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Neal Devins

William & Mary Law School, nedevis@wm.edu

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BOOK REVIEW

GOVERNMENT LAWYERS AND THE NEW DEAL

THE SUPREME COURT REBORN: The Constitutional Revolution in the Age of Roosevelt. By William E. Leuchtenburg. New York: Oxford University Press, 1995. Pp. 350. \$30.00.

*Reviewed by Neal Devins**

On March 29, 1937, America's constitutional landscape changed forever. A series of Supreme Court decisions upholding state and federal efforts to combat the Depression lowered Commerce Clause and other barriers to centralized planning. These decisions cleared the way for launching the administrative state.¹

On April 26, 1995, the Supreme Court called into question the wisdom and continuing vitality of that constitutional revolution, ruling for the first time in sixty years that a federal statute exceeded the power of Congress under the Commerce Clause.² While it is too early to tell whether this return to "first principles"³ will prove to be "epochal"⁴ or merely a blip that will disappear from the radar screen altogether, this possible return of a "'Constitution-in-exile'"⁵ may soon give New Deal nay-sayers another nail to hammer into the coffin of Franklin Delano Roosevelt's increasingly beleaguered legacy.⁶

* Professor of Law, Lecturer in Government, College of William & Mary. Thanks to Dave Douglas, Robert Glennon, Hugh Graham, Alan Meese, and Eben Moglen for reading a preliminary draft of this Review. Thanks also to Rod Ingram and Dan Pringle for research assistance, and to the editors and staff of the Columbia Law Review for their care and persistence.

1. While commentators have both heralded this event as "another great leap along the arc of nationalistic self-definition initiated by the American Revolution," 1 Bruce Ackerman, *We The People: Foundations* 105 (1991), and vilified it as "unconstitutional, . . . nothing less than a bloodless constitutional revolution," Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231 (1994), few would dispute that the New Deal "altered the constitutional system in ways so fundamental as to suggest something akin to a constitutional amendment had taken place." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 448 (1987).

2. See *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (invalidating federal law that criminalized possession of a firearm within 1,000 feet of a school).

3. *Id.*

4. Cf. *id.* at 1657 (Souter, J., dissenting) (describing the majority's holding "as only a misstep, . . . not quite in gear with the prevailing standard, but hardly an epochal case").

5. Linda Greenhouse, *Past Masters: Blowing the Dust Off the Constitution That Was*, N.Y. Times, May 28, 1995, § 4, at 1 (quoting appeals court judge and Reagan Supreme Court nominee Douglas H. Ginsburg).

6. The 1994 Republican takeover of Congress directly challenged the New Deal belief in centralized planning, including the creation of mission agencies to address identified social ills. In particular, the Republican *Contract with America* calls attention to the failings

Despite its transformative effect, there has always been considerable doubt about whether the New Deal reached its potential. In 1937 and 1938, for example, Congress turned down Roosevelt's efforts both to reorganize the federal government⁷ and to improve the lot of the poorest third of the nation through such measures as sweeping housing reforms.⁸ The rejection of these and other reform proposals, writes David M. Kennedy, "may be taken as a harbinger of the principal question that has animated New Deal scholarship ever since: Why was there not even more radical change precipitated out of that moment of unprecedented trauma and apparent political opportunity in the great crisis of the 1930s?"⁹

At the heart of this inquiry, a vigorous debate has emerged about the wisdom of Roosevelt's efforts to displace the *Lochner*-era judiciary through his ill-fated Courtpacking plan.¹⁰ On one side of this divide, the Courtpacking plan has been credited with triggering Justice Owen J. Roberts's willingness—after casting the decisive vote against several early New Deal initiatives—to sign onto the FDR agenda, the so-called "Switch in Time Save[d] Nine."¹¹ On the other side, the Courtpacking campaign has been labelled as counterproductive and has been criticized for only galvanizing opposition to New Deal initiatives while accomplishing little else.¹² Having raged for more than fifty years, this debate shows no sign of letting up.

of a too powerful central government. See Louis Fisher, *The 'Contract With America': What It Really Means*, N.Y. Rev. Books, June 22, 1995, at 20 ("The Contract indicts the national government as 'too big, too intrusive, and too easy with the public's money.'") (quoting Newt Gingrich et al., *Contract with America* 7 (1994)).

7. See William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940*, at 277–80 (1963).

8. See *id.* at 135–36.

9. David M. Kennedy, *How FDR Derailed the New Deal*, *Atlantic Monthly*, July 1995, at 87, 92.

10. The most provocative and illuminating treatment of this topic is Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201 (1994). For commentary on Cushman, see Eben Moglen, *Toward a New Deal Legal History*, 80 Va. L. Rev. 263 (1994); Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 Va. L. Rev. 277 (1994).

11. Joseph Aslop & Turner Catledge, *The 168 Days*, at 135 (1938). New Deal Department of Justice officials have vigorously advanced this understanding. See Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics 190–91* (1941); Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 Harv. L. Rev. 645, 681–82 (1946) (arguing that Supreme Court believed that it had to switch in time to avoid public acceptance of Courtpacking plan). For Roosevelt, "the [switch] would never have come, unless this frontal attack had been made." Franklin D. Roosevelt, 6 *The Public Papers and Addresses of Franklin D. Roosevelt: The Constitution Prevails* lxvi (1937 volume) (1941) [hereinafter *Roosevelt Papers*].

12. For example, responding to Roosevelt's claim that although "he had lost the [Courtpacking] battle [he had] won the war," (p. 156) James MacGregor Burns concluded that "in view of the breakdown of the 'Grand Coalition' in the Democratic party that the Court-packing episode had triggered, 'it could better be said that [Roosevelt] lost the

William E. Leuchtenburg's *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* provides insights into this and other matters. Through a gripping and lucid account of some of the cases which inspired the Courtpacking plan and, more significantly, the politics surrounding its introduction and eventual defeat, Leuchtenburg reveals that "at the time [of its proposal], the plan seemed to have an inherent logic and even inevitability" (p. 131). Leuchtenburg, however, also acknowledges that this failed strategy ultimately "helped blunt the most important drive for social reform in American history and squandered the advantage of Roosevelt's triumph in 1936" (p. 157). While the costs of pursuing this strategy now appear greater than the risks of not launching a "frontal attack" against the Court,¹³ Leuchtenburg makes it clear that the Courtpacking proposal was much more than the Roosevelt Administration "acting out" against a Supreme Court which it despised (pp. 108, 213-14). Not only were New Deal social welfare programs at stake, but FDR's pursuit of centralized authority within the executive branch also had been called into question.¹⁴

Leuchtenburg's uncovering of the sources of the Roosevelt Administration's dissatisfaction with the Court is masterful. By focusing on White House reaction to "Old Court" decisionmaking, Leuchtenburg demonstrates why a politician as astute as Roosevelt would risk political disaster through his Courtpacking plan (pp. 85-131). Leuchtenburg fails, however, to explain the significance of his historiography. Instead, he serves up a series of integrally interconnected essays—most of which have appeared as book chapters or journal articles—without explaining how they speak to each other. In large measure, this is intentional. Perceiving that some readers "may be interested only in a particular essay or essays," (p. ix) Leuchtenburg, perhaps the preeminent New Deal historian, has opted for a "greatest hits" anthology-style presentation. As a result, the whole of *The Supreme Court Reborn* falls short of its potential. While many of its case studies are wonderfully crafted and insightful,¹⁵ Leuchtenburg leaves the reader alone to draw ultimate conclusions about the Roosevelt Revolution. This is unfortunate, for there are dots that can and should be connected, and there are issues worthy of mention that get none.

battle, won the campaign, but lost the war.' " James M. Burns, *Roosevelt: The Lion and the Fox* 315 (1956).

13. For an opposing argument that the Courtpacking plan was, at most, an ill-advised gambit "in view of the situation Roosevelt faced at the time," see Michael Nelson, *The President and the Court: Reinterpreting the Courtpacking Episode of 1937*, 103 *Pol. Sci. Q.* 267, 292 (1988) (exploring Roosevelt's proposals for governmental reorganization).

14. On Roosevelt's interest in centralizing governmental authority, see generally Richard Polenberg, *Reorganizing Roosevelt's Government* 6-11 (1966) (providing background on factors that influenced Roosevelt's approach to government reorganization).

15. See, e.g., pp. 82-131 (on Roosevelt's Courtpacking plan) and 180-212 (on the appointment of Hugo Black to the Supreme Court).

Over the past several years, scholars have raised important questions about whether the New Deal's pre-1937 defeats were at least in part attributable to bad lawyering, meaning poorly crafted statutes and misguided litigation strategies.¹⁶ Roosevelt and his advisors have been criticized for failing to take this possibility into account when crafting their Courtpacking plan.¹⁷ While no clear consensus has emerged, this claim, that lawyering matters, is of more than academic interest. It suggests that Roosevelt could have avoided the backlash that followed the Courtpacking debacle, and that he could have convinced Congress to approve reorganization and other post-1937 reform efforts.¹⁸ It also reveals that judicial review can be influenced both by skillful lawyering and by judicial appointments, something which today seems obvious, but was far from clear during the pre-1937 tumult.

Leuchtenburg does not seriously address arguments that the Supreme Court was prepared to make its switch irrespective of Courtpacking.¹⁹ Furthermore, although recognizing that Courtpacking hurt Roosevelt, Leuchtenburg pays scant attention to the relationship between Courtpacking and Roosevelt's failed efforts to expand the administrative presidency (pp. 157-58). He also does not consider how Courtpacking played into growing fears of centralized planning, which at the time were associated with totalitarian regimes.

That the whole of *The Supreme Court Reborn* may be less than the sum of its often brilliant parts does not undermine the value of this collection. Part I of this Book Review will highlight the ample teachings of Leuchtenburg's work and, in so doing, will make explicit some of the connections among the vignettes which make up *The Supreme Court Re-*

16. For arguments that such lawyering mattered, see Peter Irons, *The New Deal Lawyers* 4-6, 10-13 (1982) (arguing that different models of lawyering and intra-agency lawyering conflicts both matter); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Decisions from Swift to Jones & Laughlin*, 61 *Fordham L. Rev.* 105, 146 (1992) (arguing that "craftsmanlike labors of the NLRB lawyers" presented Supreme Court with well-established doctrinal theory to sustain the Wagner Act); Nelson, *supra* note 13, at 289 (arguing that even though legal craftsmanship alone would not move the Supreme Court, it made the Court's task of reviewing legislation easier); cf. Moglen, *supra* note 10, at 269-72 (arguing against Ackerman's thesis that fate of first New Deal differed from second because of badly drafted and poorly defended legislation). For arguments that lawyering did not matter, see Joseph L. Rauh, Jr., *Lawyers and the Legislation of the Early New Deal*, 96 *Harv. L. Rev.* 947, 948, 950-56 (1983) (book review) (assuming the importance of the Courtpacking plan and claiming that "a thousand Clarence Darrows would not likely have persuaded the [pre-1937] Court [to act] otherwise"); William F. Treanor, *Book Note*, 18 *Harv. C.R.-C.L. L. Rev.* 611, 612 (1983); cf. Jackson, *supra* note 11, at 185-87 (suggesting that conservative justices were entrenched and determined to thwart the liberal administration).

17. See Cushman, *supra* note 10, at 249 (arguing that early New Deal statutes failed because of poor drafting).

18. See *infra* Part II.

19. See *infra* note 41 and text accompanying notes 105-106.

born.²⁰ In particular, Part I will reveal that the Courtpacking plan was responsive to Supreme Court opposition to both New Deal social welfare reforms *and* to centralizing governmental authority in the President. Part II of this Book Review will challenge the Roosevelt Administration's conviction—shared by Leuchtenberg²¹—that the only way to affect Supreme Court decisionmaking was through purely political means, by packing the Court with pro-New Deal Justices.²² By pointing to the ways in which improved statutory drafting and brief writing and Roosevelt's landslide victory in 1936 facilitated post-1937 Supreme Court approval of New Deal programs, Part II will uncover the plan's *de minimis* role in the 1937 revolution.

Part III of this Book Review will extend the analysis to a controversy that Leuchtenberg does not address—the nexus between the Courtpacking battle and Roosevelt's efforts to centralize the government, especially the Justice Department. Like the Courtpacking scheme, Roosevelt's 1933 reorganization of the Justice Department valued enhancing the power of the administrative presidency over good lawyering.²³ Coincidentally, Roosevelt's decision to centralize litigation authority within the Department of Justice paid next to no attention to the adverse consequences of this scheme on the quality of government arguments before the Supreme Court.²⁴ The Justice Department reorganization therefore is an earlier example of the failure, inherent in the Courtpacking scheme, to consider the possible link between good lawyering and victories in court. Furthermore, the fact that the 1933 Department of Justice reorganization succeeded,²⁵ whereas subsequent efforts at centralization failed, suggests that, absent the backlash from the Courtpacking plan, more far-reaching centralization could have been achieved.

My argument is that Roosevelt's adherence to the idea of a powerful administrative presidency blinded him to the value of good lawyering. Ironically, the fallout from the Courtpacking scheme—a prime example of valuing the ideal of a strong president over good lawyering—undermined future efforts to enhance the administrative presidency. Consequently, although Leuchtenberg quite rightly suggests that enhancing

20. I will not refer to either Leuchtenberg's chapter on the Supreme Court's application, from 1925 to 1969, of select Bill of Rights amendments to state and local government action (pp. 237–58) or his chapter on Justice Holmes's 1927 *Buck v. Bell* decision, upholding mandatory sterilization of the mentally retarded (pp. 3–25). These two chapters, although valuable for other reasons, have very little to do with the events leading up to, or the immediate aftermath of, the constitutional revolution of 1937.

21. Leuchtenberg summarily dismisses claims that Roosevelt's Courtpacking campaign played, at best, a small part in triggering the 1937 constitutional revolution. See *infra* text accompanying notes 105–106.

22. In fact, Roberts's so-called "switch" occurred before the Courtpacking plan's introduction, suggesting that perhaps the combination of better lawyering and the 1936 elections, not Courtpacking, triggered the 1937 revolution. See *infra* note 72.

23. See *infra* text accompanying notes 45–48, 132–140.

24. See *infra* text accompanying notes 110, 127–129.

25. See *infra* text accompanying note 150.

the administrative presidency mattered as much to Roosevelt and his close aides as did getting the New Deal social welfare agenda through Congress and the Court, *The Supreme Court Reborn* falls short because it does not consider the worth of scholars, who have pointed out that a little lawyering would have gone a long way toward getting the Court to approve many of the New Deal reforms. Like Roosevelt, Leuchtenburg assumes that the only way to change the Court was through political means.

I. THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT

From 1933 to 1937, Franklin Delano Roosevelt fought a bitter battle with the Supreme Court over the structure and mission of the federal government. This Part will examine that struggle. In particular, the sources of FDR's Courtpacking proposal—perceptively revealed by *The Supreme Court Reborn*—will be uncovered. What is uncovered is that as much as there was a desire to expand social welfare programs, Roosevelt and his allies were also driven by their belief in the power of the administrative presidency.

A. *The New Deal Meets the Four Horsemen*

FDR's New Deal promised nothing less than a social revolution. "The word 'Deal,' " proclaimed Roosevelt, "implied that the Government itself was going to use affirmative action to bring about its avowed objectives The word 'New' implied that a new order of things designed to benefit the great mass . . . would replace the old order of social privilege" ²⁶ The 1932 election heralded this New Deal. Not only did Roosevelt win the presidency, but the Democrats also swept Capitol Hill with a three-to-one majority in the House of Representatives and a two-to-one majority in the Senate.²⁷ "Swept into office with a mandate to repair the ravages of the Depression,"²⁸ Congress and the White House launched their "Hundred Days War," with Congress enacting into law—sometimes "sight unseen," with less than an hour of debate, and "[w]ith a

26. Franklin D. Roosevelt, 2 Roosevelt Papers, *supra* note 11, at 5 (1938). For FDR, the "Old Order," by embracing *laissez-faire* economics, was insensitive to the "radical transformation" of the nation's economic substructure brought about by the Industrial Revolution. See Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 454 (1995) (noting that from the end of the Civil War until 1929, "the total value of manufactured products increased nearly twenty times; railroad track mileage went from under 40,000 miles nationwide to over 260,000; [and] the urban population increased from 16.1 percent to 49.1 percent"). As such, Roosevelt maintained, the Old Order was responsible for the Great Depression. The "New Deal," in contrast, would reinvigorate government, lifting the "barriers to the reasonable exercise of legislative powers, both state and national, to meet the urgent needs of the twentieth-century community." Jackson, *supra* note 11, at 175.

27. See Irons, *supra* note 16, at 3.

28. *Id.*

unanimous shout" rather than a roll call vote—"the most extraordinary series of reforms in the nation's history."²⁹

The last word on the one hundred day session of the first New Deal, however, was spoken by the Supreme Court, where many reform measures ran into a judicially constructed brick wall.³⁰ Unlike the Congress and White House, the federal courts were decidedly a part of the Old Order.³¹ From 1920 to 1932, Roosevelt's three Republican predecessors appointed six Supreme Court Justices as well as two-thirds of the courts of appeals judges and three-fourths of the district court bench.³² Making matters worse, the three remaining Supreme Court Justices—James McReynolds, George Sutherland, and Willis Van Devanter—were part of the "Four Horsemen of Reaction" that opposed the New Deal (p. 174). Without question, as Leuchtenburg's history makes clear, these jurists were the immovable obstacles to New Deal reforms.

To dramatize the stakes and intensity of the FDR-Court battles, Leuchtenburg serves up two delectable case studies, each of which illustrates a different feature of the tension between the Administration and the "Old Court." Leuchtenburg's tale of the *Rail Pension* decision,³³ invalidating Congressional efforts to require railroad owners and railworkers to contribute to a common pension pool, highlights the Court's opposition to social reform programs (pp. 26–52). His account of *Humphrey's Executor v. United States*,³⁴ prohibiting the President from firing an FTC Commissioner without cause, suggests the existence of judicial animosity towards Roosevelt's efforts to strengthen the administrative presidency (pp. 52–82).

Leuchtenburg treats the five-to-four *Rail Pension* decision as monumental, signalling the Old Court's disapproval of the New Deal. When the decision was issued on May 6, 1935, there was great uncertainty about the Court's attitude towards the New Deal, as well as corresponding state reform efforts (p. 26). In 1934 and again in the first months of 1935, the Supreme Court had issued a series of mixed decisions, some invalidating, and others approving, state and federal reform efforts.³⁵ In *Rail Pension*, by admonishing Congress for "fail[ing] to distinguish constitutional

29. See Leuchtenburg, *supra* note 7, at 43, 61. During its historic 100-day session, Congress, among other things, "committed the country to an unprecedented program of government-industry cooperation; . . . accepted responsibility for the welfare of millions of unemployed; . . . undertook huge public works spending; guaranteed the small bank deposits of the country; and . . . established federal regulation of Wall Street." *Id.* at 61.

30. *Id.* at 143–45.

31. For a discussion of the "Old Order," see Jackson, *supra* note 11, at 70–74. For an insightful treatment of the role of "critical elections" on relations between the Court and elected government, see Richard Funston, *The Supreme Court and Critical Elections*, 69 *Am. Pol. Sci. Rev.* 795 (1975).

32. See Irons, *supra* note 16, at 3.

33. *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

34. 295 U.S. 602 (1935).

35. For an inventory of 1933–1936 Court decisions, see Jackson, *supra* note 11, at 181.

power from social desirability,"³⁶ the Court appeared poised to strike down Social Security and other New Deal reforms. According to Leuchtenburg, the decision's strident tone—especially since it was written by the previously moderate Justice Owen Roberts—"sent shock waves through the White House and the New Deal agencies [and] . . . created deep fissures between the executive branch and the Supreme Court" (p. 27). Indeed, within one week of the decision, Attorney General Homer Cummings signalled the Administration's interest in striking back at the Court,³⁷ writing Assistant Attorney General Angus MacLean to learn whether " 'any study has been made in this office of the right of the Congress, by legislation, to limit the terms and conditions upon which the Supreme Court can pass on constitutional questions' " (p. 51).³⁸

Cummings, however, might have been better served by turning his attention internally to the manner in which Congress enacted, and the Justice Department defended, the pension program.³⁹ Rather than build a record to support the measure's impact on the flow of interstate commerce, "Congress whipped the legislation through," with the House "consider[ing] it for only forty minutes before registering its approval" (p. 32). Leuchtenburg's history also casts doubt on the Justice Department's handling of the case. While the Department focused its "efforts on demonstrating that the law stay within the commerce power," steering clear from the measure's "social desirability" (p. 34), a memorandum drafted by *Rail Pension* dissenter Benjamin Cardozo suggests that the Justice Department " 'laid undue stress . . . upon the danger of keeping superannuated men in the [workforce]' " (p. 41). For Cardozo, this emphasis " 'has given color to the [claim] . . . that the professed motive of the statute is

36. *Railroad Retirement Bd.*, 295 U.S. at 367. The Court therefore found the statute to be little more than "a naked appropriation of private property" in violation of due process. *Id.* at 350. Of equal significance, the Court also concluded that the pension did not protect interstate commerce and therefore found the statute outside of Congress's commerce power. See *id.* at 362. The Court reasoned that to the extent that efficiency, economy or safety "demand[s] the elimination of aged employees, their retirement from the service [without a pension] would suffice to accomplish the object." *Id.* at 367. As such, the pension was unnecessary to protect interstate commerce. See *id.* at 374.

37. Cummings, in a letter to Roosevelt, described the case as a "forecast of what we may expect with reference to almost any form of social legislation." Letter from Homer Cummings, Attorney General, to Franklin Delano Roosevelt, President (May 7, 1935), reprinted in *Selected Papers of Homer Cummings: Attorney General of the United States 1933-1939*, at 130 (Carl B. Swisher ed., 1939).

38. Four months earlier, at a January 11, 1935 Cabinet meeting, Cummings reported that Roosevelt had suggested that "if the Court went against the Government" in a case involving Congress's authority to regulate the currency through gold legislation, "the number of justices should be increased at once so as to give a favorable majority" (p. 86) (quoting Jan. 11, 1935 entry in Harold L. Ickes diary).

39. Leuchtenburg never criticizes the Justice Department's handling of *Rail Pension*, although his history casts doubt on the Department's litigation strategy.

not the true one' " (p. 41).⁴⁰ The possibility that the Congress and the Justice Department were partially responsible for the *Rail Pension* decision is not one that Leuchtenburg takes seriously. In a footnote, he dismisses claims that better lawyering and better legislative drafting might have enabled the Old Court, without repudiating pre-New Deal precedents, to find ways to uphold much of the New Deal (pp. 317 n.95).⁴¹ Beyond the stridency of the *Rail Pension* decision, Leuchtenburg also points to "Black Monday," May 27, 1935, when the Court handed down a trilogy of unanimous decisions invalidating key New Deal initiatives.⁴²

The most famous of Black Monday's program victims was the National Industrial Recovery Act, "an instrument forged in the heat of the famed '100 Days' of 1933 and wielded as the Roosevelt Administration's chief weapon in the war against the Depression."⁴³ *The Supreme Court Reborn*, however, sets its sights on a less controversial, but equally important, Black Monday decision, *Humphrey's Executor v. United States*. At one level, *Humphrey's Executor* seems anything but monumental: approving a backpay award to the estate of an FTC Commissioner. Within the White House, however, *Humphrey's Executor* was considered a major blow to the President and his reform agenda, which emphasized the rise of the administrative state and, with it, a significant expansion of presidential authority (pp. 78–80).

Perceiving that government must be able to react "flexibly and rapidly to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market,"⁴⁴ the Roosevelt Administration considered a presidentially managed "system of more unified powers"⁴⁵ to be an essential part of its social reform agenda. For this system to work, the President must be in charge of the instruments of administration, including, of course, the power to hire and fire agency heads. The *Humphrey's Executor* case squarely raised this issue. William Humphrey, a Coolidge FTC appointee who supported big business and opposed the New Deal, was dismissed because, as Roosevelt explained to Humphrey, "I do not

40. Moreover, according to Leuchtenburg, Cardozo perceived that "there was a better way to defend the law—by analogizing it to a workmen's compensation act" (p. 41) (summarizing Cardozo's memorandum).

41. Leuchtenburg concludes that Barry Cushman's work, *supra* note 10, is not credible. Noting (in a footnote) that Cushman did not conduct "original research in the papers of the Justices" and did not scrutinize "most of the cases of the era," Leuchtenburg discounts Cushman's history as being, at best, conclusory (p. 318 n.95). Leuchtenburg, however, never considers Peter Irons's related work on New Deal lawyering. See Irons, *supra* note 16. For further discussion, see *infra* note 121.

42. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (rejecting presidential dismissal of Federal Trade Commissioner); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating Frazier-Lemke Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act).

43. Kennedy, *supra* note 9, at 87.

44. Sunstein, *supra* note 1, at 424.

45. *Id.* at 440. For further discussion of the administrative presidency, see *infra* Part III.

feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and frankly, I think it is best for the people of this country that I should have full confidence' " (p. 60).

Leuchtenburg's account of the ensuing dispute is truly marvelous and brings out the extent to which the FDR-Court battle line was really drawn over the power of the American President. In particular, this chronicle reveals the White House's belief that *Humphrey's Executor* was animated by Court hostility towards Roosevelt and his administrative presidency. When argued, Solicitor General Stanley Reed thought the case "couldn't be lost" (p. 64).⁴⁶ Reed's confidence stemmed from the Court's sweeping approval of presidential removal authority in the 1926 *Myers v. United States*⁴⁷ decision.⁴⁸ *Humphrey's Executor*, by unanimously ruling against the President without even hinting that the Court had changed its mind,⁴⁹ shocked and outraged the Administration (pp. 78-80). Attorney General Cummings and presidential advisor Felix Frankfurter concluded that the Court was animated by a "touch of malice" (p. 79) and a "disposition . . . to curb the executive powers" (p. 78). As a result, "[t]he *Humphrey* ruling went far to persuade the President that, sooner or later, he would have to take bold action against a Court that, from personal animus, was determined to embarrass him and to destroy his program" (p. 79).

B. *From Courtpacking to Constitutional Revolution*

Roosevelt's "bold action" was the Courtpacking plan of 1937. Claiming that the Supreme Court was unable to function effectively, Roosevelt proposed legislation that would empower the President, for every Justice over seventy years of age, to appoint an additional Justice until the number of Supreme Court Justices reached fifteen.⁵⁰ Lacking, as Robert Jackson put it, "the simplicity and clarity which was the President's ge-

46. After being instructed by Attorney General Cummings to "pick out [a case] that you can win," Reed selected *Humphrey's Executor* (p. 64). Congress, too, thought the issue was well settled. Humphrey was advised by Senator C.C. Dill that "after all the President is boss and I can't control his appointments" (p. 59). More striking, Roosevelt's appointment of George Mathews to succeed Humphrey was approved unanimously by Congress (p. 63).

47. 272 U.S. 52 (1926).

48. In fact, before Roosevelt fired Humphrey, the Administration was advised, by a former Supreme Court clerk who worked on the case (James Landis), that the *Myers* Court "deliberately put" into its decision "statements to the effect that the President's power of removal extended to members of various independent commissions" (p. 69). The Administration's defeat in *Humphrey's Executor* then cannot be blamed on poor lawyering and strategizing.

49. Cf. *Morrison v. Olson*, 487 U.S. 654, 725-26 (1988) (Scalia, J., dissenting) (describing *Humphrey's Executor* as "gutting, in six quick pages devoid of textual or historical precedent" the Court's "carefully researched and reasoned" opinion in *Myers*.)

50. When his Courtpacking plan was introduced, six Justices were over 70 (including all of the Four Horsemen). Under his plan, Roosevelt intended to transform the Court by

nus,”⁵¹ the plan’s announcement prompted an immediate and intense firestorm of criticism from Congress, the press, and the Court itself. Why then did the President choose this “technical and confusing”⁵² approach? Leuchtenburg is at his best in answering this and several other questions about the Courtpacking imbroglio, including why Roosevelt did not act sooner; why he felt compelled to launch a “frontal attack”⁵³ on the Court; why, despite his landslide 1936 victory and an overwhelmingly Democratic Congress, the plan failed; and what the political consequences of this failure were.

Leuchtenburg uncovers that Roosevelt’s plan “was not a capricious act but the result of a long period of gestation in which it seemed sensible to conclude that the problem lay not in the Constitution but in the composition of the Supreme Court” (p. 131). At the same time, fearful that an overly aggressive attack against the Court might cost him at the polls,⁵⁴ “Roosevelt maintained a studied silence on the question” throughout the 1936 campaign (p. 107). By February 1937, with the Court set to rule on the Social Security Act, the National Labor Relations Act, state minimum wage laws, and several other matters (p. 108), the President felt he could wait no longer. Rejecting a constitutional amendment as too time consuming (p. 110) and perceiving the public to be fed up with the Court and quite enthralled with him,⁵⁵ Roosevelt settled on a plan that would allow him to transform the Court at once by appointing Justices sympathetic to the New Deal and its vision of an administrative presidency (pp. 108–27).

Unanticipated, yet easily discoverable, social and political forces imperiled this gambit, however. Gallup polls, for example, revealed that most voters opposed restrictions on the Court, supported Court decisions striking down the National Recovery Act and the Agriculture Adjustment Act, and hoped that Roosevelt’s second term would be more conservative than his first.⁵⁶ Fearing the central planning and executive supremacy associated with the totalitarian governments of Hitler and Mussolini, voters strongly opposed a radical transformation of either the American economic system or the balance of power among the three branches of gov-

either replacing these Justices (if they retired) or appointing additional Justices (if they remained on the Court).

51. Jackson, *supra* note 11, at 189.

52. *Id.*

53. Roosevelt Papers, *supra* note 11, at lxvi.

54. These fears were well-founded. Following his “Black Monday” defeats, Roosevelt chastised the Court for relegating the nation “to [its] horse-and-buggy definition of interstate commerce.” Franklin D. Roosevelt, Press Conference (May 31, 1935), in 4 Roosevelt Papers, *supra* note 11, at 220–21. This comment “created a furor” (p. 90) and convinced the President of the need to move slowly on this issue.

55. Roosevelt, undoubtedly, was also buoyed by likely congressional support for the measure. Congressional disapproval of the Court was apparent; for example, “[t]he years 1935–1937 saw more ‘Court-curbing’ bills introduced in Congress than in any other three-year (or thirty-five year) period in history.” Nelson, *supra* note 13, at 273.

56. See Cushman, *supra* note 10, at 212, 241–43; Nelson, *supra* note 13, at 277–78.

ernment.⁵⁷ The Courtpacking proposal, moreover, divided Democrats in Congress, with "a number of Democratic Senators search[ing] desperately for some device that would free them from the need to commit themselves" (p. 139).⁵⁸ Nevertheless, one month after its introduction, the proposal seemed likely to prevail. Democrats in Congress, as Leuchtenburg rightly observes, "might not [have] like[d] the scheme, but they could not justify frustrating the President while the Court persisted in mowing down legislation" (p. 142).

On "White Monday," March 29, 1937, the Court gave these Democrats a way out. Reversing its ten-month-old decision that New York's minimum wage law was unconstitutional, the Court performed the "Greatest Constitutional Somersault in History" (p. 176), upholding a nearly identical Washington statute.⁵⁹ Over the next several weeks, by upholding the Social Security Act⁶⁰ and the National Labor Relations Act,⁶¹ the Court made it clear that it was willing to sign off onto the New Deal and related state reform efforts. "Thus the Court, with no change of its Justices, . . . convinced the court of Public Opinion that the sentence of reorganization posed by the court bill might safely be suspended" ⁶² With the demise of his Courtpacking plan,⁶³ Roosevelt's efforts to transform the Court continued along more traditional lines. The May 18,

57. See Leuchtenburg, *supra* note 7, at 275-98 (discussing America's fear of the "fascist challenge"); Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 Sup. Ct. Rev. 163, 195 (describing conservative opposition to the New Deal's central planning elements).

58. Roosevelt's political mishandling of the proposal exacerbated these problems. When the proposal was introduced, Roosevelt stressed the difficulty of "aged or infirm" Justices trying to manage the Court's crowded docket (pp. 133-34). That strategy backfired, especially after Chief Justice Hughes wrote to Congress to report that the "Court is fully abreast of its work" and that an increase in the number of Justices would make the Court less efficient. See S. Rep. No. 711, 75th Cong., 1st Sess. 38, 40 (1937) (Letter from Charles E. Hughes to Burton K. Wheeler (Mar. 21, 1937) (Appendix C)). In response, Roosevelt conceded that the real purpose of his plan was to strike back at a Court that was "acting not as a judicial body, but as a policy-making body." Fireside Chat (Mar. 9, 1937), in 6 Roosevelt Papers, *supra* note 11, at 122, 125.

59. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). On "White Monday," the Court also upheld the National Firearms Act, the amended Railway Labor Act, and the revised Frazier-Lemke Act. For a description of these decisions and the Roosevelt Administration reaction to them, see Jackson, *supra* note 11, at 207-13.

60. See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

61. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

62. Jackson, *supra* note 11, at 235.

63. In June 1937, the Senate Judiciary Committee issued a negative report on the Courtpacking measure (p. 146). On July 22, 1937, the Senate—without having voted on the measure—returned Roosevelt's Courtpacking proposal to the Judiciary Committee "from which it never emerged" (p. 153). Leuchtenburg suggests that neither the White Monday decisions nor Roosevelt's ability to replace retiring Justice Van Devanter doomed the Courtpacking plan. Rather, Leuchtenburg ties the plan's defeat with Senate majority leader Joe Robinson's death on July 14, 1937, the eve of the Court-plan vote (pp. 148-54).

1937 retirement of "Four Horseman" Willis Van Devanter⁶⁴ led to the nomination of Senator Hugo Black, a supporter of the Courtpacking plan and "a true believer in expanding governmental power" (p. 210).⁶⁵ Over the next two years, through a combination of deaths and retirements, Roosevelt appointed four more New Deal allies to the Court, thereby securing the Constitutional Revolution of 1937 (p. 220).

"The Constitutional Revolution of 1937," writes Leuchtenburg, "altered fundamentally the character of the Court's business, the nature of its decisions, and the alignment of its friends and foes [It] ended, apparently forever, the reign of laissez-faire and legitimated the arrival of the Leviathan State" (pp. 235–36). For Leuchtenburg, these changes were more than a doctrinal evolution; instead, "the reversals and distinctions . . . [were] so numerous and so sweeping that . . . [by 1942] much of the constitutional law of 1936 appear[ed] to belong to a different constitution" (p. 233).⁶⁶ Most strikingly, from 1937 to 1947, the New Deal Court overturned thirty pre-1937 decisions.⁶⁷

These changes, however, came at a great price, for the Court struggle "helped blunt the most important drive for social reform in American history and squandered the advantage of Roosevelt's triumph in 1936" (p. 157). The controversy "deeply divided the Democratic party" (p. 158) and "helped weld together a bipartisan coalition of anti-New Deal Sena-

64. Van Devanter's retirement may well have been prompted by Congress's enactment of legislation which protected the retirement income of Supreme Court Justices. See Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* 88 (1992). It is also possible that Van Devanter—knowing that Roberts's switch secured the 1937 constitutional revolution—sought to strengthen opposition to Roosevelt and his Courtpacking plan (pp. 143–44).

65. The Black nomination, as Leuchtenburg ably reveals in a detailed and well-crafted case study, was extraordinarily controversial (pp. 180–212). For example, when Black was nominated, the *Washington Post* and other newspapers spoke of finding "it difficult to refer to any Supreme Court nomination which combined lack of training . . . and extreme partisanship" (p. 186) (quoting *The Black Nomination*, *Wash. Post*, Aug. 13, 1937, at 8). Eclipsing concerns over Black's competence, an imbroglio over Black's one-time membership in the Ku Klux Klan consumed the nomination (pp. 188–99). Yet, as Leuchtenburg puts it, "[t]here is no evidence, however, that awareness of this past caused Roosevelt to think twice about appointing Black" (p. 208). Roosevelt's *only* concern was the fate of New Deal economic legislation and, "given the temper of the times, [it is improbable] that civil liberties considerations loomed large in his mind" (p. 208).

66. Barry Cushman, in contrast, argues that much of the decisionmaking of the New Deal Court had its roots in the constitutional law of 1936. See Cushman, *supra* note 10, at 203–08; Cushman, *supra* note 16, at 156; see also Moglen, *supra* note 10, at 269–72 (applauding Cushman's discussion of the evolution of New Deal lawyers and the impact of this change on the success of New Deal legislation); Purcell, *supra* note 10, at 280–82 (agreeing with Cushman's depiction of the 1937 decisions as the result of an intertwining of existing jurisprudence).

67. See C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947*, at 300–01 (1963). Leuchtenburg's tally of 32 overturned decisions includes the reversal of post-1937 decisions (p. 233).

tors" (p. 157).⁶⁸ Furthermore, the middle class's backing of Roosevelt "ebbed away" as a result of this dispute (p. 159).⁶⁹ All of this led Roosevelt's Vice President, Henry Wallace, to remark that "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight" (p. 158); although "[t]he new Court might be willing to uphold new laws, . . . an angry and divided Congress would pass few of them for the justices to consider."⁷⁰

II. REEXAMINING THE CONSTITUTIONAL REVOLUTION

Franklin Delano Roosevelt did not know the value of a good lawyer. By refusing to place any faith in the power of improved statute drafting as well as governmental advocacy before the Court, Roosevelt attempted to use brute political force to take over the Supreme Court. The folly of this campaign, as this Part will demonstrate, is that Courtpacking played no meaningful role in triggering the 1937 Constitutional Revolution.

At the outset, it is noteworthy that the Courtpacking plan, despite its astronomical costs, is sometimes justified as the price that needed to be paid to accomplish Roosevelt's constitutional revolution.⁷¹ Leuchtenburg hints that this is true, rejecting the argument that New Deal judicial defeats can be blamed on "[p]oorly drafted laws, weak briefs, and careless arguments" (p. 232). Furthermore, he accepts the proposition that the Court plan "may well have affected" Owen Roberts, whose defection from the Old Court—the so-called "switch in time"—signalled the 1937 Constitutional Revolution (p. 143).⁷² *The Supreme Court Reborn*, however, does not address this topic directly. In fact, Leuchtenburg barely considers claims that improved drafting of legislation and legal advocacy played a critical role in Roberts's switch.⁷³ This omission is unfortunate because strong evidence indicates that the Courtpacking plan had, at best, limited bearing on the 1937 Revolution.

68. Absent the conflagration over the Court plan, it is certainly possible—but far from certain—that another controversy would have galvanized opposition to the New Deal. For example, the 1937–1938 recession "helped produce a national mood hostile to [New Deal] experimentation." Polenberg, *supra* note 14, at 151.

69. Roosevelt's standing with the middle class was also hampered by a severe recession which called into doubt the New Deal's ability to restore economic prosperity and stability. See Leuchtenburg, *supra* note 7, at 243–44; see also Alan Brinkley, *The New Deal and the Idea of the State*, in *The Rise and Fall of the New Deal Order, 1930–1980*, at 85, 87 (Steve Fraser & Gary Gerstle eds., 1989) (stating that the 1937 recession damaged Roosevelt's goals even more than the general dissatisfaction with his Courtpacking plan).

70. Leuchtenburg, *supra* note 7, at 239.

71. See *supra* note 11 and accompanying text.

72. Roberts's "White Monday" approval of state minimum wage laws, as Leuchtenburg recognizes, had nothing to do with Roosevelt's Courtpacking plan. Roberts "cast his vote [in that case] before the plan was announced" (p. 177). Leuchtenburg's claim is that Roberts's subsequent votes "may well" have been influenced by the plan (p. 143).

73. See *supra* note 41 and accompanying text.

There are several strands to this argument, not all of which are essential to accepting it. First, poor statutory drafting during the "One Hundred Days War" may have exacerbated Old Court hostility towards the First New Deal. "The legislation of the [F]irst New Deal," as Michael Nelson writes "was not well drawn; it too often tied sweeping assertions of federal power to slap-dash justifications."⁷⁴ Indeed, Justice Harlan Fiske Stone spoke of "'[t]he general sloppiness of everything that has been done in connection with this effort'" and his "'hope that Congress will now undertake to do its job.'"⁷⁵ By 1934, a group of highly skilled lawyers, attentive to the needs of "writing legislation to skirt the legal landmines that were sprinkled through the Court's decisions," joined the administration.⁷⁶ Unlike the "loose draftsmanship and emotional advocacy" of the First New Deal, observed Arthur Schlesinger, the laws of this "Second New Deal were masterpieces of the lawyer's art."⁷⁷ When Roosevelt's Courtpacking plan was proposed, the handiwork of these Second New Deal lawyers was before the Court.⁷⁸

Second, poor lawyering may have contributed to some Supreme Court defeats. With limited litigation authority until a 1933 FDR reorganization⁷⁹ and without a building until 1935, the pre-Roosevelt Justice De-

74. Nelson, *supra* note 13, at 289. Senate Judiciary Chairman Henry Ashurst put it this way: "[Because] [w]e ground out laws so fast . . . [we] reasoned from non-existent premises and, at times, we seemed to accept chimeras, phantasies and exploded social and economic theories as our authentic guides." Cushman, *supra* note 10, at 250 (quoting Henry F. Ashurst, *A Many Colored Toga: The Diary of Henry Fountain Ashurst* 333 (George F. Sparks ed., 1962)).

75. Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 395 (1956) (quoting Letter from Harlan Fiske Stone to John Basset Moore, Jan. 20, 1935). Along the same lines, after the Court struck down the Administration's 1933 "hot oil" program, Owen Roberts informed Interior Secretary Harold Ickes that he was "entirely sympathetic with what [the administration was] . . . trying to do in the oil matter and that he hoped we would pass a statute that would enable [the Administration to constitutionally] carry out [its] policy." Harold L. Ickes, 1 *The Secret Diary of Harold L. Ickes: The First Thousand Days, 1933-1936*, at 269, 273 (1953) (diary entry of Jan. 11, 1935).

76. Nelson, *supra* note 13, at 289; see also Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, at 143-45 (1972) (discussing the "[a]ssiduously careful legal draftsmen" of the New Deal); Cushman, *supra* note 10, at 255 (distinguishing the "social evangelists" of the First New Deal, who disdained technical precision, from the "precise and trenchant" lawyers of the Second New Deal, who "embraced legal exactitude"); Stern, *supra* note 11, at 667 (suggesting that one reason the Court, in the *Carter Coal* case, struck down the 1935 Bituminous Coal Act was Congress's failure to heed Department of Justice efforts to improve the measure).

77. Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Politics of Upheaval* 395 (1960).

78. Witness, for example, the National Labor Relations Act, approved by the Court as part of its 1937 "switch." Each of the drafters of this measure was a lawyer and "the legal training of the Act's framers was reflected by the central role that constitutional concerns played in their shaping of the Act's provisions." Cushman, *supra* note 16, at 139. For a more detailed treatment of this episode, see Irons, *supra* note 16, at 226-34.

79. Through a 1933 executive order, Roosevelt transferred litigation authority from executive agencies and departments to the Department of Justice. See *infra* part III.A.

partment had great difficulty attracting high-quality lawyers.⁸⁰ Matters did not improve much under Roosevelt, at least not at first.⁸¹ For example, Attorney General Homer Cummings, by staffing the Department with “deserving Democrats,”⁸² prompted Supreme Court Justices Louis Brandeis and Harlan Fiske Stone to express their concerns over the Department’s competence to Roosevelt.⁸³ While Old Court hostility towards the New Deal may have made it impossible for any litigation strategy to succeed,⁸⁴ the Justice Department could have done a better job in several cases,⁸⁵ including the Rail Pension⁸⁶ and National Industrial Recovery Act litigation.⁸⁷

Third, Old Court resistance to the New Deal programs may have been less intense than Leuchtenburg and others suppose.⁸⁸ The dreaded

80. On the Department of Justice’s difficulty in recruiting good lawyers, see Jerold S. Auerbach & Eugene Bardach, “Born to an Era of Insecurity”: Career Patterns of Law Review Editors, 1918–1941, 17 *Am. J. Legal Hist.* 3, 5 (1973). On the historically shabby facilities of the Department of Justice, see William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 103 (1965); Henry F. Pringle, *The Life and Times of William Howard Taft: A Biography* 110 (1939).

81. For a detailed discussion of how expanded Department of Justice litigation authority affected governmental advocacy before the Supreme Court, see *infra* Part III.A.

82. Irons, *supra* note 16, at 11. Cummings, a “Democratic party wheelhorse who helped swing the 1932 convention to Roosevelt,” was much more a politician than a lawyer. *Id.*

83. See *id.*; see also Bruce A. Murphy, *The Brandeis/Frankfurter Connection* 130 (1982) (suggesting that Brandeis had questions about Cummings’s skills as a lawyer). Chief Justice Charles Evans Hughes put it this way: “[T]he laws have been poorly drafted, the briefs have been badly drawn and the arguments have been poorly presented. We’ve had to be not only the Court but we’ve had to do the work that should have been done by the Attorney General.” Burton K. Wheeler & Paul F. Healy, *Yankee from the West* 329 (1962). While Hughes’s comment was somewhat self-serving, seeking to place blame for the Courtpacking crisis on the Roosevelt Administration, it contains at least a few kernels of truth, for disapproval of New Deal objectives cannot alone explain pre-1937 decisionmaking. See *infra* text accompanying notes 88–93.

84. For example, the Roosevelt Justice Department’s defeat in *Humphrey’s Executor* cannot be blamed on poor lawyering. See *supra* text accompanying notes 45–49. On Old Court hostility towards the New Deal, see generally Rauh, *supra* note 16, at 949–50 (discussing the low probability of winning a case before the Supreme Court composed of four staunch conservatives and two justices opposed to the New Deal); Treanor, *supra* note 16, at 611–13 (“the composition of the Supreme Court made invalidation [of some New Deal legislation] inevitable”).

85. Another example is the “hot oil” case discussed *supra* note 75. For Interior Secretary Harold Ickes: “It makes me sick when I think of the way [the Justice Department] handled our oil cases before the Supreme Court.” Irons, *supra* note 16, at 72 (quoting Harold Ickes).

86. See *supra* text accompanying notes 39–42.

87. See Irons, *supra* note 16, at 97 (describing how a National Recovery Administration attorney who shared oral argument responsibilities with the Solicitor General was forced to “contradict[] his fellow advocate”); see also Cushman, *supra* note 16, at 132. For a discussion of lawyer attitudes (both corporate and governmental) to NIRA, see Ronen Shamir, *Managing Legal Uncertainty* 15–35 (1995).

88. See Cushman, *supra* note 10, at 238–49 (discussing Department’s failure to advance a strong test case); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction*:

Four Horsemen, for example, cast several votes in favor of New Deal initiatives.⁸⁹ Likewise, Hughes and Roberts, the Swing Justices, “had hardly been consistent foes of activist government prior to the plan’s announcement.”⁹⁰ While the New Deal Court certainly transformed, rather than built upon Old Court doctrine,⁹¹ the fate of the New Deal hinged not just on who sat on the Court but also on the lawyering and lawmaking before the Court.⁹² At the least, improvements in Second New Deal lawyering provided cover to Justices who were prepared to uphold social reform programs without directly contradicting prior decisionmaking. Owen Roberts’s “switch” is a classic example of this phenomenon, for Roberts claimed that he never switched, but, instead, that poor lawyering prevented him from upholding minimum wage laws in an earlier case.⁹³

Fourth, beyond the possible failings of lawyers and law writers, the 1936 election may have convinced the Court (or at least Justices Roberts and Hughes, its two swing voters) of persistent widespread public support for the New Deal.⁹⁴ Indeed, Hughes had written in 1936 that when the

A Critique of Bruce Ackerman’s Theory of Constitutional Moments, 44 *Stan. L. Rev.* 759, 774–75 n.98 (1992); Moglen, *supra* note 10, at 269.

89. The old age provisions of the Social Security Act, the Wagner Act, and the Tennessee Valley Authority are among these initiatives. For an inventory of cases in which some or all of the Four Horsemen signed onto New Deal initiatives, see Cushman, *supra* note 10, at 246–48 n.255.

90. Klarman, *supra* note 88, at 774–75 n.98; see *supra* note 75 for a discussion of Justice Roberts; *supra* note 83 for a discussion of Justice Hughes; see also Cushman, *supra* note 10, at 243 (discussing Justice Roberts), 249 (discussing Justice Hughes).

91. On this point, Edward Purcell—responding to Barry Cushman’s claim that post-1937 decisionmaking is an outgrowth of existing doctrine—made the common sense point that “[t]o show that a doctrinal passageway existed is important, but it is not to show why the individual Justices—particularly Justice Roberts in a five-to-four decision—chose to walk through it.” Purcell, *supra* note 10, at 280.

92. Peter Irons suggests that good lawyering explains the Court’s upholding of the National Labor Relations Act in 1937. See Irons, *supra* note 16, at 288–89. For arguments that Irons is wrong, see Rauh, *supra* note 16, at 952–55; Treanor, *supra* note 16, at 612.

93. Specifically, Roberts claimed that the Court was not asked to overturn its 1923 disapproval of minimum wage restrictions until 1937, when Roberts’s supposed “switch” took place. See Memorandum from Owen Roberts to Felix Frankfurter (Nov. 9, 1945), in Felix Frankfurter, Mr. Justice Roberts, 104 *U. Pa. L. Rev.* 311, 314–15 (1955). For an assessment of both Roberts’s claim and the authenticity of the Frankfurter memo, compare Michael Ariens, A Thrice-Told Tale, or Felix the Cat, 107 *Harv. L. Rev.* 620, 645–51 (1994) (arguing that memo was non-existent, or at best, inaccurate) with Richard D. Friedman, A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger, 142 *U. Pa. L. Rev.* 1985, 1985–95 (1994) [hereinafter Friedman, A Reaffirmation] (defending the memo’s accuracy) and Richard D. Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 *U. Pa. L. Rev.* 1891, 1949–53 (1994) (supporting Roberts’s claim).

94. The mid-term 1934 election was far less significant both because of its proximity in time to the 1932 election and because Roosevelt, the embodiment of the New Deal, was not up for reelection. The 1936 election, moreover, took on added significance because of Roosevelt’s lopsided electoral margin of 370 to 6. For this reason, I find unpersuasive the claims of Barry Cushman and Mike Klarman that, since the 1934 election did not slow down the Court’s repudiation of several New Deal measures, there is no reason to think

Court departed from "its fortress in public opinion,"⁹⁵ it suffered severely from self-inflicted wounds.⁹⁶ For his part, Roberts, after retiring, explained the force of public opinion that beat against the Court: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."⁹⁷ Along these lines, Roberts's shift in the minimum wage case occurred after the 1936 election but before Roosevelt introduced his Courtpacking plan.⁹⁸ Whether Roberts was simply following the election returns is uncertain; what is clear is that Roberts was not bowing solely to the Courtpacking proposal.⁹⁹

In light of the foregoing, Roosevelt and his advisors—particularly Homer Cummings, the Courtpacking plan's chief architect (pp. 82–131)—can and should be faulted. By treating their defeats before the Court as purely political, the Roosevelt Administration refused to consider the role that legal writing and lawyering may have played in Supreme Court decisionmaking. By failing to look at its own blemishes (pp. 78–81), the Administration could not see what the lawyers of the Second New Deal did see: namely, an opportunity to fit New Deal programs into the fabric of prior Court doctrine.¹⁰⁰ Furthermore, by viewing the Supreme Court as unalterably opposed to New Deal reforms,¹⁰¹ Roosevelt did not take into account how his 1936 electoral landslide affected Supreme Court attitudes.

that the election of 1936 *did* influence the Court. See Cushman, *supra* note 10, at 228–38; Klarman, *supra* note 88, at 774–75 n.98.

95. Charles E. Hughes, *The Supreme Court of the United States* 24 (1936).

96. See *id.* at 51–53.

97. Owen J. Roberts, *The Court and the Constitution* 61 (1951). For this reason, it is possible that Roberts did switch, but did not cave to the pressures of Courtpacking. See generally Ariens, *supra* note 93, at 635–40 (providing Frankfurter's account of the reasons for Roberts's switch).

98. See *supra* text accompanying note 93. Moreover, according to Felix Frankfurter, Roberts voted to grant certiorari in this case prior to the 1936 election. See Frankfurter, *supra* note 93, at 315. Frankfurter's reporting, however, is suspect; it may well have been motivated by a desire to shield the Court from charges that its decisionmaking is inherently political. See Ariens, *supra* note 93, at 640–52. For a powerful critique of Ariens, see Friedman, *A Reaffirmation*, *supra* note 93, at 1985–95.

99. At the same time, the Courtpacking plan may have figured into Roberts's calculation, for Roberts later spoke of being "fully conscious" of the Court plan and thought it placed a "tremendous strain" on the Court. See *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 83d Cong., 2nd. Sess. 9 (1954) (statement of Owen J. Roberts); see also Walter F. Murphy, *Congress and the Court* 59–60 (1962) (suggesting that Roberts anticipated the Courtpacking plan before its formal announcement). It is also likely that Roberts recognized that continuing judicial invalidation of the New Deal imposed unacceptable costs on both the Court and the nation. On this point, cf. Lessig, *supra* note 26, at 414 (stating that where judge's rhetoric conflicts with "uncontested discourse," judges face "infinite cost" of certain "rhetorical moves" and risk engaging in "rhetorical self immolation").

100. See Nelson, *supra* note 13, at 289; *supra* notes 76–78.

101. See *supra* notes 90–93; *infra* notes 107–116 and accompanying text.

Roosevelt also underestimated the burgeoning public distrust of a too-powerful executive branch. Fears of totalitarian rule and the concomitant belief that the Supreme Court, while far from perfect, checked elected government excesses, help explain why "FDR's [Court] message generated an intensity of response unmatched by any legislative controversy of this century" (p. 134). For FDR opponents, the Courtpacking plan proved to be a political bonanza, galvanizing opposition to the New Deal and prompting "remonstrances comparing Roosevelt to Stuart tyrants and European dictators" (p. 137). The Senate Judiciary Committee echoed these concerns, proclaiming "that we would rather have an independent Court, . . . a Court that will dare to announce its honest opinions . . . [rather] than a Court that, out of fear or sense of obligation to the appointing power" validates governmental action.¹⁰² This claim, that "[w]e are not the judges of the judges. We are not above the Constitution,"¹⁰³ enabled Courtpacking plan opponents to cast Roosevelt as being more interested in executive-dominated centralized authority than in the rule of law.

This is not to say that Roosevelt did not have good reason to act. When his Courtpacking plan was announced, none of the Four Horsemen appeared ready to retire, and actuarial tables suggested that even the oldest justice would live another five years.¹⁰⁴ With reason to think that the Old Court would continue to invalidate governmental reform efforts, Roosevelt appropriately feared for the future of his New Deal.¹⁰⁵ Furthermore, the possibility that the Second New Deal would have fared better than early New Deal legislation does not mean that the Court was poised to launch its doctrinal transformation. Instead, as Leuchtenburg contends (pp. 231–32), the 1936 election and other external pressures were almost certainly necessary to prompt the 1937 Constitutional Revolution.

Whether the Courtpacking plan was a necessary ingredient to this mix, however, is quite another matter. The combination of better legal writing and Roosevelt's 1936 landslide victory were probably enough to secure the critical swing votes of Justices Roberts and Hughes. Through the appointment of pro-New Deal Justices, moreover, the sweeping reversals of Old Court decisionmaking was secured. In other words, the Courtpacking plan may well have undermined subsequent New Deal reform efforts without any offsetting benefits.

102. S. Rep. No. 711, 75th Cong., 1st Sess. 14 (1937).

103. *Id.*

104. See Jackson, *supra* note 11, at 185; Nelson, *supra* note 13, at 289.

105. The possibility that the Court would follow the 1936 election returns was not seriously considered by Roosevelt. See Aslop, *supra* note 9, at 24. Justice Department attorneys, however, did notice "a less hostile attitude in arguments" after Roosevelt's landslide victory. Jackson, *supra* note 11, at 197; see also Nelson, *supra* note 13, at 291 (noting that Four Horsemen "treated [Government lawyers] with respect rather than contempt" after election).

The Supreme Court Reborn never seriously considers this possibility, arguing instead that the 1937 Revolution was simply too drastic a change to have as its primary source better lawyering and the political impact of the 1936 elections (pp. 231–33). For Leuchtenburg, First New Deal lawyering was anything but “inept” (p. 232) and, consequently, “one cannot seriously believe that more expert draftsmanship” of Second New Deal legislation explains the Court’s shift (p. 231). Although he recognizes that Roberts’s “White Monday” switch occurred after the 1936 election, but before the introduction of the Court plan, Leuchtenburg claims that “in the long history of the Supreme Court, no event has had more momentous consequences than Franklin Roosevelt’s [Courtpacking] message” (p. 162). As a result, Leuchtenburg commits the same error that Roosevelt did, accepting the premise that the 1937 Revolution could only have been accomplished through a direct assault on the Court.

III. GOVERNMENT LAWYERS AND THE NEW DEAL

The true nature of the Courtpacking fight becomes clear in a related battle, the effort to reorganize the Justice Department, which combines the themes of bad lawyering and Roosevelt’s desire to increase the power of the presidency. In 1933, FDR reorganized the Justice Department to give it exclusive authority over much government litigation.¹⁰⁶ While this change served centralized planning objectives, Roosevelt failed to recognize its effect on the quality of government lawyering. In this way, Roosevelt’s failure to appreciate the role of government litigators and statute writers during the Courtpacking episode is part of a larger pattern in which his pursuit of centralized planning blinded him to other ways of solving the problem of the Old Court. Correspondingly, just as New Deal opponents capitalized on voters’ concerns of a too powerful President in order to bring down the Court plan, Roosevelt’s efforts to reform the administrative state were also undermined by these fears, fears which first took hold during the Courtpacking crisis. Ironically, Roosevelt pursued both Courtpacking and the Justice Department reorganization as means to the larger end of strengthening the administrative presidency. As this Part will show, the defeat of Roosevelt’s administrative presidency campaign can be traced to these two initiatives.

A. *The Department of Justice in the Age of Roosevelt*

The New Deal was a “‘lawyer’s deal,’” a period where “lawyers and legal means would stop the country’s deterioration,” where lawyers “‘enjoyed direct access to . . . [the] critical levers of power and monopolized the instruments of governance,’” and where, for the editors of *Ivy League law reviews*, “the lucre of New York did not match the excitement

106. See Exec. Order No. 6166 (1933), reprinted as amended in 5 U.S.C. § 901 (1988).

posed by the problems confronting Washington.”¹⁰⁷ With the rise of the administrative state, the lawyer’s craft—the drafting of statutes and implementing regulations, as well as litigation defending their workproduct—dominated New Deal policymaking.¹⁰⁸ As a result, the New Deal triggered not only an explosion in the ranks of government lawyers¹⁰⁹ but also numerous political battles over the proper conduct of federal legal policymaking.

Roosevelt, although a lawyer himself, placed little faith in the power of good lawyering to overcome Old Court opposition to New Deal reforms. His Courtpacking plan, by seeking to remake the Court through political means, reflects this belief. This compartmentalized view that the possible influence of legal arguments should give way to concerns of power and politics also characterized Roosevelt’s management of the federal legal apparatus. In 1933, Roosevelt strengthened the Department of Justice’s control of litigation so that he could better supervise the operations of government agencies.¹¹⁰ Consistent with his determination that politics, not lawyering, mattered, Roosevelt did not consider the consequences of this reorganization on New Deal lawyering before the federal courts. As a result, Roosevelt paid little, if any attention to disputes between the Department of Justice and New Deal agencies over the proper handling of litigation. In retrospect, these disputes should have signalled to the President the possibility that lawyering, after all, may matter.

Reorganization of the Justice Department was not a novel concept in 1933. Beginning with the establishment of a Justice Department in 1870, Attorneys General have consistently sought to strengthen their control of government litigation.¹¹¹ Standing in the way, however, were powerful department solicitors and their allies in Congress who limited Department of Justice authority through grants of independent litigation authority.¹¹² In fact, on the eve of the New Deal, Attorney General John Sargent reported to Congress that only 115 of 900 federally employed attorneys were under his control, and at least nine separate government

107. Glennon, *supra* note 80, at 69 (quoting Irons, *supra* note 16, at x).

108. See Glennon, *supra* note 80, at 68–70.

109. It is interesting to note that the staff of the Justice Department grew from 250 in 1905 to 32,000 in 1968. See *id.* at 214 n.8.

110. See Exec. Order No. 6166 (1933), reprinted as amended in 5 U.S.C. § 901 (1988), discussed *infra* note 116.

111. See Cornell N. Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* 73 (1992); Sewall Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165, 181–201 (1938); Carl B. Swisher, *Federal Organization of Legal Functions*, 33 Am. Pol. Sci. Rev. 973, 975–95 (1939).

112. Congress limited Roosevelt’s control of the administrative state by continuing to grant litigation authority to select agencies throughout Roosevelt’s presidency. See Swisher, *supra* note 111, at 991–95. For treatments of the consequences of these grants of litigation authority, see generally Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 321–27 (1994); Susan M. Olson, *Challenges to the Gatekeeper: The Debate over Federal Litigating Authority*, 68 *Judicature* 70, 73 (1984).

agencies or departments had independent litigation authority.¹¹³ Through powers granted to the President under the 1932 Economy Act,¹¹⁴ however, Roosevelt, at the urging of Attorney General Homer Cummings,¹¹⁵ issued a June 1933 executive order that confined to "the Department of Justice the responsibility of prosecuting and defending Court actions to which the United States is a party."¹¹⁶

Centralization of litigation authority did not sit well with the talented New Deal lawyers who dominated the federal agencies and departments.¹¹⁷ Having come to Washington to work for newly created agencies, and determined to find creative solutions to the economic crisis that ravaged the country, these lawyers wanted to change the world, not to play second fiddle to the Department of Justice.¹¹⁸ Consequently, when the Department of Justice sought to rein in highly talented agency lawyers and assert its dominance over federal legal policymaking, all hell broke loose. Unwilling to cede voluntarily authority to the Department of Justice, New Deal lawyers complained bitterly about the Department's mishandling of its legal work.¹¹⁹ For its part, the Department sometimes appeared at least as interested in building up its power as it did in winning lawsuits.¹²⁰

113. See Clayton, *supra* note 111, at 75.

114. Pub. L. No. 212, 47 Stat. 382, 413 (1932) as amended by Pub. L. No. 428, 47 Stat. 1489, 1517-18 (1933). Under the statute, Congress could disapprove of proposed reorganizations through a legislative veto. For a discussion of the politics of this legislative veto provision, see Fisher & Devins, *supra* note 64, at 121-42.

115. See Irons, *supra* note 16, at 146.

116. Exec. Order No. 6166, reprinted as amended in 5 U.S.C. § 901 (1988). Under the executive order, the internal legal work of government agencies was to be handled by the agency itself. For further discussion of this divorce of functions, see Donald L. Horowitz, *The Jurocracy* 12-24 (1977); Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in *Government Lawyers* 143 (Cornell W. Clayton ed., 1995); Swisher, *supra* note 111, at 999-1000.

117. The Agricultural Agency Administration's Office of General Counsel, for example, was headed by former Yale law professor and future appeals court judge Jerome Frank and was staffed by future Supreme Court Justice Abe Fortas, future democratic presidential candidate Adlai Stevenson, future Yale law dean Wesley Sturges, future appeals court judge Thurman Arnold, future Nuremberg war-crimes prosecutor and Columbia law professor Telford Taylor, and Holmes law clerk and future subject of anti-communist investigations Alger Hiss. See Glennon, *supra* note 80, at 70-72.

118. Making matters worse, these lawyers doubted the abilities of Department of Justice lawyers, most of whom had come to the Department at a time when institutional and other limitations impeded its efforts to hire quality lawyers. Specifically, the Department was limited both by numerous statutory exceptions to its presumptive control of government litigation and by the fact that government jobs were not considered as attractive as jobs with New York law firms. See *id.* at 68-70 (discussing the dominance of New York law firms prior to the creation of New Deal agencies); Swisher, *supra* note 111, at 999-1000 (discussing how Roosevelt's reorganization affected the Department of Justice's legal policymaking authority).

119. See Glennon, *supra* note 80, at 83-84; see also Irons, *supra* note 16, at 220-25.

120. See, e.g., Irons, *supra* note 16, at 220-25 (discussing "the emerging political duel between the two agencies"—the National Labor Relations Board and the Justice

The resulting conflicts, needless to say, did not help New Deal reform efforts. Turf wars between the Justice Department and New Deal agencies over the conduct and control of litigation proved time-consuming and emotionally draining.¹²¹ More significantly, after wresting control of litigation from a resisting agency, the Department sometimes proved ill-equipped to advance vigorously agency interests.¹²² Finally, at times, efforts at coordination between Department and agency attorneys backfired.¹²³ As a result, while an internal Department memorandum emphasized that “care must be taken to avoid the impression that we are seeking to curb or limit the authority of a particular agency,”¹²⁴ the Department concluded that the best way to avoid “mishaps” was to be unrelenting in its quest to establish itself as chief litigator for the United

Department—and that duel’s negative impact on creating an effective litigation strategy); see also *supra* note 82.

121. Peter Irons describes three competing litigation strategies in his study on New Deal lawyering: the use of political pressure to settle disagreements (legal politics), the use of negotiation instead of litigation (legal reform), and the use of litigation to gain formal court approval of agency action (legal crafting). Not surprisingly, as Irons recounts in detail, the choice of one or another of these competing models prompted different types of conflicts between New Deal agencies and the Department of Justice. All of these battles, however, were time consuming and emotional. See Irons, *supra* note 16, at 3–14; see also Glennon, *supra* note 80, at 83–84 (describing conflict between Justice Department and Agricultural Adjustment Administration). My research assistant, Roderick Ingram, reached a similar conclusion after reviewing Attorney General Cummings’s papers at the University of Virginia. Cummings and his staff, for example, fought bitter fights with the General Accounting Office, the Department of Interior, the Tennessee Valley Authority, and the National Recovery Administration. See *The Papers of Homer Stille Cummings* (Special Collection of Alderman Library, University of Virginia, Accession # 9973) [hereinafter *Cummings Papers*].

122. See *supra* notes 80–87, and *infra* note 123 and accompanying text; see also Glennon, *supra* note 80, at 84 (describing how Agricultural Adjustment Administration litigation was turned over to “neophyte [Justice Department] attorneys” who were no match against industry’s “skilled trial lawyers”); see Irons, *supra* note 16, at 86–94 (describing Department of Justice’s mishandling of National Recovery Act litigation); *id.* at 155 (noting that AAA lawyers “blame[d] their defeats . . . on the inexperience of Justice Department lawyers”).

123. At oral arguments in the National Recovery Act litigation, attorneys for the National Recovery Administration and Department of Justice “openly disagreed before the Court on the meaning of the statute and its implications for the determinative delegation issue.” Rauh, *supra* note 16, at 950; see also Irons, *supra* note 16, at 95–100 (describing oral arguments for *Schechter* case). Another example of failed cooperation involved Attorney General Cummings’s authorization of the Petroleum Board to litigate a case on its own behalf. This decision prompted several government agencies to complain to Cummings about both the litigation strategy and the legal position advanced by the Board. This episode is recounted in Letter from Homer S. Cummings, Attorney General, to Charles E. Clark, Dean, Yale Law School (May 12, 1934), in *Cummings Papers*, *supra* note 121, Box 177, Folder 1934 March: Department of Justice Case File, 114–57–1–3.

124. Memorandum from Ugo Carusi, Executive Assistant to the Attorney General, to Angus D. MacLean, Assistant Attorney General (Oct. 4, 1934), in *Cummings Papers*, *supra* note 121, Box 173, Folder 1934 October to 1938 August.

States.¹²⁵ During this period of transition,¹²⁶ New Deal programmatic objectives sometimes gave way to New Deal efforts to strengthen the administrative presidency through the centralization of litigation authority.

The Roosevelt White House did not intervene in these intra-executive disputes.¹²⁷ Believing that judicial appointments, not legal arguments, were the key to transforming the Court, Roosevelt apparently concluded these turf wars were inconsequential. Yet, even if the White House thought that legal advocacy mattered, FDR's interest in strengthening the administrative presidency may well have justified the shift in litigation authority. In particular, by centralizing legal policymaking in the Justice Department, the government can speak with a single voice in court. Equally significant, the President or his cabinet level surrogate, the Attorney General, is in charge of that voice. Under a decentralized scheme, in contrast, government agencies—subject to competing external pressures from oversight committees and constituency interests—will sometimes square off with each other in court.¹²⁸ Decentralization, moreover, encourages agencies to advance conflicting approaches to jurisdiction, statutory interpretation, and other issues that cut across all government litigation. To prevent New Deal agencies from discounting the consequences of their legal arguments for other parts of the government, it makes sense that Roosevelt would have wanted the Department of Justice to coordinate government litigation.¹²⁹

125. See Memorandum of unidentified author, Cummings Papers, *supra* note 121, Box 177, Folder 1933 July to 1935: Department of Justice Case File, 114-0, Sec. 1-8. This memorandum also notes that the granting of litigation authority to the Petroleum Board was "an unwise expedient because they did not have the sense of responsibility to the Department of Justice. We had to terminate that arrangement in order to be sure that we could control properly the work for which were responsible." *Id.*; see also *Power of the Attorney General in Matters of Compromise*, 38 Op. Att'y Gen. 124 (1934) (Executive Order No. 6166 "vests in the Attorney General exclusive control of any case after reference thereof to the Department of Justice.").

126. Today, of course, there are far fewer battles between the Department and its agency clients. See Horowitz, *supra* note 116, at 133. Moreover, by having established its control over nearly all governmental litigation, the Department is able to recruit the best students from the most selective law schools. See *id.* at 132; U.S. Dep't of Justice, *United States Department of Justice Legal Activities 1995-96*, at 8 (1995) (discussing how its recruitment program is "highly competitive," accepting only "outstanding" third year law students).

127. Research undertaken by myself and my research assistants at the FDR Presidential Library and the Homer Stille Cummings papers did not uncover direct White House participation in intraexecutive litigation disputes. By failing to intercede when the Justice Department upset agency desired, however, the White House tacitly supported the Department's position.

128. For example, the Environmental Protection Agency (whose performance as enforcer of environmental laws is at least sometimes measured by its aggressiveness) and the Department of Energy (as potential violator of environmental laws) are likely to advance different arguments in court.

129. The Roosevelt Department of Justice adopted this view—proclaiming, for example, that one of the Solicitor General's principal functions is "to protect against different agencies' taking inconsistent positions or positions which injure each other."

This approach towards centralized, coordinated legal policymaking matched Roosevelt's views on reorganization. According to Richard Polenberg, Roosevelt felt that the primary purpose of reorganization was not to reduce expenditures, but to strengthen the administrative presidency through "improved management, which would make administration more responsive to the national interest and better able to serve that interest."¹³⁰ Along these lines, Roosevelt's Justice Department officials spoke of "[c]onsistency . . . in the field of litigation" being "absolutely necessary to the maintenance of efficiency and good administration," so that when the United States appears in court "it appears as a single entity."¹³¹ This linkage between "efficiency" and the United States appearing in court "as a single entity" is critical. It underscores the Roosevelt Administration's belief in the President's role as chief executive of the administrative state. In contrast, were the United States a conglomeration of "autonomous units," Justice Department control of litigation might well frustrate the "autonomous" nature of government departments and agencies.

B. *Courtpacking and the Failed Reorganization of Roosevelt's Government*

Roosevelt's efforts to strengthen the administrative presidency extended well beyond his 1933 reorganization of the Department of Justice. Through his Committee on Administrative Management, headed by Louis Brownlow, Roosevelt sought to expand the power of the President and of the federal government vis-a-vis the states.¹³² First, Roosevelt embraced national planning, proclaiming that "'the problems of townships, counties and States, should be coordinated through large geographical regions.'" ¹³³ Furthermore, Roosevelt wanted a National Planning Board housed in the White House to oversee this regional system of planning

Memorandum from Richard S. Salant to the Solicitor General (July 1, 1943) (on file with the Columbia Law Review).

130. Polenberg, *supra* note 14, at 7.

131. Key, *supra* note 111, at 198-99. Roosevelt, however, claimed that the "justification for sending this [Justice Department] Executive Order up [to Congress]. . . is that it will effect a savings of more than \$25,000,000." Franklin D. Roosevelt, A Message to Congress Transmitting Executive Order No. 6166, Consolidating and Abolishing Many Governmental Agencies (June 10, 1933), in 2 Roosevelt Papers, *supra* note 11, at 223. In all likelihood, this cost-cutting argument was advanced to help Roosevelt sell this reorganization to Congress. This conclusion is supported by the Justice Department's emphasis on efficiency concerns in its active lobbying for this order as well as Roosevelt's rejection of cost savings justifications for governmental reorganizations. See Irons, *supra* note 16, at 146; Key, *supra* note 111, at 198-99; see also Polenberg, *supra* note 14, at 8 (noting that Roosevelt perceived "that it is awfully erroneous to assume that it is in the reorganization of Departments and Bureaus that you save money" (quoting Franklin D. Roosevelt, Press Conference (May 31, 1933), in 1 Roosevelt Papers, *supra* note 11, at 333-34)).

132. See generally Peri E. Arnold, *Making the Managerial Presidency* 81-117 (1986) (examining Roosevelt's contribution to nearly a century of administrative reorganization).

133. Karl, *supra* note 57, at 186.

boards.¹³⁴ Second, Roosevelt sought to strike back at Congressional efforts to limit presidential control of independent regulatory agencies.¹³⁵ Indeed, consistent with Roosevelt's view that "the independent commissions [should be] brought under the general supervision of Cabinet officers,"¹³⁶ the Brownlow Committee deemed independent agencies to be Public Enemy Number One. In the Committee's view, independent agencies undermined the President's power to direct governmental operations by removing those subordinates who were unable to advance his agenda in a satisfactory manner.¹³⁷ Starting in January 1937, the Administration tried to consolidate presidential authority through a massive reorganization of the burgeoning administrative state, including the establishment of a National Resources Planning Board.¹³⁸ Yet just as the Supreme Court thwarted its efforts to gain control of these commissions in *Humphrey's Executor*,¹³⁹ the 1938 Congress rejected these administrative reforms.¹⁴⁰

Congress had good reason to oppose the Roosevelt reorganization, especially its national planning component. As Barry Karl observed, "[p]lanning requires administration. Administration requires bureaucracy. Bureaucracy threatens legislative control."¹⁴¹ In fact, to combat executive branch dominion of government, Congress purposefully limited presidential control of the bureaucracy by creating independent regulatory commissions.¹⁴² Consequently, had it approved Roosevelt's proposed reorganization, Congress would have severely limited its own institutional authority.¹⁴³ Congress, however, did approve FDR's 1933 re-

134. See *id.* at 188 (discussing Roosevelt's attempts at managing the New Deal through reorganization and the Brownlow Committee).

135. See *infra* note 142; cf. Sunstein, *supra* note 1, at 444 (The "legacy of Progressive faith in technocracy . . . [which] translated into a large degree of autonomy for agency officials" had as much to do with these Congressional restrictions on presidential authority as did congressional distrust of a very powerful president.).

136. Polenberg, *supra* note 14, at 25.

137. See *supra* text accompanying notes 41-46; see also Arnold, *supra* note 132, at 105-06 (noting that the Brownlow Report recommended transferring the policy-administrative operations of independent agencies to executive departments and agencies).

138. See Karl, *supra* note 57, at 182-87.

139. 295 U.S. 602 (1935).

140. For a comprehensive examination of these failed reorganization efforts, see Polenberg, *supra* note 14, at 28-51.

141. Karl, *supra* note 57, at 192.

142. See *id.* at 192-93; see also Polenberg, *supra* note 14, at 44-45 (describing how Congressional pressure prompted Roosevelt to back down from attempts to reorganize the independent regulatory commissions). In addition, throughout Roosevelt's presidency, Congress limited Department of Justice control of independent agency litigation through grants of independent litigation authority. See Swisher, *supra* note 111, at 991-95.

143. For an analogous argument, explaining why Congress conditions its grants of legislative authority through the legislative veto and other checking mechanisms, see Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 *Law & Contemp. Probs.* 273 (Autumn 1993).

organization of the Justice Department.¹⁴⁴ What explains this difference between the 1933 Congress and the 1938 Congress—which, incidentally, had an even more lopsided Democratic majority than the 1933 Congress?

Roosevelt's Courtpacking plan played a decisive role here. "[R]eorganization was largely forgotten" during the Court controversy.¹⁴⁵ Moreover, with "[t]he conservative opposition to Roosevelt crystallized around the Court issue,"¹⁴⁶ Roosevelt's critics succeeded in depicting the reorganization proposal as yet another attempt by Roosevelt to "establish an executive dictatorship."¹⁴⁷ Specifically, just as the Courtpacking plan exposed Roosevelt to charges that he placed his political agenda ahead of the rule of law, the reorganization plan likewise was resisted because of "fears and anxieties produced by European dictatorship."¹⁴⁸ Roosevelt could not overcome this specter of a centralized totalitarian regime undermining democratic rule, for Courtpacking plan opponents had succeeded in casting him as a man of power rather than a man of law.¹⁴⁹ Consequently, unlike the One Hundred Days War, when Roosevelt was able to push through his reorganization of the Justice Department,¹⁵⁰ the Courtpacking plan backlash made impossible any further expansions of the administrative presidency.

Roosevelt was crushed by this defeat, having made attaining the aims of the Brownlow Committee the centerpiece of his 1936–1940 term.¹⁵¹ What is truly amazing and ironic about this turn of events is the pivotal role played by Courtpacking in the undoing of this "Third New Deal."¹⁵² First, the 1933 Congress that overwhelmingly approved Roosevelt's Department of Justice reorganization may well have been willing to approve his 1937 reorganization plan. Second, absent the Courtpacking debacle, it seems likely that the 1938 Congress would have approved the Roosevelt reorganization. Even with the baggage of Courtpacking and ever-increasing fears of Europe's totalitarian regimes, the 1937 reorganization nonetheless passed the Senate and nearly passed the House (where it was re-

144. See *infra* note 150 and accompanying text.

145. Polenberg, *supra* note 14, at 28; see also Arnold, *supra* note 132, at 109 (noting that Roosevelt "ask[ed] his son James to shepherd the reorganization program while he gave primary attention to the judiciary plan").

146. Kennedy, *supra* note 9, at 88.

147. Polenberg, *supra* note 14, at 194.

148. *Id.* at 149.

149. See *id.* at 148–52.

150. Roosevelt sent Executive Order No. 6166 to Congress on June 10, 1933, the last scheduled day of the 100 Day session. While some members characterized Roosevelt's action as a "contemptuous gesture toward the Members of Congress," 77 Cong. Rec. 5617 (1933) (statement of Sen. Reed), and complained that "[t]here is no way in which Congress can pass upon this matter under these circumstances," *id.* at 5600 (statement of Sen. Borah), most members applauded the consolidation of government litigation in the Justice Department, condemning the existing arrangement as "a maze of conflicting and anomalous provisions." *Id.* at 5615 (statement of Sen. Robinson).

151. See Karl, *supra* note 57, at 187–88.

152. See *id.* at 188.

jected by a vote of 204 to 196, with 108 Democrats voting against the bill).¹⁵³ Needing only four additional votes to win approval, Roosevelt might have had the political leverage to persevere in Congress without the Courtpacking's galvanizing effect on the opposition. Third, had FDR not pursued Courtpacking, not only would Congress have approved his reorganization but, as Part II suggests, the Supreme Court may well have upheld this Third New Deal. For example, nothing in *Humphrey's Executor* or any other Supreme Court separation of powers decision limits Congress from making independent agencies more like executive departments and agencies.¹⁵⁴ In other words, by leaving the Court issue alone, Roosevelt—rather than suffer the Courtpacking's devastating boomerang—could have garnered congressional and judicial approval of his Third New Deal. Fourth (and relatedly), by pursuing Courtpacking, Roosevelt undermined the very objectives he was trying to pursue, namely, to strengthen centralized governmental controls and to place the President in charge of the administrative state.¹⁵⁵

The Courtpacking plan and the Justice Department reorganization both show a similar failure to value properly the ability of lawyers to make a difference. As a result, the Department of Justice reorganization may have started a chain of events leading through the Courtpacking episode and onto the failure of subsequent broader reforms. Had the Administration perceived the nexus between good lawyering and success in court, it might have delayed its Courtpacking plan and paid more attention to the consequences of its Justice Department reorganization. In particular, as Part II suggests, there was reason for the Roosevelt Administration to be cautiously optimistic about the Court's 1936–37 term. The Courtpacking plan, however, presupposed that the Old Court would not deem consequential either the 1936 election or differences between First and Second New Deal legislation and lawyering. Furthermore, as this Part reveals, there was also reason for the Roosevelt Administration to recognize that the Justice Department reorganization affected government lawyering before the Supreme Court. In advancing its Courtpacking plan, however, the administration never considered the possible consequences of its reorganization effort. In other words, although strength-

153. See Leuchtenburg, *supra* note 7, at 279.

154. Roosevelt therefore could have overcome *Humphrey's Executor* through political means. Since *Humphrey's Executor* was a unanimous decision, Roosevelt—even with several Supreme Court appointments—could not realistically expect the Court to overturn it.

155. For similar reasons, Roosevelt was also outraged by the Supreme Court's invalidation of the National Industrial Recovery Act in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). By holding that Congress had gone too far in delegating lawmaking power to the president, *Schechter* stood in the way of FDR's efforts to centralize authority through broadly worded Congressional delegations. See Karl, *supra* note 57, at 197 ("Schechter was a criticism . . . [of] a far-reaching design for governmental reform."). See generally, Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 273–74 (2d ed. 1979) (discussing the "Roosevelt Revolution" and the changing functions of government).

ening the Justice Department furthered Roosevelt's vision of the administrative presidency, Roosevelt erred by failing to link this reform effort to Supreme Court decisionmaking. This is not to say that the Justice Department reorganization is to blame for the Supreme Court's rejection of much of Roosevelt's First New Deal.¹⁵⁶ Yet, by assuming that litigation skills have no bearing on outcomes, Roosevelt's simultaneous pursuit of Supreme Court and Justice Department reorganization cost him dearly. Future social reform and reorganization efforts were casualties to a Courtpacking plan that marked "the beginning of the end of the New Deal."¹⁵⁷

CONCLUSION

The Courtpacking episode, despite the passage of sixty years and countless hours of academic attention, remains a subject of debate. Over the past two years, for example, important questions have been raised about both Justice Roberts's claim that the Courtpacking plan did not affect his "switch"¹⁵⁸ and the generally accepted view that the Constitutional Revolution of 1937 transformed, rather than built upon, existing Court doctrine.¹⁵⁹ Courtpacking's continuing relevancy is not limited to academic writings. In *Planned Parenthood v. Casey*,¹⁶⁰ the Supreme Court's surprising 1992 reaffirmation of abortion rights, the plurality and dissenting opinions advanced strikingly different visions of Courtpacking's role in the 1937 Revolution. For the plurality, who sought to distinguish the 1937 "switch" from efforts to have the Court overrule *Roe v. Wade* under "political fire," there is no reference to the Courtpacking conflagration. Instead, the switch is described as a response to the Old Court's "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."¹⁶¹ For the dissent, the plurality committed error by failing to consider "Franklin Roosevelt's proposal to 'reorganize' this Court," for it "is difficult to imagine a situation in which the Court would face more intense [pressure] than it did at that time."¹⁶²

William Leuchtenburg's *The Supreme Court Reborn*, while it will not end the debate over the Courtpacking plan, is an enormously valuable contribution to an overcrowded field. By telling the story of the politics

156. Cf. Rauh, *supra* note 16, at 948-50 (stating that poor litigation was unrelated to the Supreme Court's rejection of the New Deal); Treanor, *supra* note 16, at 612 (stating that composition of Supreme Court was behind the failure of the New Deal).

157. Kennedy, *supra* note 9, at 88.

158. See Ariens, *supra* note 93, at 623.

159. See Cushman, *supra* note 10, at 203.

160. 112 S. Ct. 2791 (1992).

161. *Id.* at 2812.

162. *Id.* at 2863 (Rehnquist, C.J., dissenting). The 1995 *Lopez* decision also hints at the Courtpacking's continuing relevance, with Justice Souter noting in dissent that the Constitutional Revolution of 1937 occurred "only after one of this Court's most chastening experiences." *United States v. Lopez*, 115 S. Ct. 1624, 1652 (1995) (Souter, J., dissenting).

behind the Courtpacking plan, *The Supreme Court Reborn* makes clear that neither Roosevelt nor his staff, including Attorney General Homer Cummings, thought that the Old Court could be moved by better legal advocacy, statutory drafting, or Roosevelt's 1936 electoral landslide. Moreover, through his review of the *Humphrey's Executor* litigation, Leuchtenburg also reveals that the Courtpacking plan was as much about Roosevelt's interest in strengthening the administrative presidency as it was about New Deal social reform programs.

Leuchtenburg does not address the role that poor lawyering and statutory drafting may have played in the Court's repudiation of the National Recovery Act, Agricultural Adjustment Act, and several other One Hundred Day reforms. While suggesting that better lawyering could not overcome Supreme Court resistance towards Roosevelt and his New Deal, Leuchtenburg's failure to consider meaningfully this issue leaves his history subject to attack. For example, there is good reason to think that the confluence of the 1936 election and improvements in the crafting of legislation to meet judicially imposed hurdles played a decisive role in the "switch" that began the 1937 Revolution.

Leuchtenburg also does not consider the possible significance of Roosevelt's 1933 Department of Justice reorganization to Courtpacking. This reorganization is illuminating for two quite disparate reasons. First, although this reorganization affected government litigation before the Supreme Court, Roosevelt never took this reorganization into account when formulating his Courtpacking proposal. Second, Congress's willingness to accede to this reorganization suggests that Roosevelt's pursuit of Courtpacking undermined his administrative presidency agenda.

Leuchtenburg should not be faulted too much for failing to consider these matters. He does not intend that his history speak to these issues. More than anything, his is the story of why the Roosevelt Administration pursued its Courtpacking plan, why the plan was defeated, and the consequences of its defeat. Consequently, just as the Roosevelt Administration did not seriously contemplate the possibility that its Constitutional Revolution could be launched without a "frontal attack" on the courts, Leuchtenburg, too, pays little attention to this issue. Correlatively, it is not surprising that Leuchtenburg does not address FDR's reorganization of the Justice Department, for the Roosevelt Administration never seriously considered the possible impact of this reorganization on its litigation agenda.

The Supreme Court Reborn, then, is neither monumental nor definitive. It is, however, essential reading on the Roosevelt Revolution. Literate and well-crafted, Leuchtenburg's work is a compelling account of the

1937 Constitutional Revolution through the eyes of the Roosevelt Administration.¹⁶³

163. With a two-volume history of the constitutional crisis of the 1930s in the works, Leuchtenburg may yet speak the last word on those matters not considered in *The Supreme Court Reborn* (p. ix).