

“A Switch in Time that Saved Nine”

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“Nearly every forceful President in American history has come at one time or another into a collision with the Court.”¹ During the Great Depression farm prices fell sixty percent, national wholesale prices plunged thirty-eight percent, over ten thousand banks failed, and nearly twenty-five million Americans were left without work.² Although the country was ready for the economic revolution that President Franklin Delano Roosevelt promoted in his New Deal legislation, the Supreme Court was not yet ready to abandon the laissez-faire doctrine of minimal government intervention in economics. The Court’s resistance to change became evident between 1934 and 1936, when it issued twelve decisions overthrowing New Deal legislation. As a result, FDR decided that it was necessary for him to take dramatic action to change the Supreme Court so that it would no longer prevent the government from implementing the “will of the people.” In February 1937, FDR proposed judicial legislation that became known as his Court-packing plan. Under this plan FDR proposed that an additional justice be added for every justice over the age of seventy, which at the time of its proposal meant a total of six new justices. The plan was presented as a method to aid elderly justices who were becoming overburdened and unfit to do all of the work at hand. In reality, FDR was searching for a method that would allow him to gain a majority in the Supreme Court, thus enabling him to win judicial approval for all of his New Deal legislation. The Court-packing legislation failed to be approved and many historians argue that not only did the plan fail to change the Supreme Court, but that it also did substantial damage to Roosevelt’s legacy, power, and ability to lead the country. However, even though the Court-packing legislation was never approved, the plan ultimately aided FDR in acquiring power over the judicial branch as the Supreme Court upheld every piece of New Deal legislation from 1937 forward, bringing an end to the domination of laissez-faire capitalism and introducing the modern welfare state. FDR could have made the Supreme Court a major

campaign issue during the 1936 presidential election; he could have proposed a constitutional amendment that permanently altered the Court; or he could have simply waited for the deaths or retirements of the incumbent elderly justices. Instead, he proposed the forceful Court-packing plan and continued to pursue it even after it became evident that it lacked the public support he had anticipated. However, the pressure from his plan led to a dramatic shift in the Court's philosophy, particularly Justice Owen J. Roberts's opinion. FDR's decision to take action against the Court served as a catalyst for getting the Court to accept legislation that allowed the government to become directly involved in the nation's economic system. Despite what some historians believe, the Court-packing legislation, though never approved, pressured the Supreme Court into accepting the federal government's new role in regulating the economy.

October 23rd, 1929, infamously labeled "Black Tuesday," marked the beginning of the most severe and economically devastating period in American history. Factors such as the decline in the consumer market, imprudent loans, and perpetually growing international debt joined to create the most destructive recession that the country had ever experienced: the Great Depression. President Herbert Hoover reluctantly created programs and conservatively invested federal funds in a weak attempt to pull the nation out of the Great Depression. After nearly four years of unsuccessful small-scale attempts at healing economic wounds the nation had suffered, Hoover left office without having achieved any significant improvements. In 1932, Democratic candidate FDR handily defeated Hoover and came into office with the promise of creating a New Deal for Americans. The New Deal that FDR proposed came in the form of numerous programs to be funded, monitored, and enforced by the federal government, all aimed at putting money back into the economy and alleviating unemployment. With a Democratic majority in both the

House of Representatives and the Senate, FDR significantly expanded the role of the executive branch in the nation's economic affairs by shifting away from the conservative ideals and beliefs that had previously dominated the White House.³

Although Congress passed numerous pieces of New Deal legislation throughout FDR's first term, between 1934 and 1936 the Supreme Court ruled on a number of cases challenging the constitutionality of the New Deal. On May 6, 1935, the Supreme Court ruled against the New Deal in a 5-4 decision that declared the Railroad Retirement Act of 1934 unconstitutional.⁴ The Court stated that the Retirement Act, designed by the government to provide an organized retirement system, was unconstitutional based on a narrow interpretation of the interstate commerce clause. Furthermore, the Court declared that the act violated the Fifth and Fourteenth Amendments.⁵ Two weeks later, the Court heard the *A.L.A. Schechter Poultry Corp. v. United States*, which again challenged New Deal legislation that FDR had approved during the first months of his presidency. The case involved two corporations that bought and resold poultry under the "Live Poultry Code" approved by FDR on April 13, 1934, under the National Industrial Recovery Act (NIRA).⁶ On May 27, 1935, the Supreme Court invalidated the industrial codes of fair competition that had been set by FDR and declared that the NIRA provisions exceeded the limits of congressional power under the commerce clause.

Differentiating between interstate and intrastate commerce, the Court ruled that the codes were an unconstitutional delegation of legislative power to the President.⁷ The opinion of the majority clearly stated that "[E]xtraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority."⁸ In another case concerning interstate commerce, *Carter v. Carter Coal Co.*, the Supreme Court in 1936 found the Bituminous Coal Conservation Act to be

unconstitutional in a 5-4 decision by declaring that coal production only indirectly affected interstate commerce and therefore could not be regulated by Congress.⁹ The same year, in *Morehead v. New York Ex Rel. Tipaldo*, the Court again split 5-4 in deciding that the New York State minimum wage law protecting women and children was unconstitutional based on the due process clause, which the Court believed was written to protect private businesses from government regulation in negotiating contracts.¹⁰ FDR believed that these decisions meant that the Court would oppose all New Deal legislation. Over a two-year period, the New Deal had been dealt repeated blows that seemed to make it impossible to regulate railroads, manufacturing, and mining because of the Court's interpretation of the interstate commerce clause. In addition, the federal government was unable to regulate wages and working conditions because of the Court's interpretation of due process. In sharp contrast to FDR's belief in an activist federal government, the Court had, as FDR argued in a national press conference, "relegated [the nation] to the horse-and-buggy definition of interstate commerce" and was now clearly blocking the path of progress.¹¹

Representing a serious threat to the success of the New Deal, the conservative court repeatedly voted against the New Deal in 5-4 decisions. It was obvious to FDR that the Court would be a significant obstacle to his recovery plans.¹² During FDR's first term, the Supreme Court consisted of six justices over seventy years old and three justices over sixty years old. These were "men born in a much different era, when government intervention was something to be avoided at any cost."¹³ The Court included four strong conservatives and three liberal Democrats; Justice Roberts and Chief Justice Charles E. Hughes were considered swing votes but almost always voted with the conservatives.¹⁴

With a sense of urgency and a feeling of frustration, FDR decided that he had to do something to change the Court's perspective on New Deal programs. His solution was to change the Court's majority. In February of 1937, FDR announced the Judiciary Reorganization Bill, soon to be known as the Court-packing plan. The plan proposed the addition of one new justice for every justice over the age of seventy; in effect, the bill would enable FDR to appoint six new justices to the Supreme Court, creating the clear majority that he wanted. In a fireside chat on March 9, 1937, FDR voiced his concern regarding the intentions of the Supreme Court and its role in preventing New Deal legislation from helping the nation progress:

The Court has been acting, not as a judicial body, but as a policy-making body... The Court, in addition to the proper use of its judicial functions, has improperly set itself up as a third House of the Congress—a superlegislature, as one of the justices has called it—by reading into the Constitution words and implications which are not there and which were never intended to be there.¹⁵

Six months after the proposal, the Court-packing plan was rejected by Congress. Despite the ultimate failure of the legislation to become a law, the threat of FDR's proposal resulted in an immediate reversal by the Court of its previous rulings against the New Deal.

It can be argued that both the design and the presentation of FDR's Court-packing proposal led to the plan's failure to win approval. During his 1936 presidential reelection campaign, FDR failed to make the Court-packing plan an election issue. He kept his plan a secret until after he was securely reelected in 1936, stating that he believed "[t]here's one issue in this campaign. It's myself, and people must be either for me or against me."¹⁶ When FDR finally did announce his Court-packing plan, he argued that the elderly justices would be incapable of completing all of the work at hand. Dispelling FDR's argument that the Court was behind on its work, Chief Justice Hughes declared in a letter that "when we [the Supreme Court] rose on March 15...we had heard argument in cases in which certiorari had been granted only four weeks

before—February 15.”¹⁷ The “reasons” FDR initially used formed a hollow argument that gained the President little support for his legislation and in reality gained him heavy and forceful opposition that attacked him for his “unvarnished hypocrisy.”¹⁸ It seems as though FDR has misread America’s deep respect for the Supreme Court, which can be seen in a 1935 Gallup Poll where 53% of Americans said that they would not want to limit the power of the Supreme Court.¹⁹ Instead of gaining a strong following, he found that he had created enemies. He lost support within his own party, which ultimately delayed additional New Deal legislation. By making his proposal a bill instead of an amendment or an election issue, his true intentions of intimidating and manipulating the existing Court became transparent to most Americans. People, not least the Supreme Court justices themselves, understood the true motivation for his Court-packing proposal.

Although Court decisions changed dramatically after the Court-packing proposal, many historians argue that the decisions were in no way a reflection of or reaction to FDR’s Court-packing plan. As historian Bernard Schwartz argues, “It is too facile to state that the 1937 change was merely a protective response to the Court-packing plan.... [T]he 1937 reversal reflected changes in legal ideology common to the entire legal profession.”²⁰ One argument is that the economic devastation caused by the Great Depression forced the Supreme Court to begin to alter its conservative view over time to a more pragmatic one. In contrast, some historians argue that Justice Roberts was personally intimidated and even pressured by the Court-packing plan into switching his view and voting in favor of the New Deal. However, as historian Robert J. Wagman argues, the timing does not align to fit the argument that the Court-packing influenced Justice Roberts. Although the first decision in support of the New Deal in the *West Coast Hotel v. Parrish* case was announced after FDR’s Court-packing had been announced, it is possible

that this case had been decided as much as a month before the plan was introduced.²¹ If this decision was indeed reached prior to the announcement of FDR's plan, the effect of the Court-packing plan on Justice Roberts and other justices of the Court may have been insignificant.

Other historians believe that FDR's Court-packing plan was in fact a direct contributor to the success of the New Deal during 1937. FDR's ultimate objective was to prevent the Court from destroying his New Deal legislation and to diminish opposition to his national recovery plans, and in this sense he achieved his goal. He agreed with Theodore Roosevelt, who once said, "I may not know much about law, but I do know one can put the fear of God into judges."²² Although it would be impossible to expect a justice to admit to being intimidated into a decision, FDR's plan was a force that threatened the stability and sanctity of the Court and brought the issue of government involvement directly to the justices of the Supreme Court. Given FDR's popularity and the severe hardship created by the Depression, it is difficult to imagine that the justices were not concerned about the survival of the Supreme Court as a co-equal branch of the government. In his annual message to Congress on January 6, 1937, FDR made it clear that "it is not to be assumed that there will be prolonged failure to bring legislative and judicial action into closer harmony. Means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs."²³ The members of the Court were thus aware, prior to the unveiling of the proposed legislation in February, that some form of attack was imminent. This makes it clear that the threat from FDR and later the plan itself catalyzed the issue between the president and the court system and caused the justices to reevaluate their positions.

The Court-packing plan contributed to FDR's ability to influence the judicial branch because after the plan was proposed, Justice Roberts' shift to voting with the liberal justices switched the majority opinion from opposing FDR's policies to supporting them. On March 29,

1937, known as “White Monday,” after two years of striking down and questioning the constitutionality of FDR’s recovery programs, the Court announced a series of decisions in favor of New Deal legislation. In one of the critical cases, *West Coast Hotel v. Parrish*, the Court ruled 5-4 vote that the state of Washington could impose minimum wage laws on private employers without violating the Fourteenth Amendment.²⁴ This decision reversed *Morehead v. New York Ex Rel. Tipaldo*, which had been decided only ten months prior. The Supreme Court was now defending minimum wage laws, and it also appeared that Justice Roberts’ and Chief Justice Hughes’ votes had been the deciding factors that shifted the majority. In addition, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, the Court decided again by the same 5-4 majority that the Wagner Act, a cornerstone of the New Deal that had replaced the NIRA, was constitutional.²⁵ When Democratic party chairman Jim Farley called Senator Wagner to alert him that the Wagner Act had been declared constitutional Farley said, “Maybe the Court was doing a little electioneering against the court-packing plan in the decisions [on ‘White Monday’].”²⁶ The Court appeared to the public and to Washington as being intimidated into siding with FDR and the New Deal. Because of these decisions, the Court-packing plan had served its purpose and was no longer necessary. The plan was ultimately rejected by Congress in August of 1937. The cases announced on “White Monday,” together with the approval of the Social Security legislation, not only displayed Justice Roberts’ and Chief Justice Hughes’ uncharacteristic shifts in opinion, but also symbolized the end of FDR’s battle with the Court. The New Deal programs were no longer threatened by the opinion of the Supreme Court. The significant and clear shift of the Court’s opinion regarding interstate commerce and due process had taken less than a year, while the only significant intervening events had been FDR’s reelection and the announcement of the Court-packing plan. As FDR said, “It would be a little

naïve to refuse to recognize some connection between these decisions and the Supreme Court fight.”²⁷ The sudden change in Justice Roberts’ decisions suggested that the Court-packing plan played a pivotal role in altering his opinion regarding the New Deal and FDR’s interpretation of the Constitution.

The Court-packing proposal set off a chain of events that allowed FDR to gain more control over the Supreme Court than any prior president. As argued by historian Robert J. Wagman, the effect of the Court-packing proposal was that it gave FDR the freedom to pass the New Deal legislation he desired without opposition from the Court.²⁸ FDR’s power over the Court was further consolidated and extended after August 1937 because he had the opportunity to appoint eight Supreme Court justices during the remainder of his presidency, which in effect allowed him to control the path of the Court and the path of the nation as a whole.²⁹

The Court-packing plan was FDR’s proposed solution to an obstructionist Supreme Court that he believed was preventing him from ending horrific suffering caused by the Great Depression. At the same time it was an alarming attack on the sanctity of the Court and the Constitution itself. It appeared likely that some version of the Court-packing plan would be approved because of the country’s economic problems, FDR’s landslide victory in 1936, and continuing frustration over the Supreme Court decisions from 1934 to 1936. However, following FDR’s proposal, the Court undertook a sudden and dramatic change of direction from a narrow to a very broad interpretation of both the interstate commerce and due process clauses, making the Court-packing plan unnecessary. Some historians argue that the change was not caused by the threat of FDR’s plan. The primary support that those historians cite is the disputed claim that the vote on the *Parish* minimum wage case took place prior to the announcement of the plan.

Even if the claim is true, which cannot be documented, there is no question that the justices were already aware that some form of attack on the Court was extremely likely if their interpretation of the Constitution did not change. Justice Roberts, and to a lesser extent Chief Justice Hughes, were responsible for the Court's switch in philosophy. It is reasonable to believe that these two moderate justices were swayed by the threat to the Supreme Court as an independent institution, particularly as it was coupled with FDR's popularity and the country's dire economic conditions. Precedents established between 1934 and 1936 sharply restricting the scope of the New Deal were reversed by the same nine justices in 1937, with the Court-packing plan being the primary motivating event. The Court had survived the attack by rewriting its legal interpretation of the Constitution, thereby fending off the threat of the Court-packing legislation. FDR had accomplished what no president had been able to since Jackson; he had battled the Supreme Court and emerged victorious.

Notes

1. Arthur M. Schelesinger Jr., *The Politics of Upheaval* (Boston: Houghton Mifflin, 1960), 484.
2. Carl N. Degler, *Out of our Past: The Forces that Shaped Modern America* (New York: Harper & Row, 1984), 413.
3. Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* (New York: Fordham University Press, 2002), xviii.

4. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 300 (1935). Available from: <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=295&invol=330>> (accessed 21 February 2008).

5. Ibid.

6. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Available from: <<http://newdeal.feri.org/court/295US495.htm>> (accessed 18 February 2008).

7. Ibid.

8. Ibid.

9. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Available from: <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0298_0238_ZS.html> (accessed 20 February 2008).

10. *Morehead v. New York Ex Rel. Tipaldo*, 298 U.S. 587 (1936). Available from: <<http://newdeal.feri.org/court/298US587.htm>> (accessed 18 February 2008).

11. Franklin Delano Roosevelt, "We have been relegated..." In William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 90.

12. Robert J. Wagman, *The Supreme Court: A Citizen's Guide* (New York: Pharos Books, 1993), 100.

13. Wagman, 99.

14. Wagman, 100.

15. Franklin D. Roosevelt, "Address to the People" (Fireside chat, Washington D.C., 9 March 1937). Available from: Annals of American History, Menlo School Lib. <<http://library.menloschool.org>> (accessed 15 December 2007).

16. Franklin Delano Roosevelt, "There's one issue in this campaign..." In Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* (New York: Fordham University Press, 2002), 221.

17. Justice Charles E. Hughes to Senator Burton K. Wheeler. In Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* (New York: Fordham University Press, 2002), 370.

18. McKenna, 354.

19. Leuchtenburg, 94.
20. Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 234.
21. Wagman, 101.
22. Theodore Roosevelt, "I may not know much..." In Robert H. Jackson, *The Struggle for Judicial Supremacy* (New Jersey: Alfred A. Knopf, 2000), 190.
23. Franklin Delano Roosevelt, "The Annual Message to the Congress" (Annual Message to the Congress, Washington D.C., 6 January 1937). Available from: <<http://www.newdeal.feri.org/court/fdr010637.htm>> (accessed 11 March 2008).
24. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Available from: <<http://newdeal.feri.org/court/300US379.htm>> (accessed 18 February 2008).
25. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937). Available from: <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0301_0001_ZS.html> (accessed 20 February 2008).
26. Jim Farley, "Maybe the Court was doing a little electioneering...", 13 April 1937. In Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* (New York: Fordham University Press, 2002), 431.
27. Franklin Delano Roosevelt, "It would be a little naïve..." In Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 234.
28. Wagman, 101.
29. Harvey G. Hudspeth, "The Roosevelt Court and the Changing Nature of American Liberalism," In *Franklin D. Roosevelt and the Transformation of the Supreme Court*, ed. Stephen K. Shaw, William D. Pederson, and Frank J. Williams (Armonk: M.E. Sharpe, 2004), 216.

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A "switch in time" (obviously a play on "a stitch in time saves nine") refers to when Justice Roberts did an unexpected change and voted to support one of FDR's new deal pieces of legislation even though he had consistently been against New Deal legislation. The "saves nine" portion because FDR was threatening a court packing plan to increase the number of justices up to 15 to make sure that the old guard would be outnumbered. (And of course there were and still are nine justices on the Supreme Court). Answer. "The switch in time that saved nine" re While the passage of time assured Roosevelt's ability to reconstruct the Court, he might meanwhile have lost most of his legislative program. By the end of his first term the Supreme Court had invalidated 11 of the 13 New Deal laws that had come before it, most by a 6-to-3 margin. As Prof. Thomas Reed Powell of the Harvard Law School said, "A switch in time saves nine." With no reason for the four elderly conservatives to hang on, they retired one by one, and Franklin Roosevelt's New Deal was saved. The failure of the Court-packing plan has often been called "F.D.R.'s greatest political defeat." Judging by results, I think it was his greatest political victory.

A. FRANK REEL Tarrytown, N.Y., Oct. It all changed in 1937, when swing Justice Owen Roberts voted to affirm a minimum wage statute in *West Coast Hotel Co. v. Parrish*; a year earlier he had voted against minimum wage legislation in a similar case. This "switch in time that saved nine" has no established consensus that explains its occurrence. Some have posited that President Roosevelt's "court packing" legislation forced Roberts's hand, while other have argued that public opinion caused Roberts's swing in jurisprudence. This paper approaches the question in two realms. First, the specific jurisp "The switch in time that saved nine" is the phrase, originally a quip by humorist Cal Tinney, about what was perceived in 1937 as the sudden jurisprudential shift by Associate Justice Owen Roberts of the U.S. Supreme Court in the 1937 case *West Coast Hotel Co. v. Parrish*. Conventional historical accounts portrayed the Court's majority opinion as a strategic political move to protect the Court's integrity and independence from President Franklin Roosevelt's court-reform bill (also known as the "court