurter, who had been promised a seat on the Court and was swinging along with FDR as the price of getting it." *Id.* at 327. Although Douglas was convinced that he had skewered Frankfurter, the last laugh may belong to Frankfurter.

<sup>171</sup> *See* Pusey, *supra* note 83, at 106 (concluding that Roberts did not switch as a result of FDR's court plan); Merlo J. Pusey, *The Hughes Biography: Some Personal Reflections*, 1984 Y.B. SUP. CT. HIST. SOC'Y 45, 46 (same); Robert L. Stern, *The Court-Packing Plan and the Commerce Clause*, 1988 Y.B. SUP. CT. HIST. SOC'Y 91, 96 (concluding that it was plausible that Hughes was consistent in his Commerce Clause votes, but that "Roberts's opinions and votes in 1935 and 1936 are difficult to reconcile with his joining in the Labor Board decisions in 1937"). Stern wrote in 1946 that government lawyers were convinced that FDR's court-packing plan was the basis for the Court's reversal. *See* Stern, *supra* note 73, at 681-82. In 1988, Stern wrote, "The speculation in my 1946 article . . . implies much more certainty on the subject than I now have." Stern, *supra*, at 96; *cf.* Warner W. Gardner, *Court Packing: The Drafting Recalled*, 1990 J. SUP. CT. HIST. 99, 102 (noting that the timing of the *West Coast Hotel* vote suggests that Roberts and Hughes may have changed without regard to the court-packing plan). *But see* Joseph L. Rauh, Jr., *A Personalized View of the Court-Packing Plan*, 1990 J. SUP. CT. HIST. 93, 97 (concluding that Roberts's switch in *Jones & Laughlin Steel* could have resulted only from the court-packing plan).

<sup>172</sup> Benjamin Kaplan, *The Great Civil Rights Case of Hague v. CIO: Notes of a Survivor*, 25 SUFFOLK U. L. REV. 913, 931 (1991).

<sup>173</sup> *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, at 236 (1990).

furter and Pusey for the proposition that Roberts voted in *West Coast Hotel* before the plan was made public and concludes that "it was not clear that Roberts had actually changed his mind."<sup>174</sup>

Another influential legal text which adopts the revised history is *Hart and Wechsler's The Federal Courts and the Federal System*.<sup>175</sup> Although the first edition, published in 1954, merely noted the court-packing plan,<sup>176</sup> the second edition, published eighteen years later, cited both Frankfurter's tribute and a 1967 article by Harvard Law School Professor Paul Freund as the sources for "the role of Justice Roberts in the Parish [sic] case."<sup>177</sup>

### B.

The adoption by many constitutional law casebooks of the revised history of Justice Roberts's switch played an even more important role than constitutional histories and law review articles in disseminating the revised history. Beginning in 1959 and largely continuing today, a number of constitutional law casebooks have cited Frankfurter's tribute as evidence that Roberts probably was not influenced by the court-packing plan.<sup>178</sup> Before then, constitutional law casebooks rou-

<sup>174</sup> *Id.*

<sup>175</sup> PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973). Bator and Shapiro both taught at Harvard Law School. Wechsler taught at Columbia University. Mishkin moved from the University of Pennsylvania to the University of California at Berkeley after the publication of the second edition.

<sup>176</sup> The first edition of the book, published in 1954, mentions the court-packing plan at the end and quotes, in order, from Hughes's statement of May 19, 1934, to the American Law Institute; from FDR's February 5, 1934, message regarding court reorganization; and from Hughes's March 21, 1937, letter, assented to by Brandeis and Van Devanter, to the Senate Judiciary Committee. See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1395-1403 (1st ed. 1954). The book was dedicated, "To Felix Frankfurter, who first opened our minds to these problems." *Id.* at ix.

<sup>177</sup> BATOR, MISHKIN, SHAPIRO & WECHSLER, *supra* note 175, at 44 n.61; see also PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 42 n.61 (3d ed. 1988) (citing both the Frankfurter and the Freund articles for Roberts's role in *West Coast Hotel*). According to the authors of the second edition, the late Professor Bator was ultimately responsible for Chapter I, in which this quotation is found. See BATOR, MISHKIN, SHAPIRO & WECHSLER, *supra* note 175, at xvii. Professor Mishkin, one of the authors of the second and third editions, also cited Frankfurter's tribute in his 1982 Owen J. Roberts Lecture, and cautioned that his citation of Frankfurter was "not to give any credence to the famous supposed 'switch in time' on the validity of minimum wage legislation." Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 907 n.1 (1983).

<sup>178</sup> See EDWARD L. BARRETT, JR., PAUL W. BRUTON & JOHN HONNOLD, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 210-11 (1st ed. 1959) [hereinafter BARRETT, BRUTON & HONNOLD, FIRST EDITION]; NOEL T. DOWLING & GERALD GUNTHER, *CASES AND MATERIALS ON CON-*

tinely ignored the change in voting by Hughes and Roberts, largely because there seemed to be nothing to say in defense of their actions. In 1954, four constitutional law casebooks were published. Two books, authored by Walter Dodd and Noel Dowling, ignored the court-packing episode altogether,<sup>179</sup> while a third, edited by Paul Kauper, only briefly mentioned the proposed court reorganization plan.<sup>180</sup> The most extensive coverage given to the constitutional crisis of 1937 is a note on FDR's court reorganization plan found in the casebook edited by Paul Freund, Arthur Sutherland, Mark DeWolfe Howe, and Ernest J. Brown, all professors at Harvard Law School.<sup>181</sup>

STITUTIONAL LAW 265-69, 878 n.1 (7th ed. 1965) [hereinafter DOWLING & GUNTHER, SEVENTH EDITION]; 2 PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK D.W. HOWE & ERNEST J. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1630 (1st ed. 1954); JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 39 n.16 (1st ed. 1978) (omitting the cite to Frankfurter but nevertheless concluding "[Justice] Roberts' switch thus represented an actual change in conviction and not merely a shift with the political winds caused by announcement of the court-packing plan," and citing ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 764 (4th ed. 1970) [hereinafter KELLY & HARBISON, FOURTH EDITION], in which Kelly and Harbison reversed their view of Justice Roberts's votes, and called them "principled"); JOHN E. NOWAK, RONALD J. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 2.6, at 35 n.16 (3d ed. 1986) (making the same argument but adding as support a citation to Justice Frankfurter's tribute); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-6, at 449 & n.18 (1st ed. 1978) (omitting cite to Frankfurter's tribute, but citing Arthur Sutherland's *Constitutionalism in America*, which itself cites the tribute, see SUTHERLAND, *supra* note 167, at 496-97). One casebook cited the Frankfurter tribute but used it much more cautiously. See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 302 (2d ed. 1983) ("Although there are indications that [Roberts] cast his sustaining vote in the later case [*West Coast Hotel*] before Roosevelt presented Congress with the court-packing bill, the received notion is that Roberts' fear of the bill caused him to make 'the switch in time that saved nine.' Whatever Roberts' motivation, Roosevelt's court-packing plan ultimately failed." (footnote omitted)).

Several casebooks only briefly mention the court-packing plan, often with a summary conclusion. See WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, THE AMERICAN CONSTITUTION: CASES AND MATERIALS 157-58 (1st ed. 1964) (quoting Robert L. Stern, *The Commerce Clause and the National Economy, 1939-1946*, 59 HARV. L. REV. 645, 681-82 (1946)). Compare JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 189 (1st ed. 1975) (briefly mentioning the court-packing plan and stating that "[u]nder the threat of court-packing, however, the court recanted") with JEROME A. BARRON, C. THOMAS DIENES, WAYNE McCORMACK & MARTIN H. REDISH, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 96 (4th ed. 1992) ("Whether for its own reasons or under the threat of court-packing, the Court recanted."). See generally GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 168 (1st ed. 1986) ("Whether or not [Justice Roberts's] behavior made sense to him, his position was widely characterized as 'the switch in time that saved Nine.'").

<sup>179</sup> See WALTER F. DODD, CASES ON CONSTITUTIONAL LAW (5th ed. 1954); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (5th ed. 1954); FREUND, SUTHERLAND, HOWE & BROWN, *supra* note 178; PAUL G. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS (1st ed. 1954).

<sup>180</sup> See KAUPER, *supra* note 179, at 111-12.

<sup>181</sup> See 1 FREUND, SUTHERLAND, HOWE & BROWN, *supra* note 178, at 241-44.

What is most curious about this note, however, is what it does not say. In their synopsis of FDR's court reorganization plan, the authors managed entirely to avoid discussing the switch by Justice Roberts.<sup>182</sup> In 1959, the first constitutional law casebook to cite Frankfurter's tribute — perhaps also “the first truly modern postwar constitutional law casebook”<sup>183</sup> — was Edward L. Barrett, Jr., Paul W. Bruton, and John Honnold's *Constitutional Law*.<sup>184</sup> Discussing FDR's plan, the authors cited Frankfurter's tribute for the proposition that Roberts had not switched his vote.<sup>185</sup> The authors carefully withheld judgment of the strength of the evidence, although they noted that the “memorandum does not deal with the relationship between the Carter case . . . and the *Jones & Laughlin* case.”<sup>186</sup> Two years later, Freund and his co-authors added to their discussion of substantive due process a note citing Justice Frankfurter's tribute.<sup>187</sup> The authors commented, “Mr. Justice Roberts prepared a contemporaneous memorandum concerning his ‘vote’ in the Parrish case.”<sup>188</sup> Frankfurter's tribute states that Roberts's memorandum was prepared in 1945, not contemporaneously.<sup>189</sup>

The most influential constitutional law casebook to utilize Frankfurter's tribute has been Professor Gerald Gunther's *Constitutional Law*.<sup>190</sup> After becoming co-author of the Dowling casebook beginning with the seventh edition, Gunther not only cited the Frankfurter tribute, but he also seemed to accept the proposition that, at least with respect to the decision in *West Coast Hotel*, Justice Roberts had

<sup>182</sup> See *id.*

<sup>183</sup> William Cohen, *Preface to the Eighth Edition* of EDWARD L. BARRETT, JR., WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* at xxiv (8th ed. 1989) (referring to BARRETT, BRUTON & HONNOLD, FIRST EDITION, *supra* note 178).

<sup>184</sup> See BARRETT, BRUTON & HONNOLD, FIRST EDITION, *supra* note 178, at 211.

<sup>185</sup> See *id.* at 210–11.

<sup>186</sup> *Id.* at 211. Subsequent editions of the casebook left unchanged this brief analysis of the effect of the court-packing plan on Roberts's votes. See, e.g., EDWARD L. BARRETT, JR., *CONSTITUTIONAL LAW: CASES AND MATERIALS* 225 n.1 (5th ed. 1977); EDWARD L. BARRETT, JR. & WILLIAM COHEN, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 200 n.1 (7th ed. 1985); BARRETT, COHEN & VARAT, *supra* note 183, at 221 n.1; WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 204 n.1 (9th ed. 1993). But see NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* 287 n.2 (6th ed. 1959) (“Whatever its bearing on the course of decisions or the fortune of the Court, it is a fact that in the period after Alton and Schechter and before *Jones & Laughlin* . . . , President Franklin D. Roosevelt submitted to Congress, February 1937, a proposal for the reorganization of the federal courts.”); RAY FORRESTER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 783 (1st ed. 1959) (defending Justice Roberts on the ground that “the conference vote by the Court on the case was taken in January, 1937 [sic], before the court plan was known”).

<sup>187</sup> See 2 PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK D.W. HOWE & ERNEST J. BROWN, *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* 1327 (2d ed. 1961).

<sup>188</sup> *Id.*

<sup>189</sup> See Frankfurter, *supra* note 10, at 314 n.\*.

<sup>190</sup> GERALD GUNTHER, *CONSTITUTIONAL LAW* (9th ed. 1975).

not switched his vote in response to FDR's Court packing.<sup>191</sup> Discussing the effect of the court-packing plan on the Court's interpretation of the Commerce Clause, Gunther wrote:

West Coast Hotel, in particular, provoked the charge that Justice Roberts had changed his position in the face of the Roosevelt challenge — the 'switch in time' that supposedly 'saved the Nine.' But, as a memorandum left by the Justice demonstrates, the Court voted in West Coast Hotel weeks before the judicial reorganization plan was announced.<sup>192</sup>

He then cited Justice Frankfurter's tribute.<sup>193</sup> Also found in the seventh edition was a footnote added by Gunther to the primary case of *West Coast Hotel*. This footnote was appended to the sentence in Chief Justice Hughes's opinion, which stated that *Morehead* was decided as it was because New York counsel asked the Court only to distinguish, not to reconsider *Adkins*,<sup>194</sup> and directed the reader to Justice Roberts's memorandum regarding why he voted with the majority in both *Morehead* and *West Coast Hotel*.<sup>195</sup> Although Professor Gunther cautioned the reader to compare Justice Roberts's pre- and post-1937 commerce clause and taxing power votes, the attention given to Justice Roberts's behavior concerning the minimum wage cases suggests an acceptance of Frankfurter's revisionist history.<sup>196</sup>

Beginning in the ninth edition and continuing to the present edition with only minor changes, Professor Gunther's casebook has read:

It is nevertheless clear that constitutional doctrine changed significantly during this period. But arguing that the shift was a response to the Court-Packing Plan is easiest with respect to national powers doctrines; with respect to due process, *West Coast Hotel* is certainly of a deferential piece with the pre-Court-packing decision in 1934 (written by Justice Roberts) in the *Nebbia* case.<sup>197</sup>

<sup>191</sup> See DOWLING & GUNTHER, SEVENTH EDITION, *supra* note 178, at 268, 878 n.1. Although Professor Dowling remained the lead author of the casebook, the seventh edition was edited by Professor Gunther. See Gerald Gunther, *Preface to DOWLING & GUNTHER, SEVENTH EDITION*, *supra* note 178, at xi-xii.

<sup>192</sup> DOWLING & GUNTHER, SEVENTH EDITION, *supra* note 178, at 268.

<sup>193</sup> *See id.*

<sup>194</sup> *See id.* at 878.

<sup>195</sup> *See id.* at 878 n.1.

<sup>196</sup> *See id.*

<sup>197</sup> GUNTHER, TWELFTH EDITION, *supra* note 11, at 457; GERALD GUNTHER, CONSTITUTIONAL LAW 467 (11th ed. 1985); GERALD GUNTHER, CONSTITUTIONAL LAW 534 (10th ed. 1980); GUNTHER, *supra* note 190, at 583. Professor Gunther's approach to the "switch in time" through the twelfth edition of his casebook has remained largely the same. As if to emphasize the view that it is *Nebbia*, not *West Coast Hotel*, that marks a turn in the Court's economic substantive due process jurisprudence, *Nebbia* remains a primary case throughout the editions; in contrast, *West Coast Hotel* has been relegated to the notes following *Nebbia*. After the 11th edition, *West Coast Hotel* was changed from a primary to a note case, and Gunther's reiteration



All three of Justice Frankfurter's defenses — timing, *Nebbia*, and Justice Roberts's memorandum — were thus accepted by Professor Gunther, whose casebook has been the most widely used constitutional law casebook for much of the last twenty-five years.<sup>198</sup> With the near universal adoption of Frankfurter's position in casebooks, the revised history of Roberts's "switch" was secured.

### C.

In 1967, the eminent constitutional law scholar Paul Freund<sup>199</sup> twice cited the tribute of his mentor Felix Frankfurter while discussing Justice Roberts's switch. In evaluating the contributions of Chief Justice Charles Evans Hughes, Freund wholly adopted the claim that Justice Roberts switched his position in *West Coast Hotel* before the Court Plan was announced.<sup>200</sup> From Freund's perspective, "[t]his is entirely in keeping with Roberts's character, which led him to react violently against what he thought was intellectual slipperiness and sometimes to decide cases on a seemingly impressionistic, ad hoc basis."<sup>201</sup> The other citation is found in the third edition of the constitutional law casebook co-authored by Freund. The book retained the mention of Justice Roberts's voting change in *West Coast Hotel*, as well as the erroneous statement that the memorandum was prepared contemporaneously with his decision in *West Coast Hotel*.<sup>202</sup> Over twenty years later, Freund again cited Justice Frankfurter's

of Justice Roberts's votes was made part of the note following *West Coast Hotel*, rather than a footnote added by him to the case. See GUNTHER, TWELFTH EDITION, *supra* note 11, at 122–24, 455–57. Other casebooks have also placed *Nebbia* and *West Coast Hotel* together. See, e.g., 2 PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK D.W. HOWE & ERNEST J. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1621–30 (3d ed. 1967) (placing *Nebbia* and *West Coast Hotel* as back-to-back primary cases); WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, THE AMERICAN CONSTITUTION: CASES AND MATERIALS 332–35 (2d ed. 1967) (placing *West Coast Hotel* as a note case immediately following primary case of *Nebbia*); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 375–78 (1st ed. 1981) (placing *West Coast Hotel* as a note case immediately following primary case of *Nebbia*).

<sup>198</sup> See Letter from Charles Taibi, Foundation Press, to Michael Ariens, Professor (June 9, 1993) (on file at the Harvard Law School Library). The following provides a sampling of the number of adoptions of Professor Gunther's *Constitutional Law* casebook: 9th edition (1977), 113 adoptions; 10th edition (1982), 135 adoptions; 11th edition (1987), 125 adoptions; and 12th edition (1992), 109 adoptions. Foundation Press has no record of the number of adoptions of the 7th or 8th editions of the casebook, and it has a policy of not publicly releasing the total sales of a book. See *id.* The highest number of adoptions of Professor Gunther's book was 147 in 1980, the first year of the 10th edition. Telephone Interview with Charles Taibi, Foundation Press (June 9, 1993).

<sup>199</sup> See generally Paul A. Freund, HARV. L. BULL., June 1992, at 16 (describing Freund's accomplishments).

<sup>200</sup> See Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 29–30 (1967).

<sup>201</sup> *Id.* at 30.

<sup>202</sup> See 2 FREUND, SUTHERLAND, HOWE & BROWN, *supra* note 197, at 1630.

tribute as authority,<sup>203</sup> although he was less certain that Justice Roberts and Chief Justice Hughes had not changed their votes as a result of FDR's court reorganization plan.<sup>204</sup>

Freund also played a central role in planting Justice Frankfurter's revised history in another text: Thomas Reed Powell's *Vagaries and Varieties in Constitutional Interpretation*.<sup>205</sup> *Vagaries and Varieties* was based on the Carpentier lectures given by Powell at Columbia Law School in April and May of 1955, and was intended to be a summing up of Professor Powell's work in teaching and writing about constitutional law.

While discussing Roberts's change of mind, Powell stated: "[Justice Roberts] saw a somewhat flickering white light on the road to Damascus after the election of 1936 and before the proposal of the so-called Court Plan of 1937."<sup>206</sup> After "1936" in the text, a lengthy footnote was appended that attempted to explain Justice Roberts's decisionmaking processes.<sup>207</sup> The footnote concludes: "Thus Mr. Justice Roberts's position in the two cases [*Morehead* and *West Coast Hotel*] can be harmonized as the view of one who was unable to distinguish the *Adkins* case but who would accept an opportunity to overrule it."<sup>208</sup> Powell, a professor of constitutional law at Harvard Law School from 1925 to 1949, trained in both political science and law, was a master at dissecting Supreme Court opinions and exposing biases hidden within judicial decisions.<sup>209</sup> Coming from the skeptical

<sup>203</sup> See Paul A. Freund, *The Rise and Fall of Judicial Resistance to the New Deal: Benchmarks from the Federal Courts for Massachusetts*, 74 MASS. L. REV. 234, 238 (1989).

<sup>204</sup> See *id.* Freund wrote: "Was the seeming turnabout, involving especially Hughes and Roberts, due to the President's 'Court-packing' plan? The question is probably unanswerable, even by the subjects of the inquiry, given the subtle, atmospheric, imperceptible elements that play upon one's mind and judgment." *Id.* Freund's statement may have been his considered judgment after decades of study, or may have been simply a dramatic rendering in a short article discussing the Massachusetts connection to New Deal cases.

<sup>205</sup> See THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956).

<sup>206</sup> *Id.* at 81 (footnote omitted).

<sup>207</sup> See *id.* at 81 n.89.

<sup>208</sup> *Id.*

<sup>209</sup> See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 50-51 (1986). One of Powell's quips skewered both the Supreme Court and the Restatement of the Law project of the American Law Institute. In his mock Restatement of Constitutional Law, Powell suggested that the Court's decisions in dormant commerce clause cases should be restated to the effect that the black letter law is that Congress may regulate commerce, the states may regulate commerce some, but not too much; and the comment to the black letter law should state, "how much is too much is beyond the scope of [t]his Restatement." GUNTHER, *TWELFTH EDITION*, *supra* note 11, at 254 n.1. For memorial tributes to Powell, see Erwin N. Griswold, Felix Frankfurter, Paul A. Freund & Henry M. Hart, Jr., *Thomas Reed Powell*, 69 HARV. L. REV. 793, 793-805 (1956). See also Paul A. Freund, *Powell, Thomas Reed*, in *DICTIONARY OF AMERICAN BIOGRAPHY 1951-1955*, at 549, 549 (John A. Garraty ed., Supp. V 1977) (noting that Powell would often "expose [the] lack of candor, question-begging, and logical lacunae" behind judicial opinions).

and critical mind of T.R. Powell, this statement gives an authority to the revised history and forces one to consider the possibility that the revised history is the accurate history.

Professor Powell, however, never wrote this footnote. Powell died on August 16, 1955, shortly after giving the Carpentier lectures. The task of editing these lectures into book form fell largely to Freund, who stated that the "principal task has been to document the text by furnishing the footnote references, occasionally with some explanation."<sup>210</sup> Thus, this footnote, which mouths the explanation given by Justice Frankfurter, both in the tribute and in a 1953 letter to Freund, came not from Powell, but from Freund.<sup>211</sup> Consequently, giving credence to the footnote forces one to decide whether to believe Freund's, and thus Justice Frankfurter's, interpretation of Justice Roberts's voting behavior. It is not Powell's conclusion, and it is not an independent assessment of the validity of the revised history, as some have used it.<sup>212</sup>

Freund was also Justice Frankfurter's handpicked author of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States for the 1930-41 era, the years during which Hughes

<sup>210</sup> Paul A. Freund, *Foreword* to POWELL, *supra* note 205, at x. Columbia Law School Dean William Warren, in his preface to Powell's book, wrote that "Professor Freund is very modest when he describes his work and that of his colleague [Ernest J. Brown] as 'furnishing the footnote references, occasionally with some explanation.'" William C. Warren, *Preface* to POWELL, *supra* note 205, at xv.

<sup>211</sup> See Frankfurter, *supra* note 10, at 314; Letter from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (Oct. 8, 1953), *microformed on Harvard Frankfurter Papers*, *supra* note 78, at Part III, Reel 15. Freund stated that "[a]fter the lectures were delivered Professor Powell made some slight revisions in all of them. He marked the text with footnote signs but did not supply the footnotes themselves." Paul A. Freund, *Foreword* to POWELL, *supra* note 205, at x. This may indicate that Powell himself wanted to insert the material that Freund provided in footnote 89 but was unable to do so due to his untimely death. Freund later indicates, however, that "[a]t a very few points in the manuscript we took occasion to correct a slip of memory or clarify an ambiguity that would not have survived the author's further scrutiny." *Id.* Freund does not state at which points in the text such ambiguities or slips of memory occurred.

Further, the correspondence between Justice Frankfurter and Powell located in both sets of papers contains no indications that the two ever discussed Justice Roberts's actions during the spring of 1937. See Harvard Frankfurter Papers, *supra* note 78; Thomas Reed Powell Papers, Harvard Law School Library.

Although there may be an issue concerning timing, given that *Vagaries and Varieties* was published only a few months after the tribute, a letter from Justice Frankfurter reveals that Freund was given an advance peek at the Frankfurter revisionist history in a letter to him from Frankfurter sent in October 1953. See *supra* note 78. The October 1953 letter models the explanation or "synthesis" undertaken in footnote 89 to Powell's *Vagaries and Varieties*. Freund thus had ample time and opportunity to formulate the argument made in footnote 89 of *Vagaries and Varieties*. However, because Powell gave his lectures in April and May of 1955, and died on August 16, 1955, it would have been impolitic for the footnote to cite to Frankfurter's future tribute.

<sup>212</sup> See, e.g., CURRIE, *supra* note 173, at 236 n.162.

was Chief Justice. Although Freund never completed this history,<sup>213</sup> the tentative title — *Depression, New Deal and the Court in Crisis, 1930-41* — suggests that he intended to devote considerable attention to the crucial event of this period, the 1937 crisis and Roberts's "switch in time." The correspondence between Freund and Frankfurter<sup>214</sup> illustrates Frankfurter's deep and abiding interest in making the revised history the official history.

#### D.

Some political scientists of the post-World War II generation were more skeptical of the revised history than were their counterparts in law schools.<sup>215</sup> In part, this was because political scientists viewed

<sup>213</sup> For a critical attack on Freund's editorial directorship of the Oliver Wendell Holmes Devise history, see Sanford Levinson, *Book Review*, 75 VA. L. REV. 1429, 1429 n.2 (1989) (reviewing G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815-35 (1988)). Justice Frankfurter's attempt to influence the entire Oliver Wendell Holmes Devise History of the Supreme Court, including the history of the crisis of 1937, is well documented in several of his letters to Freund. See Letters from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (Jan. 18, 1963; Sept. 24, 1963; June 13, 1964 [Library of Congress Frankfurter Papers, *supra* note 78, indicate that this letter was dated June 3, 1964]; July 1, 1964), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 38.

<sup>214</sup> See Harvard Frankfurter Papers, *supra* note 78. Freund's papers are presently being catalogued at the Harvard Law School Library and are not yet available for review. However, Professor Richard Friedman of the University of Michigan Law School possesses Freund's papers relating to the history of the Hughes Court.

<sup>215</sup> Chief among the skeptics was Alpheus T. Mason, whose many published books and articles followed the original history of Roberts's actions and largely ignored Frankfurter's tribute. Although Mason was aware of the tribute, he only mentioned it briefly in his essay on Roberts in the *Dictionary of American Biography*. See Alpheus T. Mason, *Roberts, Owen Josephus*, in *DICTIONARY OF AMERICAN BIOGRAPHY 1951-1955*, *supra* note 209, at 571, 574. It is a curious essay. To some extent, Mason accepts the revisionist history that Roberts did not retreat in *West Coast Hotel* because New York counsel in *Morehead* asked only to distinguish *Adkins*. Mason also, however, criticizes Frankfurter's tribute to Roberts, although for whatever reason, Mason's essay does not mention the memorandum itself. See *id.* Mason also suggests at one point that Roberts was simple-minded and did not switch as a result of the 1936 election. Later in the essay, though, he calls the change of mind by "Hughes-Roberts" a "switch." See *id.*

Frankfurter and Mason were not friends. Their relationship may have been colored by Mason's view of the politics of judging, and in particular, by his caustic view of Hughes. See J. Woodford Howard, Jr., *Alpheus T. Mason and the Art of Judicial Biography*, 8 CONST. COMMENTARY 41, 48-49 (1991) (noting that "Mason's dislike of Hughes was a standing joke among his graduate students of my generation"). In Mason's eyes, Hughes was the villain of the constitutional crisis of 1937 — in large part because he was a conservative who wanted to be perceived as a liberal and because, in Mason's rendering, he manipulated the law to make it conform to his subjective preferences. Frankfurter, in turn, regularly denounced both Mason and his work. See Letters from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (July 1, 1964; Feb. 20, 1956; Oct. 24, 1955; undated [October 22-23, 1950]); Note from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (undated [approx. April 1956]); Letter from Felix Frankfurter to Arthur W. Cowan, Esq., (Oct. 24, 1958), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 38. Professor

the Court as a political institution and generally were less concerned about maintaining the viability of the law/politics split.<sup>216</sup> Despite the different lens through which political scientists viewed the Court, however, this skepticism often vanished after they evaluated Frankfurter's tribute and the Roberts memorandum. For example, in 1962, Walter Murphy cited Frankfurter's tribute for the proposition that Roberts had not switched his vote in *West Coast Hotel* as a result of Roosevelt's court-packing plan. Murphy reached this conclusion even though he noted that some court plan was expected even before it was announced in February 1937, and in spite of Justice Roberts's testimony in 1954 that the Court was under tremendous strain during the crisis.<sup>217</sup> Alfred H. Kelly and Winfred A. Harbison were also deeply affected by the revised history.<sup>218</sup> In the third edition of their

Melvin Urofsky states that he was told by Pearl von Allman, the University of Louisville's late law librarian, that Frankfurter retrieved his letters to Brandeis from the Brandeis collection at the University of Louisville "because he did not want Alpheus Mason (then working on a Brandeis biography) to see them." MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 219 (1991); see also Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125, 131 (1992) (noting that "Frankfurter, whose distaste for Alpheus Mason's writings on Brandeis led him to obstruct Mason's research efforts, [also] encouraged Bickel and Freund to take up Brandeis as a subject").

<sup>216</sup> Two excellent examples of the perspective of political scientists in the post-World War II era regarding the political nature of the Supreme Court are found in the 1965 Rosenthal Lecture given by political scientist William M. Beaney and in Mason's and Beaney's textbook.

If political science is the study of how the "political system" makes "authoritative allocations of value" in any society, it follows that no apology is needed for a continuing concern with the American Supreme Court, which, more than other courts in the Anglo-American or the Civil Law system, has from the beginning made, and is expected to make, many of the crucial allocations of values in our society. It is, then, in Professor Rosenblum's felicitous phrase, "a political instrument," and should be judged in that light.

William M. Beaney, *The Supreme Court: The Perspective of Political Science*, in MAX FREEDMAN, WILLIAM M. BEANEY & EUGENE V. ROSTOW, *PERSPECTIVES ON THE COURT* 34-35 (1967) (footnotes omitted). In their casebook Mason and Beaney argue that

The Supreme Court has always consisted largely of politicians, appointed by politicians, confirmed by politicians, all in furtherance of controversial political objectives. From John Marshall to Warren Burger, the Court has been the guardian of some particular interest and the promoter of preferred values.

ALPHEUS T. MASON & WILLIAM M. BEANEY, *AMERICAN CONSTITUTIONAL LAW* at xiii (6th ed. 1978).

<sup>217</sup> See MURPHY, *supra* note 18, at 59-60 n.\*; see also ROOSEVELT AND FRANKFURTER, *supra* note 9, at 392-93 ("The accusation about 'Roberts' Switch' arose from his conduct in two cases, conduct that was gravely misunderstood not only by the public but by the legal profession.").

<sup>218</sup> Compare ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 759-60 (3d ed. 1963) [hereinafter KELLY & HARBISON, THIRD EDITION] (arguing that Justice Roberts was aware of the political implications of his change of heart, but that he did not necessarily act "merely to defeat the court plan") with KELLY & HARBISON, *FOURTH EDITION*, *supra* note 178, at 764 (decrying as "simple" any interpretation of Justice Roberts's switch that ignored the new evidence of his principled change in conviction).

history of the American Constitution, published in 1963, they had concluded that the reversal of Hughes and Roberts was "shrewdly calculated"<sup>219</sup> and that it was "scarcely conceivable" that the two Justices "were unaware of the political implications of their move."<sup>220</sup> In the fourth edition of their book, published in 1970, the authors reversed their opinion, relying on evidence initially provided by Frankfurter: "In short, Roberts' dramatic shift on minimum wage legislation reflected principled conviction on his part and not mere political opportunism."<sup>221</sup>

After Frankfurter's tribute, the most thorough attempt to return to the original case that Justice Roberts "switched" is John Chambers's article, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*.<sup>222</sup> Professor Chambers drew two conclusions: first, that "a combination of pressures — presidential, congressional, and most important, public — convinced Roberts that he must accept the new philosophy and interpret the Constitution in line with the times;"<sup>223</sup> and second, that Roberts's "memorandum is both ambiguous and contrived."<sup>224</sup> The first conclusion modified the initial interpretation, for Chambers relied on evidence of public unrest more than FDR's court-packing threat.<sup>225</sup> Although I agree with Chambers's second conclusion, it deflects us from a fuller understanding of the memorandum's purpose. Chambers was convinced that Roberts wrote it to enhance his reputation posthumously; I am convinced, however, that Frankfurter published the memorandum less to defend Roberts and more to reassert the Supreme Court's independence from politics and thereby enhance the *Court's* reputation. Roberts was a foil, a maguffin whom Frankfurter used for the Court's benefit. The memorandum was "ambiguous and contrived," but for reasons that have little to do with Roberts.

<sup>219</sup> KELLY & HARBISON, THIRD EDITION, *supra* note 218, at 759.

<sup>220</sup> *Id.*

<sup>221</sup> KELLY & HARBISON, FOURTH EDITION, *supra* note 178, at 764; *see also* GLENDON A. SCHUBERT, CONSTITUTIONAL POLITICS: THE POLITICAL BEHAVIOR OF SUPREME COURT JUSTICES AND THE CONSTITUTIONAL POLICIES THAT THEY MAKE 168 (1969) (suggesting that a quantitative analysis of the Court's decisions indicated "that *both* Hughes and Roberts switched in the term of the Court-packing fight," but tempering the conclusion by stating that the Roberts memorandum was "a powerful rebuttal" to his quantitative analysis).

<sup>222</sup> *See* Chambers, *supra* note 146, at 45 *passim*.

<sup>223</sup> *Id.* at 73; *see also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 175 (1960) (concluding that some combination of FDR's reelection victory, labor unrest, and the court-packing plan led to Roberts's turnabout).

<sup>224</sup> Chambers, *supra* note 146, at 67.

<sup>225</sup> Edward Corwin also made the argument that Hughes and Roberts were affected by labor unrest when they changed their votes. *See* CORWIN, *supra* note 70, at 73. Robert McCloskey suggested the same of Roberts. *See* MCCLOSKEY, *supra* note 223, at 175; *see also* LEO PFEFFER, THIS HONORABLE COURT 320 (1965) ("It is of little moment whether the switch in time that saved nine was made in December of 1936 or February of 1937. In either case, its explanation lies in political rather than judicial terms.").

## E.

The final path by which the revised history took hold was through Frankfurter's biographers.<sup>226</sup> For them, the most difficult question to answer, in order to evaluate the court-packing episode, was whether Frankfurter's private correspondence in the spring of 1937 could be reconciled with his public defense of Roberts nearly a generation later.<sup>227</sup>

Max Freedman, Frankfurter's hand-picked biographer<sup>228</sup> and the person who first made public Frankfurter's letter to FDR, gave the initial and still generally accepted explanation. Freedman explained that Frankfurter "deeply regretted this letter,"<sup>229</sup> and that one purpose of Frankfurter's tribute to Roberts was to "correct[] this mistake."<sup>230</sup>

<sup>226</sup> Evaluating the impact of the court-packing plan and the "switch in time" was also important to Franklin Roosevelt's biographers. In 1941, FDR claimed that he lost the battle but won the war by waging his fight to reorganize the judiciary. See 6 PUBLIC PAPERS: THE CONSTITUTION PREVAILS, *supra* note 12, at lxvi-lxx. But the fourth and most recent volume of Kenneth Davis's biography of FDR, after delving deeply into the crisis of 1937, comes to a much different conclusion. Using the Roberts memorandum for support, although critical of Roberts's "disingenuous" claims, Davis writes: "Roosevelt's court message had no such causal efficacy as he later claimed for it." DAVIS, *supra* note 11, at 99. Given this view, Davis concludes more broadly:

[Roosevelt's] sadly mistaken court-packing effort effectively ended the New Deal as a reforming, transforming social force — effectively destroyed the possibility that the New Deal could achieve those "practical controls over blind economic forces and blindly selfish men," could "create those moral controls over the services of science . . . necessary to make science a useful servant instead of a ruthless master of mankind," that Roosevelt had named in his second inaugural as fundamental objectives of his administration.

*Id.* at 99-100.

<sup>227</sup> A related question Frankfurter's biographers have wrestled with is whether Frankfurter, who refused to state publicly his views on FDR's court-packing plan, supported the plan. Although Frankfurter's critics argue that he privately detested the court-packing plan but refused to denounce FDR publicly because he desired a seat on the Supreme Court, see, e.g., DOUGLAS, *supra* note 169, at 324, the consensus is that, although Frankfurter disapproved of the plan, he was willing to forgo publicly voicing his disapproval in order to remain loyal to President Roosevelt. Compare BAKER, *supra* note 168, at 326-28 (concluding that Frankfurter privately opposed the plan but remained silent to support FDR); BAKER, *supra* note 51, at 186-87 (same); NELSON L. DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL 142 (1980) (same); Joseph P. Lash, *A Brahmin of the Law*, in LASH, *supra* note 84, at 59 (same); and HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 31 (1960) (same) with PARRISH, *supra* note 54, at 269 (concluding that Frankfurter believed the greater evil was the Court, not FDR's plan); and UROFSKY, *supra* note 215, at 44 (same). Frankfurter refused a request from a doctoral candidate in history to state publicly his views regarding the court-packing plan 15 years after the fact. See Letter from E. Kimbark MacColl to Justice Felix Frankfurter (Aug. 18, 1952), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 181 (including handwritten note from Frankfurter indicating refusal to state publicly his opinion).

<sup>228</sup> See Max Freedman, *Justice Frankfurter and Judicial Review*, in FREEDMAN, BEANEY & ROSTOW, *supra* note 216, at 1, 4.

<sup>229</sup> ROOSEVELT AND FRANKFURTER, *supra* note 9, at 392.

<sup>230</sup> *Id.* On reconciling Frankfurter's earlier and later views, Leonard Baker seemed paralyzed

Freedman (or is it Frankfurter?) continued by stating that the accusation of Roberts's switch arose from "conduct gravely misunderstood not only by the public but by the legal profession."<sup>231</sup> This explanation thus defused criticism of Roberts's actions by laying blame on Frankfurter's mistaken impression in 1937.

Frankfurter biographer and historian Michael Parrish dissents. Relying on his own survey of the evidence regarding Roberts's switch,<sup>232</sup> Parrish concluded that Frankfurter's privately expressed view in 1937 was correct<sup>233</sup> and that Frankfurter's tribute was farther from the truth.<sup>234</sup> What Parrish did not explain, however, was why it was important to Frankfurter for the revisionist history to succeed.

The opinion that I believe is closest to the truth is expressed by Professor H.N. Hirsch in his psychological biography of Frankfurter.<sup>235</sup> Hirsch notes that Frankfurter wanted history to prove that "Roberts had, after all, not really switched his votes during the Court-packing fight."<sup>236</sup> Hirsch also notes that Frankfurter regularly wrote to Paul Freund, "*The* historian of the Supreme Court,"<sup>237</sup> about his views of the events of the Hughes Court. This was, as Hirsch states, part of Frankfurter's efforts "to leave his legacy by shaping history to agree with his interpretation of events."<sup>238</sup>

by Frankfurter's tribute when compared to his evidence, which indicated a flip by Justice Roberts. See BAKER, *supra* note 168, at 177. Professor Urofsky is alone in believing that Frankfurter both supported FDR's court-packing plan and that Roberts apparently did not "switch." Urofsky did not cite Frankfurter's tribute, but noted that, "[i]n fact, as later evidence has shown, Roberts had decided to vote for the measure well before Roosevelt announced his plan." UROFSKY, *supra* note 215, at 196 n.50.

<sup>231</sup> ROOSEVELT AND FRANKFURTER, *supra* note 9, at 393. This language is suspiciously similar to the language used by Frankfurter in his tribute. See *supra* p. 635.

<sup>232</sup> See Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 HISTORIAN 286, 296-97 (1978) (concluding that Roberts switched as a result of FDR's resounding reelection).

<sup>233</sup> See ROOSEVELT AND FRANKFURTER, *supra* note 9, at 392.

<sup>234</sup> See Parrish, *supra* note 232, at 296-97. The purpose of Parrish's *Hughes Court* article was to compare the histories of the New Deal by the "legal realist" scholars, including Corwin, Wright, Mason, and McCloskey, with later histories by conservative revisionists, including Swindler and Freund, and New Left historians of the 1960s and early 1970s. Although this insightful article does a wonderful job of picking apart the histories of those whose desires lead them either to protect or to attack the Court, Parrish fails to grasp the importance of this revisionist history in the legal thought of reasoned elaboration, and the centrality of Felix Frankfurter to the legal thought of reasoned elaboration.

<sup>235</sup> See H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

<sup>236</sup> *Id.* at 199. Hirsch concludes that Frankfurter's tribute was an attempt to resurrect Roberts's reputation, but doesn't evaluate the success of Frankfurter's efforts. See *id.* at 247 n.97; see also Spillenger, *supra* note 215, at 131 (noting that "[t]he preservation of Brandeis's reputation and the transmission of the Brandeis 'word' [by 1943] became an absorbing concern for Frankfurter").

<sup>237</sup> Letter from Justice Felix Frankfurter to Paul A. Freund, Professor, Harvard Law School (July 16, 1958), *microformed on* Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 15.

<sup>238</sup> HIRSCH, *supra* note 235, at 198.



What Hirsch fails to give us is a reason why Frankfurter would have tried to shape history to declare that Roberts had not really switched. Frankfurter engaged in this undertaking, in my view, to protect the virtue and integrity of the Supreme Court, again under attack after the Court decided *Brown*.

## VI.

Americans have taken pride in the independence of their judges, and the *Brown* case may well be the leading symbol of judicial independence.

### CASS R. SUNSTEIN, HOW INDEPENDENT IS THE COURT?<sup>239</sup>

#### A.

Included in the Felix Frankfurter Papers at the Harvard Law School Library is a clipping of a letter to the editor concerning the death of Owen Roberts printed in *The London Times*. The newspaper headline above the letter is "Mr. Owen Roberts" and directly underneath, "The Rule of Law." The author, "L.C.," wrote in part: "Those who knew [Roberts] knew that he resigned because he considered that the Ark of the Covenant of the American Constitution — the Supreme Court — was being desecrated by considerations of domestic politics."<sup>240</sup> In a 1960 letter to William O. Douglas, Frankfurter wrote, "I expect from [my law clerks] if not my own religious attitude toward the Court as an institution at least a goodly portion of reverence for its responsibilities in our national life."<sup>241</sup>

This religious imagery serves to explain Justice Frankfurter's desire to protect the Court. Frankfurter had an absolute faith in the Court. As he once wrote, his life "ha[d] been dedicated to the faith in the disinterestedness of a tribunal."<sup>242</sup> The Roberts memorandum was a

<sup>239</sup> Cass R. Sunstein, *How Independent Is the Court?*, N.Y. REV. BOOKS, Oct. 22, 1992, at 47.

<sup>240</sup> *Mr. Owen Roberts: The Rule of Law*, TIMES (London), May 25, 1955, at 13, microformed on Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 3. I have been unable to ascertain the identity of "L.C." There is no indication from my research that Roberts, a religious man, ever viewed the Court in such religious terms. Statements in this letter make clear that "L.C." possessed an intimate knowledge of both Roberts and the Court.

<sup>241</sup> Letter from Justice Felix Frankfurter to Justice William O. Douglas (Mar. 23, 1960), microformed on Harvard Frankfurter Papers, *supra* note 78, at Part III, Reel 1; see also HIRSCH, *supra* note 235, at 187 ("For the fact is that I have for a considerable time been carrying myself with the thought that, perhaps, the best service I could render an institution that has semi-sacred implications for me was to resign and state fully my reasons — including Stone's major responsibility for the state of things." (quoting Letter from Justice Felix Frankfurter to Learned Hand, Judge, United States Court of Appeals for the Second Circuit (June 27, 1946)).

<sup>242</sup> PARRISH, *supra* note 54, at 272 (quoting Letter from Felix Frankfurter to Charles Wyanski (Apr. 13, 1937)).

hole card for Frankfurter to play if a decision or set of decisions suggested that the Court was enmeshed in the "turbulence of politics" as during the years 1935-1937.

The law/politics split was central to Frankfurter's vision of the American democratic experiment,<sup>243</sup> and that split was pivotal to post-World War II legal thought.<sup>244</sup> Indeed, this split was central to reasoned elaboration in part because one of the lessons legal progressives (and their heirs) drew from *Lochner v. New York*<sup>245</sup> was that the members of the Court were duty-bound to avoid injecting their subjective political and philosophical values into constitutional law. As evidenced by recent Supreme Court decisions,<sup>246</sup> that split remains vital in justifying an independent judiciary. For Frankfurter and others,<sup>247</sup> it was not necessary to prove to political scientists that

<sup>243</sup> This is most clearly shown in the infamous case of *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). The issue was whether, after failing once, it was cruel and unusual punishment for the state of Louisiana to try for a second time to kill Willie Francis. The Court held that it was not. *See id.* at 463. In a concurrence, Frankfurter wrote, "we cannot escape acknowledging that [the constitutional issue] involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce." *Id.* at 470 (Frankfurter, J., concurring). After deciding that the state could execute Francis, Frankfurter worked behind the scenes to prevent Francis's execution. He was not successful. For more on Justice Frankfurter's vision of the division between law and politics, see Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-32 (1955); Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 794 (1957) (reprinting the First Owen J. Roberts Lecture at the University of Pennsylvania Law School) (rejecting "the impression that a Justice of the Court is left at large to exercise his private wisdom"); Felix Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 PROC. AM. PHIL. SOC'Y 233, 238 (1954), reprinted as *The Process of Judging in the Supreme Court*, in *THE SUPREME COURT: VIEWS FROM INSIDE* 34, 42-43 (Alan F. Westin ed., 1961) (propounding the view "that [a judge] is there not to impose his private views upon society, that he is not to enforce personalized justice").

<sup>244</sup> I have discussed this intellectual history in the context of the codification of the law of evidence. *See* Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC'L INQ. 213, 247-52 (1992). On the realist-process jurisprudence difference regarding "constitutionalism," see Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640 *passim* (1972). For an incisive evaluation of Alexander Bickel, the most prominent constitutional scholar during the period of reasoned elaboration, see generally Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 *passim* (1976).

<sup>245</sup> 198 U.S. 45 (1905).

<sup>246</sup> *See* *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's. . . ."); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812 (1992) (linking *Lochner* and *West Coast Hotel* and explaining that "facts" required the latter case to announce a new principle and overrule *Adkins*).

<sup>247</sup> Not coincidentally, legal scholars who joined Frankfurter to defend Roberts's actions, from Erwin Griswold to Arthur Sutherland to Paul Freund, were all professors at the Harvard Law School and former students or colleagues of Frankfurter there.

Roberts (and possibly Hughes) was motivated by concerns of reason and judgment, or craft and principle. It was only necessary that preeminent legal scholars relay that message to law students and lawyers. Publication of the Roberts memorandum created the opportunity to claim that judgment (law) rather than will (politics) was responsible for Roberts's decisions, and allowed that message to be sent to legal scholars.

### B.

When the constitutional revolution came, as we indicated when we were talking about Roosevelt's court-packing plan at an earlier meeting, the problems for all of us became: How can we defend a judicial veto in areas where we thought it helpful in American life — civil liberties area, personal freedom, First Amendment — and at the same time condemn it in the areas where we considered it unhelpful.<sup>248</sup>

After the constitutional crisis of 1937, legal scholars feared the intrusion of "politics" in the Court, and this fear led them to look for ways to prevent judgment from becoming will. The difficulty was that politics could intrude from within, when a Justice voted based on his predilections, or without, when, for example, a Justice voted based on pressure from the President.

Frankfurter's explanation of Roberts's actions in 1937 became the accepted history not because Frankfurter elucidated "indisputable facts," but rather because this history better enabled legal scholars to defend the independence of the Court, which *Brown* had placed in some doubt.<sup>249</sup> When Justice Frankfurter found a "lawful" resolution to *Brown*, the happy coincidence of his personal views with the requirements of the Constitution was just that, a happy coincidence.<sup>250</sup>

<sup>248</sup> Silber & Miller, *supra* note 14, at 924 (quoting Herbert Wechsler).

<sup>249</sup> Thus, I disagree with Professor Horwitz's conclusion that *Brown* "produced a sharply critical reaction among elite legal thinkers." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 258 (1992).

<sup>250</sup> Frankfurter's role in *Brown* is the subject of much dispute. The standard story is set forth in Richard Kluger's 1975 book, *Simple Justice*, in which Frankfurter is viewed as an active proponent for holding segregated education unconstitutional. See RICHARD KLUGER, *SIMPLE JUSTICE* 599-600 (1975); see also Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 36 n.284 (1979) (noting commentators' wide variety of views about Frankfurter's position on *Brown*). Compare Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 828 (1987) (suggesting, through the use of an oral history, that Frankfurter gave the Solicitor General's office information concerning the probable votes of other Justices) with Randall Kennedy, *A Reply to Philip Elman*, 100 HARV.

For legal scholars sympathetic to the aims of the plaintiffs in *Brown*, the goal was to justify the exercise of the judicial veto as both lawful and "helpful."

The result was that, from 1954 to 1959, *Brown* was defended by legal academics as vitally important to American society and also as a legally unexceptional decision.<sup>251</sup> Writing in 1954, Harvard Law School Professor Albert M. Sacks concluded that *Brown* "illustrates the functioning of the judicial process at its best."<sup>252</sup> The next year, Sacks's colleague Robert Braucher, whose Foreword began with the caution that "[t]here will be no praise here for 'judicial statesman-

L. REV. 1938 (1987) (suggesting that oral history misleads historians about the path up to and including *Brown*). Hutchinson states that, whatever Frankfurter's views, by the Court's December 1953 conference, Frankfurter had realized that a majority of the Court planned to hold segregated schooling unconstitutional. See Hutchinson, *supra*, at 39; see also Tushnet & Lezin, *supra* note 15, at 1872-75, 1918-29 (detailing and criticizing the standard story of Frankfurter's role in *Brown*). Professor Tushnet's interpretation is that Frankfurter's dilemma in *Brown* was to find a "legal" rather than a "political" solution. See *id.* at 1919-20. In commenting on the Court's 1953 deliberations in *Brown*, Professor Tushnet writes:

Frankfurter, seeking a judicial rather than a political resolution to the question, looked for support in judicial precedent and custom, but could not find it there. His resources as a lawyer were exhausted without turning up a legal justification for what he agreed was a 'congenial' political solution. As a result, when the discussion reached the merits of *Brown*, Frankfurter was essentially paralyzed; there was nothing he could say that simultaneously satisfied his desire to overturn segregation and his insistence that the Court must act judicially rather than politically.

*Id.* Professor Tushnet concludes that once Frankfurter was able to view the remedy in *Brown* as legal rather than political, his doubts were resolved. See *id.* at 1920. I am convinced by Tushnet's interpretation of Frankfurter's role in *Brown*, and I believe that it suggests a reason why Frankfurter's revisionist history of the crisis of 1937 was important in defending *Brown*.

<sup>251</sup> See Robert Braucher, *The Supreme Court, 1954 Term — Foreword*, 69 HARV. L. REV. 120, 120-23 (1955); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 150 (1955); George L. DeLacy, *Segregation Cases: A Judicial Problem Judicially Solved*, 43 A.B.A. J. 519, 520-21 (1957); Charles Fairman, *The Supreme Court, 1955 Term — Foreword: Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 85-92 (1956); Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 350-51 (1958); Paul A. Freund, *The Supreme Court Crisis*, 31 N.Y. ST. B. BULL. 66, 66-70 (1959) [hereinafter Freund, *Supreme Court Crisis*]; Paul G. Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137, 1155-56 (1954); Robert B. McKay, "With All Deliberate Speed": *Legislative Reaction and Judicial Development, 1956-57*, 31 N.Y.U. L. REV. 991, 1078 (1956); Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96, 96-99 (1954); see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1 (1955) (stating that "the record of history" invited the *Brown* decision); cf. Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 981 (1957) ("In *Brown v. Board of Education*, the Court, speaking the conscience of a majority of the nation, took a giant step in the evolution of full equality for the Negroes."). Of course, reaction in the south was much more critical. See, e.g., C.K. Brown, *White South is a Minority Group: Supreme Court Cannot Bestow White Man's Inheritance on Another Race*, 17 ALA. LAW. 438, 439-40 (1956); Herman E. Talmadge, *School Systems, Segregation and the Supreme Court*, 6 MERCER L. REV. 189, 190 (1955).

<sup>252</sup> Sacks, *supra* note 251, at 96.

ship," because the phrase often was used "to praise unstated and even unjudicial reasons for decision,"<sup>253</sup> offered the opinion that "even as a matter of hindsight it is hard to suggest how the Court could have decided [the remedy in *Brown*] better except perhaps by deciding sooner."<sup>254</sup> Professor Edmond Cahn suggested that *Brown* "spared the nation a genuine constitutional crisis, and that in this exigency the institution of judicial review rendered an invaluable service."<sup>255</sup>

If *Brown* was lawful, then it was authoritative, and thus required obedience by state officials. The first civil rights act of the twentieth century would not be passed until 1957, and the Civil Rights Act of 1964, which named and explicitly adopted *Brown*, was a decade away. Although Eisenhower ordered the District of Columbia to desegregate its schools in advance of specific court orders,<sup>256</sup> he was conspicuously silent about *Brown*. Only a few months after the Court issued the remedy in *Brown* requiring those public schools to desegregate "with all deliberate speed," the nation learned about the acquittal of men in Mississippi who had lynched a fourteen-year-old boy from Chicago named Emmett Till.<sup>257</sup> In December 1955, Rosa Parks would make history for refusing to move to the back of the bus.<sup>258</sup> In early 1956, southern officials first coined the phrase "massive resistance" to the *Brown* mandate,<sup>259</sup> and from 1957 to 1959, the nation watched mobs in Little Rock, Arkansas, react violently to court-ordered desegregation of Central High. The crisis Professor Cahn believed the Court had spared the nation had arrived.

Writing to a colleague about the continuing crisis in Little Rock, Arkansas, Frankfurter commented that obedience to *Brown* would be based on "the *transcending* issue of the Supreme Court as the authoritative organ of what the Constitution requires."<sup>260</sup> When southern

<sup>253</sup> Braucher, *supra* note 251, at 120.

<sup>254</sup> *Id.* at 123.

<sup>255</sup> Cahn, *supra* note 251, at 157.

<sup>256</sup> See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 113 (1988).

<sup>257</sup> See JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-65, at 37-57 (1987). This is the companion book to the magnificent documentary of the same name.

<sup>258</sup> See *id.* at 59-89; BRANCH, *supra* note 256, at 128-205.

<sup>259</sup> See NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE 111 (1969) (attributing the origin of the phrase to Virginia Senator Harry Byrd); FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 55 (1973) (same).

<sup>260</sup> TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 151 (1984) (quoting Letter from Justice Felix Frankfurter to Justice John M. Harlan (Sept. 11, 1958) (emphasis added)). This letter was sent to Harlan shortly before the Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), reaffirmed *Brown* and ordered desegregation of Central High in Little Rock, see *id.* at 17-20. The most famous statement in *Cooper* is similar to Frankfurter's language in his letter: "[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." *Id.* at 18.

segregationists used the discredited doctrines of interposition and states' rights to make legalistic challenges to *Brown*,<sup>261</sup> they won the popular battle (for a while), but they were bound to lose the legal war. The crisis in Little Rock provides evidence of this. Arkansas Governor Orval Faubus's decision to forbid Negro students from entering Little Rock Central High in 1957 made him a popular governor, but also led President Eisenhower to send the 101st Airborne Division to Little Rock to protect the students. Eisenhower explained on national television that "[m]ob rule cannot be allowed to override the decisions of our courts" and that "the foundation of the American way of life is our national respect for law."<sup>262</sup> Frankfurter ingeniously perceived that this struggle was not about the narrow subject of *Brown*; this struggle was really about the faith of Americans in the authority of the Supreme Court. That authority was more firmly grounded after the "true" explanation of Roberts's actions was published.

In early 1959, Paul Freund defended the Supreme Court from "irresponsible attacks."<sup>263</sup> He began by restating the lawfulness of *Brown*<sup>264</sup> and concluded by defending the Court's First Amendment and Due Process decisions. But it is the title of Freund's address, *The Supreme Court Crisis*,<sup>265</sup> that sparks the most attention.<sup>266</sup> A generation earlier, Merlo Pusey had used the same title to discuss FDR's court-packing plan and Roberts's change of mind. Freund makes no mention of Supreme Court crises as a recurring theme, in part because the revised history of the earlier "crisis" demonstrated that in 1937 Roberts had acted as a principled judge. According to Freund, the crisis in the late 1950s was the result of an improper understanding by many public officials of the Court's role in the

<sup>261</sup> See FREYER, *supra* note 260, at 63-86.

<sup>262</sup> WILLIAMS, *supra* note 257, at 107 (quoting Eisenhower's nationally televised speech).

<sup>263</sup> Freund, *Supreme Court Crisis*, *supra* note 251, at 70. One of those attacks was made by the Conference of State Chief Justices. See *id.* at 72-80 (defending the Court from a charge by the Conference). On August 23, 1958, at the height of the Little Rock crisis, the Conference voted 36-8 to condemn the Court for taking "the role of policy-maker without proper judicial restraint." See Eugene V. Rostow, *The Court and Its Critics*, 4 SO. TEX. L.J. 160, 168-78 (1959) (quoting the resolution and defending the Court).

<sup>264</sup> Freund wrote:

A final obvious fact is that the decisions were not an abrupt departure in constitutional law or a novel interpretation of the guarantee of equal protection of the law. The old doctrine of separate-but-equal, announced in 1898, had been steadily eroded for at least a generation before the school cases, in the way that precedents are whittled down until they finally collapse.

Freund, *Supreme Court Crisis*, *supra* note 251, at 68.

<sup>265</sup> Freund, *Supreme Court Crisis*, *supra* note 251.

<sup>266</sup> In asserting the importance of incremental change, of slowly whittling away "bad" precedent, of acting as a "moderating" influence in society, of approaching the task of deciding as a "craftsman," and of relying on the singular importance of process, it is also an excellent example of post-World War II legal thought.

democratic framework, not the Court's decisions. There is not the slightest suggestion that it was "deja vu all over again," because, for him, it wasn't. Freund's defense was to show that the Court simply was undertaking its traditional duty as the authoritative organ of what the Constitution required.

By the time Professor Herbert Wechsler attacked as unprincipled the Court's reasoning in *Brown* in his 1959 Holmes lecture,<sup>267</sup> the revisionist history of the constitutional crisis of 1937 was already in place.<sup>268</sup> The new story of Roberts's actions gave legal scholars another reason to trust the Court with the power of judicial review. Entrusting the Court with the judicial veto, as Frankfurter well knew, would transcend the Court's opinion in *Brown*, despite Wechsler's criticisms.<sup>269</sup> It was enough to "persuade the persuadable"<sup>270</sup> of the Court's integrity and virtue, and enough to prevent critics in the 1950s from using the constitutional crisis of 1937 as precedent.<sup>271</sup>

<sup>267</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler's Holmes lecture was given on April 7, 1959.

<sup>268</sup> Wechsler was barred from claiming the constitutional crisis of 1937 as precedent because he apparently accepted the Frankfurter revised history. In 1960, Wechsler gave the Owen J. Roberts Lecture at the University of Pennsylvania, in which he cited Frankfurter's tribute and concluded that Roberts's switch had been "falsely publicized." Wechsler, *supra* note 165, at 465 (footnote omitted). Cf. Silber & Miller, *supra* note 14, at 872-73 (stating that during one of a series of interviews by the authors of Professor Wechsler between 1978-82, the following question and answer is reported: "Do you feel that the court-packing plan proposed by President Roosevelt in 1937 and the change in direction that the Supreme Court took following that event amounted to a constitutional revolution against the closed system on the Court? Yes, I certainly do. I think Jones & Laughlin was a revolution, a constitutional revolution. And, don't forget, the Social Security Act was also sustained." (footnotes omitted)). It is unclear from the manner in which the question was put whether Wechsler's belief that there was a "constitutional revolution" was a result of the court-packing plan. The reader should note that Wechsler's answer makes no mention of *West Coast Hotel*.

<sup>269</sup> In this view, the "crisis" generated by Wechsler's article was part of an internal debate among the heirs to the legal progressives about the Court's role in the democratic scheme. Following Wechsler's criticism, the search for the "lawful" nature of *Brown* became the search for the foundations of constitutional law. The justification of *Brown* has since shifted from its "lawfulness" to its "justness." See Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 583-84 & nn.4-7, 619-20 (1993). The influence of the realists on Post-World War II legal thought in cordoning off "moral" arguments is discussed in Ariens, *supra* note 244, at 247-52. See also HORWITZ, *supra* note 249, at 258 (arguing that *Brown* shattered the postwar ideal that the law was value-free); cf. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1014 (1965) (arguing that the doctrine of neutral principles does not "exclude value judgments from interpretation, as some others have alleged."). See generally EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74-94 (1973) (describing the linkage between moral relativism and legal realism).

<sup>270</sup> McCLOSKEY, *supra* note 223, at 216.

<sup>271</sup> In his 1959 Holmes lecture, Wechsler never sought to bolster his claim by citing to the crisis of 1937. See Wechsler, *supra* note 267, at 31-35. In his Holmes lectures of the previous year, Judge Learned Hand, who argued against the power of judicial review and concluded that *Brown* was a "legislative" and not a "judicial" decision, never mentioned FDR's court

For those looking to eliminate the Court's role as the "authoritative organ of what the Constitution requires,"<sup>272</sup> Justice Frankfurter's revision of Justice Roberts's shift from "political" to "principled" left few avenues down which opponents of the Court could travel to attack the Court's authority.<sup>273</sup> As Frankfurter suggested, obedience to the dictates of *Brown* would result from acceptance of the Court's authority to interpret the Constitution, not from a particularized assessment of the correctness of *Brown*. In voting to hold "separate but equal" public education unconstitutional in *Brown*, Justice Frankfurter properly performed his role as priest in the temple; in revising the history of the crisis of 1937, Justice Frankfurter properly performed his longer-running role as guardian of the Court's virtue.

### C.

The initial version of Roberts's switch could be associated readily with a base law=politics version of legal realism, although the revisionist history comported better with process jurisprudence, because it explained that the difference in Roberts's votes in *Morehead* and *West Coast Hotel* was based on principle rather than politics.<sup>274</sup> The fortuity of Roberts's death on the first anniversary of *Brown* allowed

reorganization plan, the *West Coast Hotel* or *Jones & Laughlin Steel* decisions, or the constitutional crisis of 1937. See HAND, *supra* note 118.

<sup>272</sup> FREYER, *supra* note 260, at 151 (quoting Letter from Justice Felix Frankfurter to Justice John M. Harlan (Sept. 11, 1958)).

<sup>273</sup> In addition to their long friendship, this might explain why Frankfurter so heartily congratulated Hand on the success of his Holmes Lectures, which were many years in the making. Frankfurter noted Hand's view that *Brown* was a "legislative" rather than "judicial" opinion, and then told Hand that, had he been faced with *Brown*, Frankfurter was confident that Hand would have voted to declare segregated schools unconstitutional. See Letter from Felix Frankfurter to Judge Learned Hand (retired) (Feb. 13, 1958), *microformed on* Library of Congress Frankfurter Papers, *supra* note 78, at Container 65.

<sup>274</sup> *But see* FRED RODELL, NINE MEN 221 (1955) ("Roberts is the perfect personification of the chanciness of government by judges."). In Rodell's version, the Supreme Court was able to avoid the imposition of the court-packing plan because the average American citizen was in awe of the Court, and because of Hughes's sagacious leadership. See *id.* at 247. Rodell was aware of the timing of the conference vote in *West Coast Hotel*, but remained convinced that Roberts had switched his vote. As a Yale law professor long associated with legal realism, Rodell also delighted in noting the political nature of judging and the judiciary. "[T]he constitutional theories of all politicians, including Supreme Court Justices, are no more than high-faluting ways of arguing for the political ends they are really after," *id.* at 217, and "the Court was a rather random collection of nine men exercising a political function atop one of the three branches of the federal government," *id.* at 247. Rodell also suggested that FDR's reelection might have been the impetus for Roberts's change, although that "must remain a matter of informed conjecture — at least until intimate memoirs are possibly published at a decent interval after the death of Roberts, the last survivor of the Nine Old Men." *Id.* at 243. On Rodell's antipathy toward Frankfurter and Harvard Law School, see KALMAN, *supra* note 209, at 145-47, 201, 294 n.80.



Frankfurter and those more sympathetic to a legal rationale to use this revised history to bolster acceptance of the Court's authority to decide the constitutionality of state and federal laws, including, most contentiously, state laws mandating segregation. In this way, the institution, and thus the independence of the Court, might be protected from charges of "lawlessness," or more currently, "politics."

If the integrity of our democratic framework required a commitment to civil rights for Negroes, and if the judiciary was the only branch of the federal government able to create a constitutional framework to implement civil rights, then it was crucial that the Court maintain its integrity. The revised history was one effort to provide a foundation for that integrity. At the time Frankfurter wrote his tribute (and continuing through today), judicial independence from politics was a necessary prerequisite to judicial integrity. Professor Sunstein is right: *Brown* is the Court's leading symbol of judicial independence.<sup>275</sup> Part of the reason *Brown* is so viewed is that a plausible story of the Court's fidelity to law, including the events of 1937, made it easier to sell *Brown* as a permissible interpretation of the Constitution in the face of massive resistance. Justice Felix Frankfurter helped to create and disseminate that plausible story.

## VII.

Justice Frankfurter began his tribute to Justice Roberts with this statement: "The dictum that history cannot be written without documents is less than a half-truth if it implies that it can be written from them."<sup>276</sup> Justice Frankfurter's wise advice is a caution to anyone trying to write about "what really happened," or anyone trying to write about what someone else claims really happened. But Justice Frankfurter failed to heed his own advice; relying heavily on a "document" to explain Justice Roberts's "switch" cannot rewrite the history of the crisis of 1937.

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<sup>275</sup> See Sunstein, *supra* note 239, at 47.

<sup>276</sup> Frankfurter, *supra* note 10, at 311. In a 1960 conversation with Gerald Gunther, Justice Frankfurter recalled that this view grew out of a conversation he had had with Charles Beard. See Transcribed Interview of Felix Frankfurter by Gerald Gunther, Sept. 15, 1960, at 16, *microformed on Harvard Frankfurter Papers, supra* note 78, at Part III, Reel 28 ("Charlie once said to me, 'You can't write documents — you can't write history without documents — without documents.' And I said, 'Charlie, if you'll only add to that, you can't write history merely out of documents.'" (Justice Frankfurter speaking)); see also Letter from Justice Felix Frankfurter to Professor Thomas Reed Powell (June 19, 1944), *microformed on Harvard Frankfurter Papers, supra* note 78, at Part III, Reel 18 ("(1) while documents are indispensable to the writing of history, disclosed documents alone are obviously insufficient; (2) even if one has all the documents, public and private, in themselves they are not the full or final voices of truth.").

Commenting on Judge Learned Hand's memorial tribute to Chief Justice Harlan Fiske Stone, Paul Freund wrote, "Memorial addresses often provide an even truer insight into the speaker than into the subject . . ." <sup>277</sup> Never was this more true than when Justice Frankfurter gave tribute to Justice Roberts.

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<sup>277</sup> PAUL A. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 34 (1961).