

## THE SECURITIES LAWS AND THE MECHANICS OF LEGAL CHANGE

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THE contribution to this symposium co-authored by Professor Pritchard and Professor Thompson is an industriously researched and thoughtfully argued paper exploring the role of Franklin Roosevelt's fascinating cast of Supreme Court appointees in enacting, defending, and ultimately interpreting the New Deal securities laws. Their paper makes a valuable contribution not only to the historiography of the regulation of American financial markets, but also to three related literatures on the mechanics of legal change. The first is a line of political science literature that traces itself to a classic 1957 article by Robert Dahl, which argues that dominant national political alliances eventually succeed in bringing the policy views of the federal judiciary into harmony with their own through regular judicial appointments.<sup>1</sup> The second is a grow-

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<sup>1</sup> Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 284–88, 291, 293–94 (1957). For examples of work in this tradition, see Walter Dean Burnham, *Critical Elections and the Main-springs of American Politics* 10 (1970); John B. Gates, The Supreme Court and Partisan Change: Contravening, Provoking, and Diffusing Partisan Conflict, in *The Supreme Court in American Politics: New Institutional Interpretations* 98 (Howard Gillman & Cornell Clayton eds., 1999); Howard Gillman, The Waite Court (1874–1888): The Collapse of Reconstruction and the Transition to Conservative Constitutionalism, in *The United States Supreme Court: The Pursuit of Justice* 124, 128, 145 (Christopher Tomlins ed., 2005); Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* (1997); Terri Jennings Peretti, *In Defense of a Political Court* 133 (1999); Robert Scigliano, *The Supreme Court and the Presidency* (1971); Martin Shapiro, Chief Justice Rehnquist and the Future of the Supreme Court, in *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices* 145 (D. Grier Stephenson, Jr. ed., 1991); Martin Shapiro, The Supreme Court: From Warren to Burger, in *The New American Political System* 179 (Anthony King ed., 1978); Mark Tushnet, The Supreme Court and the National Political Order: Collaboration and Confrontation, in *The Supreme Court and American Political Development* 117, 129 (Ronald Kahn & Ken I. Kersch eds., 2006); Richard Funston, The Supreme Court and Critical Elections, 69 Am. Pol. Sci. Rev. 795 (1975); Howard Gillman, First Amendment Doctrine as Regime Politics, 14 The Good Soc'y 59 (2005); Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891, 96 Am. Pol. Sci. Rev.

ing body of historical scholarship on the Supreme Court during the New Deal, which emphasizes the importance of changes in Court personnel to transformations in substantive due process and constitutional federalism.<sup>2</sup> The third, which builds on the first two, is a strand of positive constitutional theory that contends that judicial appointments are the means by which constitutional revolutions, including that of the New Deal, have been achieved.<sup>3</sup>

Pritchard and Thompson's principal thesis, which is congruent with these three bodies of scholarship, is that "Roosevelt ultimately prevailed [in establishing his securities law program] when he was able to appoint lawyers to the Supreme Court who had a proven record of supporting a broad role for government regulation of the economy. . . . As events unfolded, Roosevelt's appointees would ensure the survival of the securities laws . . . ."<sup>4</sup> Yet there is another, perhaps more familiar story of constitutional change during the New Deal—one that sees the transformation of constitutional doctrine principally as the product of external political pressures on the Court, such as the 1936 election and the Court-packing plan, rather than of changes in judicial personnel.<sup>5</sup>

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511, 517 (2002); Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. Pa. J. Const. L. 107 (2006); William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 W. Pol. Q. 185 (1980); Kevin J. McMahon, *Constitutional Vision and Supreme Court Decisions: Reconsidering Roosevelt on Race*, 14 Stud. Am. Pol. Dev. 20, 24, 28 (2000).

<sup>2</sup> Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998) [hereinafter Cushman, *Rethinking*]; G. Edward White, *The Constitution and the New Deal* (2000); Barry Cushman, *Lost Fidelities* [hereinafter Cushman, *Lost Fidelities*], 41 Wm. & Mary L. Rev. 95 (1999); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism* [hereinafter Cushman, *Varieties and Vicissitudes*], 85 B.U. L. Rev. 881, 982–98 (2005); Richard Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994).

<sup>3</sup> Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489, 489–502, 533–35 (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1066–68, 1073–76, 1082–83, 1092 (2001).

<sup>4</sup> A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 Va. L. Rev. 841, 873 (2009).

<sup>5</sup> The exemplar is William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995). For citations to many other instances of this view, see Cushman, *Rethinking*, *supra* note 2, at 227–28 nn.1, 8, 9, & 17.

Pritchard and Thompson occasionally introduce elements of that story line into their account, and I will make three points about that feature of their analysis: first, that it rests uneasily next to their principal claim; second, that it provides them with no explanatory purchase with respect to the securities law developments they examine; and third, that it is therefore an irrelevant excrescence on their otherwise admirable article.

Pritchard and Thompson's charting of the Court's path toward an open embrace of the New Deal securities laws starts with *Jones v. SEC*,<sup>6</sup> where the Court castigated the Commission for its refusal to permit the withdrawal of a registration statement. "The tenor of the opinion," the authors contend, "did not bode well for the Act's constitutionality."<sup>7</sup> The first sign of a departure from the posture taken by the Court in *Jones*, Pritchard and Thompson suggest, came in the case of *Landis v. North American Co.*<sup>8</sup>—a decision rendered before there had been any change in the Court's personnel. There, pending the resolution of a similar suit brought by the Commission before another court, the district court had stayed suits brought by two holding companies seeking to restrain the SEC from enforcing the Public Utilities Holding Company Act.<sup>9</sup> Pritchard and Thompson report that the Court unanimously approved the stay,<sup>10</sup> but as I read the opinion the Justices held that the district court had abused its discretion in extending the stay until resolution of the pending case by the Supreme Court, vacated the order of the district court, and remanded the case for a rehearing to determine whether, in view of the principles set forth in the opinion, any further stay of the proceedings should be ordered.<sup>11</sup> The *North American* case, Pritchard and Thompson inform us, was heard by the Supreme Court

a week after Roosevelt's smashing landslide in the 1936 election. . . . In contrast to the hostility toward the SEC and its processes that was visible in *Jones*, this opinion, written by Justice Cardozo for a unanimous Court, was considerably more accom-

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<sup>6</sup> 298 U.S. 1 (1936).

<sup>7</sup> Pritchard & Thompson, *supra* note 4, at 876.

<sup>8</sup> 299 U.S. 248 (1936).

<sup>9</sup> See *id.* at 249–53.

<sup>10</sup> Pritchard & Thompson, *supra* note 4, at 880–81.

<sup>11</sup> See *Landis*, 299 U.S. at 256–59.

modating toward agency action . . . . Not only did the SEC win, but the caustic language of *Jones* had disappeared.<sup>12</sup>

It is not entirely clear to me that the SEC actually won in this instance. As a commentator in the *Michigan Law Review* observed, "Since it can be assumed that both parties are primarily interested in a decision of the Supreme Court, it may be questioned what will be gained by a stay extending only until a decision by the district court."<sup>13</sup> But Pritchard and Thompson's suggestion here, I take it, is that both the SEC's ostensible victory and the disappearance of the critical language on display in *Jones* were direct judicial responses to Roosevelt's commanding electoral victory. Otherwise, why mention the intervening election?

Yet it seems to me quite unlikely that the election had anything to do with the outcome in *North American*. The decision was, after all, unanimous; even the Four Horsemen joined.<sup>14</sup> And as the events of 1937 would demonstrate, the voting behavior of the Four Horsemen did not reflect a preoccupation with getting on the right side of history. In view of the fact that they continued to file critical dissents from the highest profile decisions upholding New Deal legislation,<sup>15</sup> one doubts that they concurred in *North American* for any reason other than that they believed it was correctly decided. And the absence of the critical tone present in the *Jones* opinion may have been the product both of the fact that *North American*, unlike *Jones*, involved review of the action of a lower court rather than that of the Commission, and that the opinion was assigned to the sweet-tempered Justice Cardozo, who had dissented from Justice Sutherland's majority opinion in *Jones*.<sup>16</sup>

Pritchard and Thompson do not contend, however, that the decision in *North American* constituted an unmistakable switch-in-time

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<sup>12</sup> Pritchard & Thompson, *supra* note 4, at 880–81.

<sup>13</sup> Jack L. White, Recent Decision, 35 Mich. L. Rev. 996, 997 (1937).

<sup>14</sup> Justice McReynolds concurred in the result, and Justice Stone did not participate. See *Landis*, 299 U.S. at 259.

<sup>15</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76–103 (1937) (McReynolds, Van Devanter, Sutherland, Butler, JJ., dissenting from opinion upholding National Labor Relations Act); *Steward Machine Co. v. Davis*, 301 U.S. 548, 598–609 (1937) (McReynolds, J., dissenting from decision upholding Social Security Act); *id.* at 609–16 (Sutherland & Van Devanter, JJ., dissenting); *id.* at 616–18 (Butler, J., dissenting).

<sup>16</sup> See 298 U.S. 1, 29–33 (1936) (Cardozo, J., dissenting).

that saved nine. “Despite this procedural victory,” they write, “PUHCA, like other New Deal legislation, remained at risk in the shadow cast by the Supreme Court’s constitutional holdings . . . . The Supreme Court that would eventually uphold the constitutionality of economic regulation, including the securities laws, was not yet visible.”<sup>17</sup> At this point it bears emphasis that the Supreme Court’s constitutional holdings included recent decisions sustaining commodity price regulation,<sup>18</sup> state debtor relief in the form of a mortgage foreclosure moratorium,<sup>19</sup> the Government’s major re-orientation of monetary policy in the *Gold Clause Cases*,<sup>20</sup> and the Tennessee Valley Authority.<sup>21</sup> Two weeks before *North American* was decided, the Court had upheld the New York unemployment compensation statute.<sup>22</sup> The Court had upheld state blue sky laws in a trio of decisions handed down nearly two decades earlier.<sup>23</sup> And as a number of contemporary commentators and jurists would point out, there were ample commerce clause precedents to support several aspects of the New Deal securities law program.<sup>24</sup> The prospect was not altogether bleak.

Pritchard and Thompson set the litigation of *Electric Bond & Share Co. v. SEC*<sup>25</sup> against the backdrop of the struggle over the Court-packing bill in Congress, suggesting that the Court’s jurisprudence was dramatically altered in response to pendency of that proposal. “In the period between the district court and Supreme Court decisions,” they argue, “Roosevelt’s Court-packing plan had been rebuffed by Congress, but the Court’s direction had nonetheless changed radically.”<sup>26</sup> They point in particular to the March 29 decision in *West Coast Hotel Co. v. Parrish*,<sup>27</sup> which upheld Washington state’s minimum wage law for women. They observe in a

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<sup>17</sup> Pritchard & Thompson, *supra* note 4, at 881.

<sup>18</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>19</sup> See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

<sup>20</sup> See *Norman v. Balt. & Ohio R.R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935).

<sup>21</sup> See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936).

<sup>22</sup> See *W.H.H. Chamberlin, Inc. v. Andrews*, 299 U.S. 515 (1936) (per curiam).

<sup>23</sup> See *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917).

<sup>24</sup> See *infra* notes 48–51.

<sup>25</sup> 303 U.S. 419 (1938).

<sup>26</sup> Pritchard & Thompson, *supra* note 4, at 882.

<sup>27</sup> 300 U.S. 379 (1937).

footnote that “[s]cholars have more recently questioned the extent to which Roberts ‘switched,’” but defend their reading by observing that “for Frankfurter at least the move was transparent.”<sup>28</sup> The day after the *Parrish* decision, they point out, Frankfurter wrote to Roosevelt, “[a]nd now, with the shift by Roberts, even a blind man ought to see that the Court is in politics.”<sup>29</sup>

I have said a good deal about this “Roosevelt lost the battle but won the war” argument in the past,<sup>30</sup> and do not propose to repeat myself at length here. Let me offer just two quick observations. First, it has been known at least since 1951 that Roberts cast his vote to uphold the minimum wage statute at the conference held December 19, 1936—more than six weeks before the Court-packing plan, a very closely guarded secret, was revealed.<sup>31</sup> William Leuchtenburg, the leading authority on the origins of the Court-packing plan,<sup>32</sup> and a scholar not unsympathetic to externalist explanations of judicial behavior,<sup>33</sup> has long recognized that the Court-packing plan could not have influenced that vote.<sup>34</sup> Pritchard and Thompson’s apparent suggestion that Roberts’s vote in *Parrish* was the result of the Court-packing threat is thus extraordinarily difficult to defend. Moreover, it is also entirely superfluous to the defense of their principal thesis.

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<sup>28</sup> Pritchard & Thompson, *Securities Law and the New Deal Justices*, 40 n.178 (Sept. 9, 2008) (unpublished conference paper, on file with the Virginia Law Review Association). In the revised version of their paper published here, the authors have gracefully receded from this contention, now recognizing that Roberts cast his vote in *Parrish* well before he knew of the Court-packing plan, that his vote was “probably wrongly” characterized as a switch, and that Frankfurter only believed that “the switch was transparent” “[a]t the time.” Pritchard & Thompson, *supra* note 4, at 882 n.188.

<sup>29</sup> Pritchard & Thompson, *supra* note 4, at 882 n.188 (quoting Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937) (on file with the Felix Frankfurter Collection, Harvard Law School Library, Reel 155)).

<sup>30</sup> See generally Cushman, *Rethinking*, *supra* note 2.

<sup>31</sup> See Merlo J. Pusey, 2 *Charles Evans Hughes 757* (1951). Two contemporary journalists were aware as early as 1938 that the *Parrish* vote had taken place before the announcement of the Court-packing plan, though they believed that the vote had taken place in January of 1937 rather than in December of 1936. See Joseph Alsop & Turner Catledge, *The 168 Days* 140 (1938).

<sup>32</sup> See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 *Sup. Ct. Rev.* 347.

<sup>33</sup> See, e.g., Leuchtenburg, *supra* note 5, at 213–36.

<sup>34</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 236 n.20 (1963).

Second, Pritchard and Thompson's selection of Frankfurter's March 30 letter to Roosevelt to substantiate their claim that Roberts switched in *Parrish* is particularly curious. Years later, after he had had the opportunity to become informed about the matter—and after his relentless cultivation of Roosevelt had secured him a seat on the Court—Frankfurter recanted his earlier view. When Roberts retired in 1945, Frankfurter joined Jackson in insisting that Stone leave in his draft of the Court's letter to Roberts the line, "You have made fidelity to principle your guide to decision."<sup>35</sup> In 1953, Frankfurter wrote privately to Paul Freund concerning the minimum wage cases, "The fact is that Roberts did not switch. He was prepared in *Tipaldo* to make a majority overruling *Adkins*. . . . Because there was no majority for overruling *Adkins* he was in the majority in the *Morehead* case."<sup>36</sup> And in a special issue of the *University of Pennsylvania Law Review* published following Roberts' death in 1955, Frankfurter publicly repudiated the contention that Roberts had switched in *Parrish*.<sup>37</sup> In my view, it is entirely unnecessary for Pritchard and Thompson to take a position on whether Roberts switched in *Parrish*. But if they do propose to weigh in on the issue, it might behoove them to rely upon a source who did not himself later reverse his judgment on the matter.

More persuasive is Pritchard and Thompson's assessment that, by the time that *Electric Bond & Share* got to the Court, "the departure of two of the four Horsemen"—Justices Van Devanter and Sutherland, each of whom had retired—had "changed the balance of power on the Court."<sup>38</sup> Those retirements were in many respects crucial to the near-term course of constitutional development.<sup>39</sup> But here the authors may overstate the importance of personnel changes in greasing the skids for judicial acceptance of the New

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<sup>35</sup> See Cushman, *Lost Fidelities*, supra note 2, at 97–99.

<sup>36</sup> Letter from Justice Felix Frankfurter to Paul Freund, Professor, Harvard Law Sch. (Oct. 18, 1953) (on file with the Felix Frankfurter Collection, Harvard Law School Library, Part 3, Reel 15), quoted in Michael Ariens, *A Thrice-Told Tale*, or Felix the Cat, 107 Harv. L. Rev. 620, 633 n.78 (1994).

<sup>37</sup> See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. Pa. L. Rev. 311 (1955). The "switch-in-time" thesis was similarly rejected in another article, published in the same issue, by Dean Erwin N. Griswold. See Owen J. Roberts as a Judge, 104 U. Pa. L. Rev. 332, 340–44 (1955).

<sup>38</sup> Pritchard & Thompson, supra note 4, at 882–83.

<sup>39</sup> See, e.g., Cushman, *Lost Fidelities*, supra note 2, at 129–45; Cushman, *Varieties and Vicissitudes*, supra note 2, at 982–98.

Deal securities laws. For Pritchard and Thompson observe that not only did *Electric Bond & Share* explicitly uphold the registration provisions of the Public Utility Holding Company Act, it also “implicitly affirmed the constitutionality of the Securities Act and the Exchange Act.”<sup>40</sup> The sole dissenter from Chief Justice Hughes’s opinion was Justice McReynolds.<sup>41</sup> Justice Butler, the other remaining Horseman, joined the majority. Justice Butler is not generally thought to have changed his constitutional views in response to the Court-packing plan, nor, for that matter, in response to any other stimulus. In the spring of 1937 he dissented from the opinions upholding the minimum wage statute,<sup>42</sup> the National Labor Relations Act,<sup>43</sup> and the Social Security Act.<sup>44</sup> By the time the Court decided *Electric Bond & Share* in the spring of 1938, the external pressures on the Court were significantly fewer than they had been the preceding spring. The Court-packing plan had been defeated, a bipartisan anti-New Deal coalition had formed in Congress, and the legislative branch had begun to rebuff the President at nearly every turn.<sup>45</sup> “A year after his overwhelming triumph in the 1936 election,” wrote William Leuchtenburg, “Roosevelt appeared to be a thoroughly repudiated leader.”<sup>46</sup> If the implacable Justice Butler could join an opinion both explicitly upholding the Public Utility Holding Company Act’s registration provisions and implicitly affirming the constitutionality of the Securities and Exchange Act in March of 1938, then there is reason to wonder whether the constitutional fate of those Acts—or at least that of certain of their provisions—was ever in serious jeopardy.

Pritchard and Thompson quote an interview recorded by Katie Louchheim in the early 1980s, in which Joseph Rauh asserted that “[i]f you had asked anyone in 1935 if the Supreme Court would

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<sup>40</sup> Pritchard & Thompson, *supra* note 4, at 883.

<sup>41</sup> See *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 443 (1938) (McReynolds, J., dissenting without opinion).

<sup>42</sup> See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400–14 (1937) (Sutherland, Van Devanter, McReynolds & Butler, JJ., dissenting).

<sup>43</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76–103 (1937) (McReynolds, Van Devanter, Sutherland & Butler, JJ., dissenting).

<sup>44</sup> See *Steward Machine Co. v. Davis*, 301 U.S. 548, 616–18 (1937) (Butler, J., dissenting).

<sup>45</sup> See Cushman, *Rethinking*, *supra* note 2, at 30–31.

<sup>46</sup> Leuchtenburg, *supra* note 34, at 251.



uphold the Public Utility Holding Company Act, you would have been laughed at.”<sup>47</sup> In view of the vote in *Electric Bond & Share*, it appears that Mr. Rauh may have been indulging in a bit of hyperbole. A commentator in the January 1936 issue of the *Yale Law Journal*, for example, seemed optimistic that the registration provisions of the Act might be sustained as an exercise of the commerce power,<sup>48</sup> while a colleague writing in the *George Washington Law Review* was prepared to defend the Act’s constitutionality more generally.<sup>49</sup> Commentators in other law journals had expressed confidence that at least some of the provisions of the 1933<sup>50</sup>

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<sup>47</sup> Pritchard & Thompson, *supra* note 4, at 873 (quoting Joseph L. Rauh, Jr., Clerks of the Court on the Justices, in *The Making of the New Deal: The Insiders Speak* 55, 57 (Katie Louchheim ed., 1983)). From his remarks in a separate interview for the book, it appears that Rauh believed that the Court would have invalidated the registration provisions of PUHCA in 1935 and 1936. In describing Ben Cohen’s efforts to avoid a constitutional challenge to the registration provisions of the statute, Rauh opined that “[t]he Supreme Court of 1935–36 was a very conservative Court, which would have held the Holding Company Act unconstitutional.” Joseph L. Rauh, Jr., *The Draftsmen*, in *The Making of the New Deal*, *supra*, at 111. After recounting Cohen’s success in persuading the Court not to grant certiorari in a 1935 case from the Fourth Circuit, Rauh reports that “[t]he *Electric Bond and Share* case got there a couple of years later. The Court had changed by then and Ben won.” *Id.* at 112.

<sup>48</sup> Compare Comment, *Federal Regulation of Holding Companies: The Public Utility Act of 1935*, 45 *Yale L.J.* 468, 485–89 (1936), with Note, *The Constitutionality of the Public Utility Holding Company Act of 1935*, 23 *Va. L. Rev.* 678, 692 (1937) (expressing doubt that the Act could be constitutionally applied to companies other than those “whose chief business is the interstate sale of gas and electricity,” but holding out the prospect that a Court made “more liberal . . . through a change in its personnel” might find a “vital connection” between holding companies and interstate commerce).

<sup>49</sup> *Recent Cases*, 4 *Geo. Wash. L. Rev.* 532, 535–36 (1936).

<sup>50</sup> See George J. Feldman, *The New Federal Securities Act*, 14 *B.U. L. Rev.* 1, 6 n.26 (1934) (“There seems little doubt that the Act, based on the Congressional power over interstate commerce and the mails, is, in almost all its provisions, well beyond constitutional interdict.”); Legislation, *The Securities Act of 1933*, 33 *Colum. L. Rev.* 1220, 1221–23 (1933) (expressing confidence in the Act’s constitutionality); Deneen A. Watson, *The Illinois and Federal Securities Acts*, 29 *Ill. L. Rev.* 41, 45 (1934) (inclining to view the Act as constitutional); Herman Goralnik, Note, *Securities As Subjects of Interstate Commerce*, 19 *St. Louis L. Rev.* 69, 74–76 (1933) (“[I]t seems that the sale, offer to sell, or transportation of securities among the states . . . is interstate commerce subject to federal regulation. . . . [T]he court, if it so desires, would find no difficulty in affirming the Act as being within the power of Congress to regulate commerce among the states. . . . [Cases supporting this view] should prevail over [older cases suggesting a contrary result because the latter] have been distinguished on other grounds.”). But cf. Nathan Isaacs, *The Securities Act and the Constitution*,

and 1934<sup>51</sup> Acts would be upheld under the commerce power, and all three statutes had been upheld by lower federal courts anticipating review by the Supreme Court. As Pritchard and Thompson observe,<sup>52</sup> the district court, in an opinion written by Taft appointee Julian Mack,<sup>53</sup> had ruled in favor of the SEC in the *Electric Bond & Share* case on January 29, 1937,<sup>54</sup> a week before the announcement of the Court-packing plan and months before the announcement of the Court's decision in the minimum wage and National Labor Relations Act cases. Indeed, law review commentators on the decision greeted it without surprise, finding the Court's commerce clause holding well grounded in a long line of decisions antedating 1937.<sup>55</sup> Hoover appointee Gunnar Nordbye<sup>56</sup> of the District of Minnesota upheld the constitutionality of the registration provisions of the 1933 Act in September of 1935,<sup>57</sup> just a few months after the

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43 Yale L.J. 218 (1933) (expressing doubt); Comment, 32 Mich. L. Rev. 811 (1934) (expressing uncertainty).

<sup>51</sup> See Jacob Lippman, Constitutionality of the Securities Exchange Act of 1934, 9 St. John's L. Rev. 1, 23 (1934) (concluding that "the powers entrusted to the Commission are valid in all respects"); Milward W. Martin, Constitutionality of the Securities Exchange Act of 1934, 21 A.B.A. J. 811, 815-17 (1935) (concluding that many of the Act's provisions are constitutional exercises of the commerce power); Jess Halsted, Securities and Exchange Act of 1934 Regulating Stock Exchanges, Trading in Securities, Etc. Under Administration of the Securities and Exchange Commission, 2 J. Marshall L.Q. 145, 149 (1936) (agreeing with Martin); see also Legislation, Delegation of Power Under the Securities Exchange Act of 1934, 36 Colum. L. Rev. 974, 992 (1936) (rejecting contention that the Act violates the nondelegation doctrine). But cf. Legislation, The Securities Exchange Act of 1934, 83 U. Pa. L. Rev. 255, 255-58 (1934) (expressing uncertainty concerning Act's constitutionality); John Hanna, The Securities Exchange Act of 1934, 23 Cal. L. Rev. 1, 23-29 (1934) (expressing uncertainty concerning the Act's constitutionality).

<sup>52</sup> Pritchard & Thompson, *supra* note 4, at 881-82.

<sup>53</sup> See Harold Chase et al., Biographical Dictionary of the Federal Judiciary 172 (1976).

<sup>54</sup> SEC v. Elec. Bond & Share Co., 18 F. Supp. 131 (S.D.N.Y. 1937). The Second Circuit affirmed that November. See 92 F.2d 580 (2d Cir. 1937). Compare *Electric Bond & Share*, 92 F.2d 580, with *In re American States Public Service Co.*, 12 F. Supp. 667 (D. Md. 1935) and *Burco, Inc. v. Whitworth*, 81 F.2d 721, 740 (4th Cir. 1936), holding unconstitutional the application of the Act to debtors in bankruptcy not engaged in interstate commerce.

<sup>55</sup> See Gerald L. Stotzer, Comment, 36 Mich. L. Rev. 1324, 1332-36 (1938); Recent Case, 12 Temp. L.Q. 400, 400-02 (1938); Recent Decision, Constitutional Law—Validity of Registration Provisions of Public Utility Holding Company Act, 24 Va. L. Rev. 328, 329 (1938).

<sup>56</sup> See Chase et al., *supra* note 53, at 208-09.

<sup>57</sup> SEC v. Wickham, 12 F. Supp. 245, 249 (D. Minn. 1935).

Court's unanimous decision lowering the curtain on the National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>58</sup> District courts in Tennessee<sup>59</sup> and Wisconsin<sup>60</sup> similarly sustained the 1933 Act on September 15 and December 1, 1936, respectively—months after the *Jones* decision and well before the announcement of the Court's decisions upholding the minimum wage and the National Labor Relations Act. Coolidge appointee Curtis Wilbur<sup>61</sup> joined two Roosevelt appointees (Francis Garrecht and Bert Haney<sup>62</sup>) in sustaining the 1933 Act on March 1, 1937,<sup>63</sup> weeks before *West Coast Hotel* and the *Labor Board Cases* were handed down. Hoover appointee Robert Patterson<sup>64</sup> of the federal district court in New York upheld provisions of the 1934 Act regulating trading in securities by means of interstate commerce or on a national securities exchange on April 10, 1936, a mere four days after *Jones* was handed down.<sup>65</sup> And in the *Jones* case itself, Hoover appointee Francis Caffey<sup>66</sup> had upheld the 1933 Act as a constitutional exercise of the commerce power at the trial level,<sup>67</sup> and that judgment had been affirmed by a unanimous Second Circuit panel,<sup>68</sup> two of whose members had been appointed by President Coolidge.<sup>69</sup> The view that these provisions of the securities laws were constitutional was not confined to New Dealers.

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<sup>58</sup> 295 U.S. 495 (1935).

<sup>59</sup> *United States v. Bogy*, 16 F. Supp. 407, 411–13 (W.D. Tenn. 1936).

<sup>60</sup> *SEC v. Crude Oil Corp.*, 17 F. Supp. 164, 167 (W.D. Wis. 1936), *aff'd*, 93 F.2d 844 (7th Cir. 1937).

<sup>61</sup> See *Chase et al.*, *supra* note 53, at 301.

<sup>62</sup> See *id.* at 98–99, 115.

<sup>63</sup> *Coplin v. United States*, 88 F.2d 652, 657 (9th Cir. 1937).

<sup>64</sup> See *Chase et al.*, *supra* note 53, at 216.

<sup>65</sup> *SEC v. Torr*, 15 F. Supp. 315, 319 (S.D.N.Y. 1936), *rev'd* on other grounds, 87 F.2d 446 (2d Cir. 1937). See also *McMann v. Engel*, 16 F. Supp. 446, 447 (S.D.N.Y. 1936), in which Judge Patterson upheld the 1934 Act against a nondelegation challenge on August 5, 1936.

<sup>66</sup> See *Chase et al.*, *supra* note 53, at 40.

<sup>67</sup> *SEC v. Jones*, 12 F. Supp. 210, 213 (S.D.N.Y. 1935). See also *SEC v. Torr*, 15 F. Supp. 144, 145 (S.D.N.Y. 1936), where Judge Caffey rejected the contention that the denial to defendants of copies of testimony they had given during an investigation carried on by a representative of the SEC deprived them of due process.

<sup>68</sup> *Jones v. SEC*, 79 F.2d 617, 621 (2d Cir. 1935).

<sup>69</sup> The two Coolidge appointees were Learned and Augustus Hand. See *Chase et al.*, *supra* note 53, at 114–15. See also *Newfield v. Ryan*, 91 F.2d 700, 704–05 (5th Cir. 1937), in which a panel comprised by Coolidge appointee Rufus Foster and Hoover

If Justice Butler's vote to uphold PUHCA's registration provisions and, by implication, the 1934 Act, was not the product of a jurisprudential switch, then it is doubtful that the votes of Hughes and Roberts are best accounted for by such a hypothesis. Indeed, the suggestion that Hughes and Roberts switched on the securities laws issue in 1937 is significantly undermined by their performance in *SEC v. United States Realty & Improvement Co.*<sup>70</sup> in 1940. There they dissented from Justice Stone's majority opinion recognizing broad authority in the Commission to intervene in corporate reorganizations under the Chandler Act.<sup>71</sup> As Justice Douglas wrote of the case in his diary, "If the Chief had had his way, it would be another Jones decision."<sup>72</sup> Douglas's assessment suggests that Hughes's and Roberts's views of the appropriate scope of the Commission's authority had not become more relaxed between 1936 and 1940. This in turn further calls into question the suggestion that their performances in *Electric Bond & Share* were the product of a general change in attitude toward the securities laws that they experienced in the shadow of the 1936 election and the Court-packing plan. It is of course possible that they, along with Butler, switched between *Jones* and *Electric Bond & Share*, and then switched back in *U.S. Realty*; though it would be interesting to see how Professors Pritchard and Thompson might account for such a pattern of behavior, I do not find them addressing that question in their article. My own suspicion is that positing such a behavioral epicycle would not improve our understanding of the Justices, and it is at this point that I start looking around for Ockham's razor. This is an instance in which it seems that Pritchard and Thompson's general thesis has much greater explanatory power: the Court's jurisprudence concerning the power of the Commission changed not because Hughes and Roberts altered their positions, but because Roosevelt had by 1940 placed five appointees on the Court.

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appointees Samuel Sibley and Joseph Hutcheson upheld provisions of both the 1933 and 1934 Acts. See Chase et al., *supra* note 53, at 94, 135, 252.

<sup>70</sup> 310 U.S. 434 (1940).

<sup>71</sup> See *id.* at 461-69 (Roberts, J., Hughes, C.J., & McReynolds, J., dissenting).

<sup>72</sup> William O. Douglas, *Diary* (May 27, 1940) (on file with the William O. Douglas Collection, Library of Congress, Box 1780), *quoted in* Pritchard & Thompson, *supra* note 4, at 885.

By the time the Court upheld PUHCA's Section 11 in 1946,<sup>73</sup> no member of the old Court remained. A Court dominated by Roosevelt appointees had transformed commerce clause jurisprudence in *United States v. Darby*<sup>74</sup> and *Wickard v. Filburn*<sup>75</sup>—two landmark decisions to which Pritchard and Thompson curiously do not refer. Portions of the New Deal securities laws, the constitutionality of which may have been doubted in the mid- and late-1930s, now commanded the support of a unanimous Court. This final chapter in the constitutional struggle over the New Deal securities law program helps to underscore the persuasive power of Pritchard and Thompson's principal thesis. Indeed, as I have tried to argue, their paper is at its most persuasive when they adhere to that thesis, while it falters when they yield to the temptation to muddy their account with elements of a familiar and seductive but ultimately unconvincing story. Their principal thesis is the one that best fits the evidence, and I would encourage them to embrace it with the confidence it so richly deserves.

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<sup>73</sup> See *N. Am. Co. v. SEC*, 327 U.S. 686, 707–10 (1946).

<sup>74</sup> 312 U.S. 100 (1941).

<sup>75</sup> 317 U.S. 111 (1942).