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Two Great Leaders

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I. INTRODUCTION

FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle over the New Deal is James F. Simon's dual biography of the two major figures who battled over the constitutional visions of the New Deal and the Old Order.[1] It is Simon's third dual biography of the contentious relationships between a new President and a sitting Chief Justice of the other political party.[2]

Simon began with Thomas Jefferson and Chief Justice John Marshall, two distantly related Virginia aristocrats who despised each other. Notwithstanding Jefferson's popularity, Marshall prevailed in their major disputes. To be sure, William Marbury never received his "vested" commission, but Jefferson was on the receiving end of a lecture about the need for "a government of laws, and not of men."[3] Associate Justice Samuel Chase was impeached in an effort initiated by Jefferson, but not convicted.[4] Aaron Burr's trial for treason, so aggressively championed by Jefferson and presided over by Marshall, resulted in a directed acquittal.[5] And a decade after his presidency, Jefferson gasped at the nationalism of Marshall's opinion in *McCulloch v. Maryland*.[6]

Simon followed with Abraham Lincoln, the antislavery Republican who had risen from poverty to become a successful lawyer-politician, and Chief Justice Roger B. Taney, the Jacksonian Maryland aristocrat who had freed his own slaves but authored *Dred Scott v. Sandford*.[7] Lincoln came to national prominence because of *Dred Scott*, which Lincoln claimed was part of a conspiracy between Taney, James Buchanan, Franklin Pierce, and Stephen Douglas to nationalize slavery.[8] Like Jefferson and Marshall, Lincoln and Taney held decidedly different visions of the country. Lincoln saw a Nation, while Taney hoped for an amicable divorce between North and South—or, failing that, a short successful war for Southern independence. They clashed directly only once, when Lincoln refused to accede to Taney's issuance of a writ of

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1. James F. Simon, FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle over the New Deal (2012).

2. *See* James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers (2006); James F. Simon, What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States (2002) [hereinafter Simon, What Kind of Nation].

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803).

4. Simon, What Kind of Nation, *supra* note 2, at 197–219; Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, at 422–24 (2009). The failure of the U.S. Senate to convict Chase ended the idea of impeaching Justices simply because elected officials disagreed with their decisions. Richard Nixon and Gerald Ford both attempted to revive the idea and impeach liberal Justice William O. Douglas in 1953 and 1970, respectively, but their efforts went nowhere.

5. *See* United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

6. *See* 17 U.S. (4 Wheat.) 316 (1819).

7. 60 U.S. (19 How.) 393 (1856).

8. 2 Abraham Lincoln, *"A House Divided": Speech at Springfield, Illinois*, *in* The Collected Works of Abraham Lincoln 465 (Roy P. Basler et al. eds., 1953).

habeas corpus to John Merryman.[9] On the only war measure that came before the Court during the Civil War, Taney joined dissenters claiming Lincoln's blockade of Confederate ports was illegal.[10] Taney would also have held all of the key Union war measures—the income tax, the draft, greenbacks—unconstitutional. He died at the age of eighty-eight just before Lincoln's reelection; had he died at eighty, before *Dred Scott*, his record would have looked so much better.

With Marshall's win over Jefferson, followed by Lincoln's sweep of Taney, *FDR and Chief Justice Hughes* could be seen as Simon's tie-breaker in Supreme Court-President battles. Yet the battles of the 1930s were a draw. With the failure of FDR's Court-packing plan, Chief Justice Charles Evans Hughes kept his independent Court. But in the aftermath of the Court-packing plan, Franklin D. Roosevelt got the judicial seal of approval on all his New Deal measures. Still, the failure of the Court-packing plan was costly. FDR's refusal to compromise squandered his 1936 landslide and sucked the wind out of the New Deal.

There are multiple biographies of FDR and studies of the New Deal, as well as two very recent books on the Court-packing controversy.[11] Hughes, however, is decidedly less well known.[12] There is a two-volume authorized biography[13] (now six decades old), Hughes's own autobiographical notes,[14] chapters in a few anthologies, and entries in encyclopedias, but that is it. Simon gives us a modern Hughes, an accurate depiction of FDR, and then, later, their interactions during the New Deal. There is real value in James Simon's four hundred pages because Simon, who began his career as a reporter, understands the appeal of a good story. What follows is Simon's description of Hughes's career before he became Chief Justice, President Roosevelt's reactions to the Court's rulings blocking his New Deal, the clash over FDR's Court-packing plan, and the aftermath of the plan's defeat.

II. INTRODUCING CHARLES EVANS HUGHES

For those unaware of Hughes's life, it is stunning to realize how impressive his resume was by the time Herbert Hoover nominated him to be Chief Justice at just under the age of 68. Hughes was the third man to have previously resigned from the Court only to be later nominated for the higher office of Chief Justice. Of the three, he was also the only nominee to actually be confirmed; John Rutledge was defeated in the Senate, and John Jay declined the nomination.

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9. *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

10. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

11. Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (2010); Burt Solomon, FDR v. the Constitution: The Court-Packing Fight and the Triumph of Democracy (2009).

12. One of my jurisprudentially-oriented constitutional law colleagues admitted he knew nothing of Hughes.

13. Merlo J. Pusey, Charles Evans Hughes (1951).

14. The Autobiographic Notes of Charles Evans Hughes (David J. Danelski & Joseph S. Tulchin eds., 1973).

Hughes was the only child of an immigrant Welsh minister and a strong-willed American mother. He was a prodigy from the age of three and excelled both in school and then in the practice of law. But the tedium of the latter often bored him, and after the turn of the century he accepted the job of independent counsel to legislative investigations of the gas utilities and life insurance industries. In both cases his meticulous work and questioning exposed major financial improprieties. The work propelled him into the governorship of New York, where he pushed a recalcitrant legislature into "labor reforms, strengthening executive oversight of factory conditions and supporting legislation regulating child labor and providing additional safety protection for workers."[15]

Hughes declined William Howard Taft's invitation to be vice president and instead won reelection as governor, but his second term was less successful than his first and he gladly accepted Taft's appointment to the Supreme Court in 1910, gaining unanimous Senate approval. Shortly thereafter, Chief Justice Melville Weston Fuller died. Because Taft claimed to admire Hughes more than any other man and had expressed a desire to make him Chief Justice, when the White House called to invite Hughes to meet with the President, Hughes could assume promotion was coming. But a half hour later a second call came cancelling the meeting. The next day Taft promoted a sitting Justice, the sixty-six-year-old former Confederate Edward White to Chief Justice. We do not know exactly why Taft changed his mind; perhaps Taft wanted the office to become vacant again when his presidency was over, because it was clear that he would prefer being Chief Justice to being President.

III. ASSOCIATE JUSTICE HUGHES

Despite Oliver Wendell Holmes's towering reputation, Hughes was the most liberal Justice on the Court during his initial tenure because of the former's blind spot on race. On the economic front, Hughes wrote the opinion of the Court in both the *Minnesota Rate Cases*[16] and *Houston E. & W. Texas Ry. Co. v. United States* (*Shreveport Rate Case*).[17] The former upheld a state railroad rate order that had the effect of lowering interstate rates—when there had been no previous federal regulation of those rates.[18] More importantly, the latter upheld a federal rate order that overturned a state rate order that operated entirely within the state of Texas. The Texas Railroad Commission had set rates between Dallas and Houston to eastern Texas that were lower than the rates from Shreveport to the same destinations. In upholding the federal order, Hughes ruled that the federal government could regulate intrastate activity that had a "close and substantial" relation to interstate commerce.[19]

15. Simon, *supra* note 1, at 41.

16. Simpson v. Shepard (*Minn. Rate Cases*), 230 U.S. 352 (1913).

17. 234 U.S. 342 (1914).

18. *See Minn. Rate Cases*, 230 U.S. at 433.

19. *Shreveport Rate Case*, 234 U.S. at 351.

Hughes also cast two important votes in liberty of contract cases. In *Coppage v. Kansas*, the Court struck down a ban on yellow dog contracts (whereby an employee agrees not to join a union on penalty of immediate dismissal) in an opinion celebrating the inequalities that flow from the ability to contract freely.[20] Hughes joined Holmes's dissent, which would have allowed the state to prevent an employer from overreaching in this manner. But in an opinion implementing the positive side of freedom of contract, Hughes, writing for the Court, struck down an Arizona law that required employers of five or more workers to have at least eighty percent of their workforce be American citizens and had caused an Austrian immigrant to be laid off.[21] Hughes found the law violated the equal protection rights of lawful resident aliens.

Striking down that discriminatory Arizona law was an illustration of Hughes's lifelong commitment to civil rights and civil liberties. In *Bailey v. Alabama*, he wrote for the Court in striking down a state law that deemed it fraud for an employee to take an advance and subsequently quit the job without being able to repay the advance.[22] Alonzo Bailey had received a $15 advance on a contract to work for $12 a month for a year. A few days into his second month, he quit. Unable to repay the advance, he was convicted and sentenced to 136 days at hard labor. Hughes wrote, "The State may impose involuntary servitude as a punishment for a crime, but it may not compel one man to labor for another in payment of debt, by punishing him as a criminal if he does not perform the service."[23] Similarly, Hughes joined a subsequent opinion of the Court striking down Alabama's criminal surety law, which allowed employers to pay a defendant's fine for minor crimes—"Negro crimes" like vagrancy—and then compel the defendant to work off the fine.[24]

Hughes again wrote for the Court in striking down an Oklahoma law that required railroads to provide luxury cars for whites but not for blacks. He tersely rejected the claim that too few blacks could afford a luxury car ticket: "[T]he constitutional right [could not] depend upon the number of persons who may be discriminated against."[25] This foreshadowed Hughes's response as Chief Justice to a complaint by the Court's marshal that blacks were eating in the Court's cafeteria: The marshal was told to go outside and read the words emblazoned on the Court's new building—"Equal Justice Under Law"—and that if he did not understand the words, he would be replaced.[26]

Finally, Hughes joined a Holmes dissent when the Court denied a habeas trial to Leo Frank, a New York Jew who managed a pencil factory in Georgia. Frank was convicted of murdering a thirteen-year-old female employee, but the facts showed a

20. 236 U.S. 1 (1915).

21. Truax v. Raich, 239 U.S. 33 (1915).

22. 219 U.S. 219 (1910).

23. *Id.* at 244.

24. United States v. Reynolds, 235 U.S. 133 (1914).

25. McCabe v. Atchison, Topeka & Santa Fe R.R. Co., 235 U.S. 151, 161 (1914).

26. Lucas A. Powe, Jr., The Supreme Court and the American Elite, 1789–2008, at 188 (2009).

mob-dominated courtroom where the trial judge did nothing to maintain order. The majority found the Georgia Supreme Court's rejection of the mob domination claim sufficient.[27] The dissent asserted a duty "to declare lynch law as little valid when practiced by a regular drawn jury as when administered by one elected by a mob intent upon death."[28]

IV. HUGHES OFF THE COURT

Hughes's career on the Court was cut short when he became the subject of a true draft to become the Republican presidential candidate in 1916. Other Justices had hoped to become President—John McLean and Salmon Chase hungered for it in the nineteenth century and Hugo L. Black and William O. Douglas hoped for it in the 1940s—but only Hughes got the nomination. And the kicker was, he wanted no part of it.

Republicans had been split since Theodore Roosevelt declared the War of 1912 on Taft, his chosen successor.[29] In 1916, Taft believed that Hughes was the only candidate who could unite Republicans.

> You will certainly be elected if you accept the nomination and you will reunite the only party from which constructive progress can be expected at a most critical time in the country's history . . . . Strong men will respond to your call because you are yourself so satisfying in strength and in your political courage and patriotism.[30]

When the Republicans nominated him on the third ballot by a landslide, Hughes tearfully resigned from the Court. "I was torn between two profound desires," he later recalled, "one to keep the judicial ermine unsullied, and the other not to fail in meeting what might be a duty to the country."[31]

Hughes should have won, but he was not a good candidate—Theodore Roosevelt called him a "bearded iceberg"[32]—and bungled California. To put Hughes's failure into context, Republican Governor Hiram Johnson won a Californian Senate seat by 300,000 votes while Hughes lost the state (and the presidency) by only 4000 votes.

Defeated, Hughes moved back to New York City and the practice—the very lucrative practice—of law. Yet he always found time for public service. Hughes actively supported the war effort once President Woodrow Wilson broke his pledge to keep the country out of war. In addition to heading the city's draft board, at Wilson's request he led an investigation of the aircraft industry. The *New York Times*

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27. *See* Frank v. Mangum, 237 U.S. 309 (1915).

28. *Id.* at 350 (Holmes, J., dissenting).

29. Theodore Roosevelt had supported Taft for the 1908 Republican nomination, but became frustrated with Taft's performance and decided to run against him in the 1912 Republican primaries. This led to a disastrous and ignominious defeat and created a rift within the party. Patricia O'Toole, *The War of 1912*, Time (June 25, 2006), http://www.time.com/time/magazine/article/0,9171,1207791,00.html.

30. Simon, *supra* note 1, at 96.

31. *Id.* at 97.

32. *Id.* at 100.

lauded his report: "There has never been a more searching and thorough investigation under the direction of the Government."[33]

During the Red Scare immediately after World War I, five Socialist members of the New York legislature had been ousted for their views. Hughes, acting pro bono, came to their defense, writing to the speaker of the Assembly within forty-eight hours of the action:

> If there was anything against these men as individuals, if they were deemed to be guilty of criminal offenses, they should have been charged accordingly. But I understand that the action is not directed against these five elected members as individuals but that the proceeding is virtually an attempt to indict a political party and deny it representation in the Legislature. This is not, in my judgment, American government.[34]

With Republicans looking dominant in 1920, the presidency could have been Hughes's. Many prominent Republicans wanted him as the standard-bearer, but when a Republican delegation came to him, he stated, "I beg of you to believe me. Since our daughter died, Mrs. Hughes and I are heartbroken. I don't want to be president of the United States. I request that my name not even be mentioned in the convention."[35] Nevertheless, after Warren Harding won the presidency, Hughes accepted the prime cabinet position: Secretary of State.

Although Hughes favored joining the League of Nations, President Warren Harding, six weeks into his administration, came down against it. Later, Hughes was equally unsuccessful in getting the United States to join the International Court of Justice. His principal foreign policy success was the Washington Naval Conference in 1922 for which, as always, he was meticulously prepared, with specific ships to be scuttled by each power. While he did not achieve all his objectives, the three naval powers—the United States, Great Britain, and Japan—agreed to drastically reduce their fleets. As late as 1935, FDR hailed this achievement as "the first important voluntary agreement for limitation and reduction of armament. It stands out as a milestone of civilization."[36] Hughes also understood the problems of war debts caused by the Treaty of Versailles. He observed that "[w]e cannot dispose of these problems by calling them European."[37]

With Calvin Coolidge's election in 1924, Hughes submitted his letter of resignation. He was disappointed when it was accepted. Hughes again returned to a "large, varied, and lucrative" practice of law where his yearly income was $400,000.[38] When Coolidge announced he would not run for reelection, once again Hughes's name was mentioned. He issued a statement declining interest. To back it up, he

33. *Id.* at 116.

34. Zechariah Chafee, Jr., Free Speech in the United States 273 (1941).

35. Simon, *supra* note 1, at 123.

36. *Id.* at 161.

37. *Id.* at 164.

38. *Id.* at 172.

declined (as he also had in 1920) the offer to deliver the keynote address at the Republican convention (lest it lead to a draft). With Herbert Hoover's election, Hughes was offered his old job as Secretary of State, but, having accepted a two-year appointment to the International Court of Justice, he declined.

Taft once again showed his respect for Hughes when, dying as Chief Justice, he recommended to President Hoover that Hughes be nominated as Taft's replacement. At Hughes's meeting with Hoover, Hughes put up arguments against the appointment—including the fact that his son was Solicitor General. But Hoover replied, "It is your duty to take it."[39] Hoover also assured Hughes there would be no trouble with confirmation.

Hoover was wrong. Progressives forgot Hughes the investigator, the governor, the Supreme Court Justice, but could not forget—or forgive—his paying clients. George Norris claimed Hughes had the philosophy of his clients: "He looks through glasses contaminated by the influence of monopoly as it seeks to get favors by means which are denied to the common, ordinary citizen."[40] Southerners, by contrast, remembered Hughes the Supreme Court Justice and his commitment to equal justice for everyone. They joined Progressives in opposing Hughes, but he was still confirmed by a 52–26 vote.

V. FDR AND THE COURT, 1932–1936

In the closing days of the 1932 campaign, FDR noted that when the Depression began Republicans were "in complete control of all branches of the federal government."[41] He then ad-libbed "the Executive, the Senate, the House of Representatives and, I might add for good measure, to make it complete, the Supreme Court as well."[42] A day later, talking to Senator James Byrnes he reaffirmed his statement with an indication of his concern. "[W]hatever is in a man's heart is apt to come out of his tongue—I shall not make any explanations or apology for it!"[43] He had reason for concern since there were four arch-conservatives on the Court who viewed FDR, in the words of one of them, as "unfitted and unsafe for the presidency."[44]

Yet Roosevelt knew and liked several of the Justices. Responding to Justice Benjamin Cardozo's congratulations, FDR replied "that he looked forward to the same 'delightful relations with the Supreme Court' that he had enjoyed as governor with the state's highest court when Cardozo served as its chief judge."[45] During the interregnum FDR received advice from Justice Louis D. Brandeis, who concluded that FDR understood the challenges he faced. With Hughes, FDR noted that, in

39. *Id.* at 175.

40. *Id.* at 178.

41. Shesol, *supra* note 11, at 9.

42. *Id.*

43. *Id.* at 12.

44. Simon, *supra* note 1, at 245.

45. *Id.* at 221.

addition to "our long time friendship and to my admiration and respect for you, I think it is interesting that a governor of New York is to administer the oath to another governor of New York."[46]

Initially FDR received the results of the Court with satisfaction—even if he did remain wary. His last recorded comment on the Court until he was reelected was in January 1936, and it is worth looking at his experiences in the two years preceding that comment (which was made in private to his cabinet) that led him to be certain the Court would nullify everything of significance.

The two key 1934 cases, *Home Building & Loan Ass'n v. Blaisdell*[47] and *Nebbia v. New York*,[48] were examples of state experimentation in the face of the hard economic times. Both were 5–4 victories for experimentation, with Hughes writing the former and Owen Roberts, the true swing Justice, writing the latter. FDR stated that the two cases gave him "a glimmer of hope that the Supreme Court would take a broad view of the Constitution," and that was the logical reading of the cases.[49]

FDR was undismayed when the government lost the *Hot Oil Case* in January 1935.[50] He told reporters that the Court was just telling Congress to do a better job drafting its legislation—again the most plausible reading of the case.

FDR had more trepidation about the *Gold Clause Cases* because the government had repudiated its promise to pay off its bonds in gold.[51] At oral argument, Attorney General Homer Cummings told the Court the case was of "almost unprecedented importance" as a loss would increase the national debt by $70 billion.[52] Anticipating a loss, FDR prepared a Fireside Chat wherein he would tell the American people that he would not abide the decision because it would throw the nation into "an infinitely more serious economic plight than we have yet experienced."[53]

The Court, again by a 5–4 vote, sustained the government's position on the theory that while the plaintiffs were correct as a matter of constitutional law, it would unjustly enrich them to be paid off in gold given its new dollar value. FDR was euphoric. "As a lawyer it seems to me that the Supreme Court has at last definitely put human values ahead of the 'pound of flesh' called for by a contract."[54]

Any euphoria was short-lived and ended on Black Monday when the Court struck down three New Deal measures, including its showcase statute, the National Industrial

46. *Id.* at 230.

47. 290 U.S. 398 (1934).

48. 291 U.S. 502 (1934).

49. Simon, *supra* note 1, at 248.

50. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); *see* Simon, *supra* note 1, at 249–51.

51. Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935); *see* Simon, *supra* note 1, at 252–56.

52. Powe, *supra* note 26, at 204.

53. *Id.*

54. Simon, *supra* note 1, at 256–57.

Recovery Act, which fell unanimously in *Schechter Poultry v. United States*.[55] The Court found an unconstitutional delegation, but went beyond that to conclude that chickens sent from Pennsylvania to Manhattan and then resold to a Brooklyn processing plant had ceased traveling in interstate commerce; hence any regulation exceeded Congressional power. Counsel for the poultry company stated that if Congress could regulate their business, then "Congress would soon be 'in charge of all human activity.'"[56]

Naturally, FDR held a different view. After he digested the opinion, he delivered his own biting dissent—which quickly became known as the "horse-and-buggy" attack on the Court—for almost an hour and a half to about two hundred reporters. "The implications of this decision are much more important than any decision probably since the *Dred Scott* case."[57] He then asked rhetorically, "Does this decision mean that the United States Government has no control over any national economic problem? . . . [W]e have been relegated to the horse-and-buggy definition of interstate commerce."[58]

In September 1935, an issue of the weekly *Collier's* published an article by FDR's friend George Creel that stated:

> It is the deep conviction of Franklin D. Roosevelt that the Constitution was never meant to be a "dead hand," chilling human aspiration and blocking humanity's advance, but that the founding fathers conceived it as a living force for the expression of the national will with respect to national needs.[59]

It is for these reasons that, in January 1936 at a cabinet meeting, FDR predicted doom by the Court.[60]

FDR's prediction that everything of significance would be struck down looked perfect as the Court took out the Agriculture Adjustment Act,[61] the Guffey Coal Act,[62] and then for good measure reaffirmed that neither the states nor the federal government had the power to mandate a minimum wage for women.[63] This latter decision was too extreme even for Republicans. The Party's platform came out in favor of state minimum wage laws and many conservative Republicans decried the decision. Hamilton Fish (of Roosevelt's (in)famous "Martin, Barton, and Fish"[64]), for

55. 295 U.S. 495 (1935).

56. Simon, *supra* note 1, at 262. Henry Stimson, the former Secretary of State, agreed. *Id.* at 267.

57. *Id.* at 264.

58. *Id.*

59. *Id.* at 269.

60. *See id.* at 284.

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

62. *See* Carter v. Carter Coal, 298 U.S. 238 (1936).

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

64. David M. Kennedy, Freedom from Fear: The American People in Depression and War, 1929–1945, at 462 (1999). FDR reminded "audiences that [1940 Republican candidate Wendell] Wilkie's party was also the party of 'Martin, Barton, and Fish,' three notoriously isolationist congressmen whose names formed a catchy trinomial chant with which Roosevelt worked Democratic crowds into paroxysms of partisan enthusiasm." *Id.*

instance, claimed the decision was "a new *Dred Scott* . . . condemning millions of Americans to economic slavery."[65]

The 1936 decisions left the National Labor Relations Act, Social Security, and the Tennessee Valley Authority ready for future slaying. Yet prior to his reelection FDR was silent about the Court—except when talking to Attorney General Homer Cummings.[66]

After his landslide victory, FDR told a reporter for the *New York Daily News* that a short holiday "will give me a chance to re-study the problem created for the Nation by the Supreme Court." He claimed it could be "solved without getting away from our underlying principles."[67]

VI. THE COURT-PACKING BATTLE

Early drafts of FDR's State of the Union address "did not hide his hostility toward the Court."[68] But the final draft concluded that "[w]e do not ask the Courts to call non-existent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good."[69] Still, Roosevelt's heart was with his early drafts. After his inauguration, he told aide (and speechwriter) Samuel Rosenman that:

> When the Chief Justice read me the oath and came to the words "support the Constitution of the United States" I felt like saying, "Yes, but it's the Constitution as *I* understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution your Court has raised up as a barrier to progress and democracy."[70]

Unbeknownst to anyone of importance—because FDR loved secrecy and surprise—he and Cummings were about to spring the Court-packing plan, which would add a new Justice to the Court for every Justice aged seventy or older who did not retire. That would create six new Justices, so that by persuading any two of Brandeis, Cardozo, or Harlan Fiske Stone (who was becoming increasingly bitter at Hughes and the conservatives)[71] to join with the new Justices, the New Deal could be assured of eight votes for a majority of his packed Court.

As is well known, FDR fumbled his opening kickoff on the Court-packing plan. He had consulted no one but Cummings and laid no legislative groundwork for passing the plan. Furthermore, his initial justifications for adding new Justices—

65. Powe, *supra* note 26, at 207.

66. Cummings was an early FDR supporter and during the course of FDR's first term "he had demonstrated a trained eye for political advantage and an insatiable drive to find a practical solution for the president's Court problem." Simon, *supra* note 1, at 308.

67. *Id.* at 298.

68. *Id.* at 310.

69. *Id.* at 311.

70. Samuel I. Rosenman, Working with Roosevelt 144 (1952).

71. *The Washington Post* noted that when Stone read his dissent in the AAA case, "[t]here was bitterness, too, and scorn. You could not miss it." Simon, *supra* note 1, at 281.

infirmities of age and the need for efficiency—were disingenuous (and wrong on the evidence, as Hughes would soon demonstrate). Concluding that a seventy-year-old Justice was "losing it" was a frontal attack on two progressive icons—the now deceased Holmes and the very much alive eighty-year-old Brandeis. In a Fireside Chat, FDR moved to the truth: The Court needed an infusion of new Justices in tune with the spirit of the age (i.e., New Dealers).

There was no groundswell of support for the plan, which was, after all, a direct attack on the independence of the judiciary and was not offered as a constitutional amendment. But with 3–1 Democratic margins in both the House and the Senate, FDR thought he could push it through over any opposition. Republicans were aghast but numbered too few to matter. And Democrats concerned with civil liberties (issues on which the Court was better than any of its recent predecessors[72]) were unhappy with an attack on the judiciary at a time when civil liberties were already extinguished in Germany, the Soviet Union, and Italy.

The two people most responsible for defeating the plan were Senator Burton Wheeler and Hughes. Wheeler, a Montana Democrat progressive who felt unappreciated by an administration he had wholeheartedly supported, came out quickly against the plan and gained the invaluable assistance of Hughes. The Chief Justice declined to testify before the Senate Judiciary Committee, but did offer to write a letter to the committee that Wheeler could use when he testified. When Wheeler arrived at Hughes's residence on the Sunday before Wheeler was to testify, Hughes handed him a seven-page letter and, with a big smile, stated, "The baby is born."[73]

Hughes's letter, which Wheeler then read to the committee, declined to speak to the merits of FDR's plan—and then did just that. He noted that the Court was fully abreast of its work and that creating additional Justices could, and likely would, make the Court less efficient. The letter was signed by the two most senior associate Justices—Justice Brandeis, a liberal, and Justice Willis Van Devanter, a conservative. This offered the impression that all of the Justices agreed with it (which was not accurate, since Stone considered it a high-handed tactic).

The letter alone could not defeat the plan, but Hughes had plenty more. A week later, the Court handed down *West Coast Hotel v. Parrish*, upholding a state minimum wage law for women and specifically overruling the prior Term's contrary holding.[74] Over the next seven weeks the Court upheld the National Labor Relations Act[75] and the unemployment compensation provisions of the Social Security Act,[76] and Van Devanter announced his retirement. Yet FDR refused to compromise, even though the Senate majority leader stated that he could have easily gotten the President three

72. By the end of the 1935 Term, the Court had decided *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931); *Powell v. Alabama*, 287 U.S. 45 (1932); *Grosjean v. Am. Press*, 297 U.S. 233 (1936); and *Brown v. Mississippi*, 297 U.S. 278 (1936).

73. Simon, *supra* note 1, at 322.

74. 300 U.S. 397 (1937).

75. *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel, 301 U.S. 1 (1937).

76. *See* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

new Justices.[77] FDR, however, wanted six and went down in his most decisive defeat, one that broke the back of the New Deal. As FDR's second vice president, Henry Wallace, observed, "The whole New Deal really went up in smoke as a result of the Supreme Court fight."[78]

The report of the Senate Judiciary Committee put the lie to FDR's claim that he could solve the problem without doing damage to "our underlying principles."[79] The Court-packing plan's "ultimate purpose would be to make this government one of men rather than one of law . . . . It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[80]

VII. WHY THE SWITCH?

The three decisions announced after the Court-packing plan, *West Coast Hotel v. Parrish*, *NLRB v. Jones,* and *Steward Machine v. Davis,* undid the three comparable decisions of the prior Term. They did so by 5–4 votes, with Roberts switching positions—hence T.R. Powell's label of "the switch in time that saves nine."[81]

It is clear that the Court-packing plan itself was not the cause of Roberts's switch. Roberts voted to support the minimum wage in *West Coast Hotel* weeks prior to the announcement of the plan.

With what once was the prime explanation debunked, there are two competing theories for the change, and Simon wisely avers to both. The internalist theory, championed by Barry Cushman[82] and G. Edward White,[83] is that the statutes passed during the Hundred Days[84] were so hastily drafted that they almost invited invalidation—consider the overwhelming votes in the *Hot Oil Case* and *Schechter Poultry*, demonstrating that better drafting meant better laws. Furthermore, lawyering got better with experience, assisting Justices (i.e., Roberts) in better understanding the needs of a modern age.

In contrast to this internalist theory, the alternative is that the external political pressure to do something about the Court was becoming so great that, even before the Court-packing plan, Roberts had come to understand the Court had overstepped what was possible in a democratic society. Hughes believed that "[t]his Court was

77. Powe, *supra* note 26, at 211.

78. *Id.* at 213.

79. Simon, *supra* note 1, at 298.

80. *Id.* at 339.

81. Solomon, *supra* note 11, at 162 (quoting it as "serves nine" rather than "saves nine").

82. *See* Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998).

83. *See* G. Edward White, The Constitution and the New Deal (2000).

84. *See* Jonathan Alter, The Defining Moment: FDR's Hundred Days and the Triumph of Hope (2006); Adam Cohen, Nothing to Fear: FDR's Inner Circle and the Hundred Days that Created Modern America (2009).

under attack, it seemed, from all directions."[85] This was underscored when the 1936 election once again showed that FDR was a President with a mandate to continue the New Deal. This explains why I subscribe to the externalist theory.[86]

Simon appears to be a fellow traveler. He tellingly recounts the story of Hughes and his wife returning from their 1936 summer vacation and stopping off at Roberts's country estate in rural Pennsylvania. The visit lasted twenty-four hours, but the two men spent many hours alone talking—"intense conversation" is the characterization.[87] Mrs. Roberts stated that the men's time alone was so lengthy that she and Mrs. Hughes "got to the end of our rope."[88] What the two Justices talked about is unknown, but Simon implies that it was about the Court being in an untenable position in its opposition to the popular New Deal—a position, at least on state minimum wages for women, that even the Republican Party was repudiating.

Simon quite properly relied on the major New Deal historian William E. Leuchtenburg for the story of the farm meeting.[89] Leuchtenburg, in turn, relies on an oral history by FDR's Labor Secretary Frances Perkins. The problem here, as Barry Cushman points out (subsequent to Simon's publication),[90] is that Perkins is referring to a visit in 1935—not 1936.[91] Somehow Leuchtenburg erred, and that caused Simon to emphasize a point that does not help his argument. Maybe this could cause him to abandon the externalist view—even as it does not affect my own belief in that theory based on the criticisms of the Court for overreaching and capped by the New Deal's landslide victory in the 1936 elections.

VIII. HUGHES AND STONE

In retrospect, Hughes comes across as a great leader. FDR's appointees all admired him. His initial kindnesses to both Hugo Black (who had voted against confirming Hughes and had come to the Court with the stain of his Ku Klux Klan membership exposed) and Felix Frankfurter won them over. William O. Douglas admired Hughes's intellect and efficiency;[92] throughout my clerkship, he never spoke to me more highly of another Justice than he did of Hughes. When Douglas was angling for the vice presidency in 1944, he used Hughes as his model so that if the call came it would be perceived as a draft.

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85. Simon, *supra* note 1, at 300.

86. *See* Powe, *supra* note 26, at 208–11, 213.

87. Simon, *supra* note 1, at 300.

88. *Id.*

89. *Id.* at 427 n.300 (citing William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. Rev. 1187, 1199–1200 (2005)).

90. Barry Cushman, *The Hughes-Roberts Visit*, 15 Green Bag 2d 125, 130 (2012).

91. If Hughes was trying to convince Roberts to switch in the summer of 1935, he was totally ineffective in that effort in 1936. *Id.* at 125.

92. William O. Douglas, The Court Years 1939–1975: The Autobiography of William O. Douglas 219, 222 (1980).

The Justices discussed and argued cases for hours each Saturday. Hughes came meticulously prepared, talking first, and stating the facts and what he deemed to be the salient points of law. Unlike some proselytizing Justices, this presentation was the only time Hughes tried to sway the others (which is a reason to believe Hughes did not strong-arm Roberts to change his position on the New Deal). Yet by 1936 there was a belief that Hughes could not lead because of the fractured nature of the Court, and the liberal Republican Harlan Fiske Stone (with the assistance of then-Harvard Professor Felix Frankfurter) voiced this view with consistency. Stone's relationship with Hughes was always fraught. Stone, a friend of Hoover, believed that Hoover should have chosen him as the Chief Justice to succeed Taft. Not only did Taft think highly of Hughes, but he also likely wished to persuade Hoover not to select Stone, whom Taft believed was "not a leader, and would have a great deal of trouble in massing the court."[93] That, of course, was not Stone's view; he thought he could do a better job leading the Court, and he viewed the conservative opinions as a failure of Hughes's leadership.

If achieving lopsided victories in contentious cases is a measure of leadership, then Hughes mostly failed. The conservatives could never be reconciled with the New Deal, and so overwhelming votes could occur only when the liberals felt there was government overreaching; they rarely had that feeling. If Stone thought he could have done better, he was living in a dream world.

Stone's chaotic and unsatisfying years as Chief Justice on a Court loaded with Roosevelt appointees shine an unfortunate light on his resentment of Hughes. With the war pending and only Democrats nominated to the Court, FDR promoted Stone, a Republican, to replace Hughes as Chief Justice. Under Stone, conferences became interminable because he believed Hughes had run too tight a ship. According to Douglas:

> [The] Stone method killed Stone. He would start the conference at the beginning at twelve o'clock. He would state his views on a case. He would not only take up the main point, but he would take up the five or six or seven collateral points that Hughes would always say that we can leave . . . to the writer of the opinion. And he would discuss them with a thoroughness of which a professor in . . . law school of the first-year class might proceed.[94]

Stone's inability to handle his strong-willed brethren—Black, Douglas, Frankfurter, Robert Jackson—is legendary. Chief Justice John Marshall may have been able to suppress dissents, but from the New Deal forward, no Chief Justice ever could. Hughes did the best that anyone could, and when the independence of the Supreme Court was threatened, he knew how to lead and how to win, as Simon and his contemporaries, Burt Solomon and Jeff Shesol, show.[95]

93. Simon, *supra* note 1, at 174.

94. *Transcripts of Conversations between Justice William O. Douglas and Professor Walter F. Murphy*, Seeley G. Mudd Manuscript Libr. Princeton U., (Dec. 20, 1961), http://www.Princeton.edu/-mudd/finding_aids/douglas/douglas2.html. I recall Douglas, who had been a student in Stone's property class, saying he dealt with cases at conference like he did in class. If a case had twelve issues, eleven of them frivolous, Stone treated them all equally.

95. *See* Solomon, *supra* note 11; Shesol, *supra* note 11.

IX. THE PERSONAL AFTERMATH

Both FDR and Hughes were politicians, meaning that their battle over the Court-packing plan had been business, but nothing personal.[96] Thus, with the battle behind them, they resumed their cordial relationship. Hughes and his wife were invited to a 1939 State Dinner for King George VI and his wife, but Hughes had to back out for a medical reason. Roosevelt then personally called Mrs. Hughes to express his regrets that the Chief Justice could not attend and urged her to attend because, he promised, she would be seated next to the King. She did, and she was.

In 1940, Hoover asked Hughes to resign so that Hughes could campaign against FDR. Hughes declined. At a dinner before the third inauguration, Hughes was overheard telling Roosevelt, "I hope you won't mind, after I administer the oath to you the third time, if I lean over and quietly ask, 'Governor is this getting to be a habit?'"[97] Both men then enjoyed a good laugh.

Although Theodore Roosevelt thought that Hughes was a "bearded iceberg,"[98] the more common (albeit later) assessment was that of Justice Robert Jackson, who claimed Hughes "look[ed] like God and talk[ed] like God."[99] Both characterizations were apt, but so was FDR's characterization of Hughes in the wake of the Court-packing plan: Hughes "was the best politician in the country."[100]

As H.W. Brands demonstrates, FDR became a great President when he became a great world leader during World War II.[101] Hughes's greatness came earlier. Their conjoining in a readable dual biography is a fine and worthy accomplishment.

X. CONCLUSION

Simon's three books on Presidents and Chief Justices have featured great and transformative Presidents, but the current book is separated from its predecessors by the extraordinary career of Hughes. Roger Taney had no national elective career, and while John Marshall was an outstanding politician, he could never have been elected President. Hughes, however, almost won the presidency in 1916, and he would have won in 1920 had he wished to seek the Republican nomination. Although he was never president, he had a deservedly towering stature. This made him close to FDR's equal, and their intertwining story is nothing short of compelling. Having seized on the story, Simon makes the most of it.

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96. Advice by Tom Hagen to Sonny Corleone that should have been taken in Godfather I.

97. Simon, *supra* note 1, at 384.

98. *Id.* at 100.

99. Powe, *supra* note 26, at 210.

100. Simon, *supra* note 1, at 7.

101. *See* H.W. Brands, Traitor to His Class: The Privileged Life and Radical Presidency of Franklin Delano Roosevelt (2008).