

LOSING BATTLES AND WINNING WARS: FRANKLIN ROOSEVELT AND THE FIGHT TO TRANSFORM THE SUPREME COURT, 1937 - 1941

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ABSTRACT

This paper examines the dramatic rise of the Roosevelt Court between the years 1937 and 1941. Having gone through his first term of office without a single Supreme Court appointment, Franklin Roosevelt was to be given the opportunity during his second term to make no less than five nominations with an additional four coming in his third term. Initially, however, he was to face great controversy, first with his notorious "Court Packing" scheme of 1937, followed quickly by revelations that his first Court appointee, Hugo Black, had once been affiliated with the Ku Klux Klan. Weathering these early defeats, however, Franklin Roosevelt ultimately won his war against the "Nine Old Men" to turn the Court towards economic liberalism. This paper traces the course of Roosevelt's struggle, his early losses, and his ultimate victory.

Introduction

The Hughes Court and the Perceived Failure of Economic Moderation, 1930 - 1937

For most Americans, the period between 1930 and 1937 was a time intermixed with both hope and despair. The economic depression that followed the stock market crash of 1929 put millions of Americans out of work. When progressive Republican President Herbert Clark Hoover seemed unable, if not unwilling, to take the measures deemed necessary to restore economic stability, he was voted out of office along with his Republican Congress in the Roosevelt Landslide of 1932. While Democrats thus came to dominate the two elective branches of the Federal Government as well as most of the state governments by the Spring of 1933, there was one powerful institution which seemingly remained immune from the public will - the Supreme Court of the United States.

While the court of Chief Justice Charles Evans Hughes has largely been denigrated in history as the ultra-conservative bastion of the notorious "Nine Old Men," the fact is that it was actually moderate in nature with four economic conservatives, George Sutherland, Willis Van Devanter, Pierce Butler, and James McReynolds, pitted against three economic liberals, Louis Brandeis, Harlan Fiske Stone, and Oliver Wendall Holmes (subsequently succeeded in 1932, by Benjamin Cardozo). Caught in the middle were two economic moderates, Chief Justice Hughes and Owen Josephus Roberts. This delicate judicial balance often led to narrow five-to-four decisions in cases involving govern-

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ment regulation by either the states or the national government. While Hughes often sided with the liberals, Roberts more often than not sided with the conservatives. This was especially true in 1935 and 1936 when the Court rendered a series of five-to-four decisions wherein major elements of Franklin Roosevelt's so-called "First New Deal" program were narrowly declared unconstitutional.

Franklin Roosevelt was to go through his first four years in office without making a single Supreme Court appointment. The constitutional crisis which grew out of the Court's rulings in *Morehead, Warden v. New York ex rel Tipaldo* as well as the so-called "Hot-Oil" and "Sick Chicken" cases of 1935 came to dominate the presidential campaign of 1936. Having won re-election by a landslide, however, Roosevelt believed he now enjoyed the mandate necessary to enact judicial reforms. On January 20, 1937, as Charles Evans Hughes, in his capacity as head of the judicial branch of the federal government, swore Franklin Delano Roosevelt in to a second term as head of the executive branch of the federal government, the stage was set for a constitutional struggle which was to see FDR both losing battles and winning wars.¹

The Year of Living Dangerously: 1937

On February 5, 1937, Franklin Roosevelt presented his Court reorganization message to Congress. Choosing to ignore both the course of recent Supreme Court decisions and the constitutional crisis which was resulting from them, Roosevelt instead submitted a general discussion as to the problems of delay in federal court litigation, the heavy burden on the Supreme Court, and the many petitions for review which it was forced to deny for want of time to hear them.

Asserting the Court's need for a "consistent infusion of new blood," the president went on to propose that he be given authority to appoint a new justice in any federal court where an incumbent reached the retirement age of seventy but failed to retire. Under this plan, the Supreme Court would have been increased in size from its current nine to as many as fifteen members. In lieu of any judicial resignations then, Roosevelt hoped to be able to alter the Supreme Court from its seemingly unbreakable five to four conservative majority to a more liberal court with as many as ten out of fifteen justices favoring the President.²

That this "Court Packing Plan" ultimately failed and was subsequently regarded as one of the lower points of the Roosevelt presidency has never been a matter of serious historical dispute. While Roosevelt was correct in citing prior instances between 1789 and 1869 when the Court's membership had been altered by Congress, the fact remained that by 1937, the nine-member Supreme Court had endured nearly seven full decades of constitutional acceptance. Hence in the end, notwithstanding the Court's perceived unwillingness to help the President in meeting the crucial issues of the day, Roosevelt's plan was to ultimately fail for having "sought to solve a great Constitutional question by resort to political cleverness."³

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Debacle that it was, the Court Packing Plan was nevertheless crucial as a reflection of the impact that the Court's 1935 - 1936 rulings were having on the nation. In a series of Post-Depression reminiscences published after Roosevelt's death, the President's closest former advisors went into great detail as to the devastating impact that the Court's collective decisions had on the New Deal.⁴ In a 1937 memorandum, Felix Frankfurter spoke of the Court's "accumulating disregard of its own settled canons of constitutional construction" which had led to its distortion of

"... the power of judicial review in a revision of legislative policy, thereby usurping powers belonging to the Congress and to the legislatures of the several states, always by a divided court and always over the protest of its most distinguished members."

Asserting that the Court's more recent decisions "cannot be justified by anything in the Constitution," Frankfurter concluded that, "They are explained by the fact that some of the Justices have identified the Constitution with their private social philosophy."⁵

With the lines thus drawn between a determined Chief Executive popularly re-elected with a national mandate to initiate and continue economic change and a solidly entrenched five-man Court majority equally determined to enforce what it considered to be a constitutional mandate to resist economic change seemingly at all cost, Chief Justice Charles Evans Hughes was now to emerge as the only man who could prevent this crisis. Having successfully avoided the predictions made seven years earlier, that he would "some-day write a decision on an economic question as pregnant with awful consequences as was the *Dred Scott* decision,"⁶ Hughes nevertheless helplessly sat back in minority dissent in cases such as *Morehead* as that prophecy was instead fulfilled by Justices Sutherland and Butler.

The extent to which Sutherland and Butler, as well as their two conservative colleagues, Van Devanter and Mc Reynolds, were prepared to go on maintaining their stand had been revealed one year earlier in the case of *Home Building & Loan Association v. Blaisdell*. With Roberts joining the liberals to uphold Minnesota's emergency mortgage moratorium law, Justice Sutherland was chosen to write the Court's four-man dissent. Ominously, he elected to quote from Roger Taney's infamous opinion in *Dred Scott* wherein the Chief Justice wrote:

While the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption, that it is not only the same in words, but the same in meaning."⁷

Herein lay the very foundation of what one critic subsequently came to describe as "nine black-gowned beetles aloof from all reality, meting out laws as inflexible as the massive blocks of marble that surround them in their mausoleum of justice." The columnist Drew Pearson went on to describe Willis Van Devanter as being a "fanatic reactionary," and James Mc Reynolds as both a "tragedy" and a "Scrooge." At the same time,

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George Sutherland's economic and social theories were blasted as about as up-to-date as the "moldy opera house, the gilded saloons" and Pierce Butler was described as a man who having "pleaded for special privilege" as an attorney, now "creates and sanctifies it as a justice."

To this four-man bloc was added Owen Roberts, a justice who "did not reflect the wishes of his progressive supporters and 'is the biggest joke ever played upon the fighting liberals of the United States Senate.'" History can only speculate what the Court would have done at this time had Hugo Black not opposed the confirmation of liberal jurist John Parker a few years earlier in 1930. As former Justice John Clarke, another economic liberal, came out to endorse Roosevelt's court reform package, the question may also be asked as to what he would have done had he chosen not to step down in favor of Sutherland so many years before in 1922.

Speculation notwithstanding, the Court in 1935 and 1936 seemed to be solidly (albeit by a narrow 5 to 4 margin) in conservative hands. As Roosevelt's Court Packing Plan of 1937 revealed the extent of the President's ever-deepening frustrations, the Court gave no indication of retreat. As "the man on the flying trapeze," Chief Justice Hughes now found himself at history's center stage. Having already cast his lot with the Court's liberals, it remained for Hughes and Hughes alone to somehow induce the still somewhat reluctant Roberts to join him.⁸

Hughes was to prove to be more than ready for the challenge before him. As history has shown, beginning with the *West Coast Hotel Company v. Parrish* decision on March 29, 1937, Roberts' "Switch in Time which saved Nine" was to result not only in a complete reversal of the Court's previous attachment to laissez faire principles but also in the preservation of the Court's constitutional integrity in the face of growing public demands for radical political change. Consequently, with *Parrish*, the Court was to rule five to four to reverse its previous decision in *Morehead* (as well as its notorious 1923 ruling in the case of *Adkins v. Children's Hospital*) to uphold a Washington state statute setting minimum wages for women. Speaking for the majority, the Chief Justice noted "the unparalleled demands for relief which arose during the recent period of depression" to find that a state "has necessarily a wide field of discretion" in order to assist in the nation's economic recovery.⁹

Two weeks later, in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp*, the Court was to apply this same rationale to the subject of federal regulation of the economy. Once again speaking for a five to four majority, Hughes discarded the old anti-regulatory logic adhered to in the 1918 ruling in *Hammer v. Dagenhart* to uphold the NLRB's authority over a steel manufacturer in Pennsylvania. While noting that the "distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal form of government," the Chief Justice nevertheless held that "[a]n interpretation which conforms a statute to the Constitution must be preferred to another which would render it unconstitutional or of doubtful validity."

Thus with *Jones & Laughlin*, a Pennsylvania manufacturer "which shipped 75% of

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the manufactured products out of Pennsylvania and disposed of them throughout this country and in Canada” was held to fall within Congress’s jurisdiction as operating within interstate commerce and therefore was subject to federal regulation.¹⁰ Similarly, in the case of *Steward Machine Company v. Davis, Collector of Internal Revenue*, the Court voted again by a five to four margin, to uphold the Social Security Act as a legitimate exercise of federal power.

Once again rejecting claims that the federal government’s excise tax on employers constituted an unlawful infringement on the individual states, Justice Cardozo declared that “[t]he problem of unemployment is national as well as local; and in promotion of the general welfare, moneys of the Nation may be used to relieve the unemployed and their dependents in economic depressions and to guard against such disasters.”¹¹

Ironically, the Roosevelt Administration was to prove less than charitable in its reaction to all of this. Interior Secretary Harold Ickes, for example, thought the Chief Justice “self-serving” and guilty of “playing politics in order to defeat the President’s [Court-packing] proposal.” Believing that Hughes had “always been aggressive when his own political fortunes were involved,” Ickes along with presidential aide Tom Corcoran urged a “head-on attack” through which he could be “debunked.”¹²

This sentiment was shared by Felix Frankfurter who noted “with the shift by Roberts, even a blind man ought to see that the Court is in politics and understands how the Constitution is ‘judicially’ construed.” Finding the Court’s turnaround “a characteristic Hughes performance” in which even his beloved Brandeis was involved, Frankfurter termed it “a deep object lesson — a lurid demonstration — of the relation of men to the ‘meaning of the Constitution.’”

In later years, Frankfurter was to think better of these events. Publicly repudiating his earlier criticism of Roberts in 1955, he argued that Roberts’ ten-month switch on state regulation from conservative in *Morehead* to liberal in *Parrish* was “vastly more complicated” than that of “mere deference to political considerations” and had actually been made two months prior to Roosevelt’s Court Packing proposals in December of 1936.¹³ Roberts was subsequently also praised for “visualizing and relieving a situation in the country which would have opened the door to fascism if he had not had the courage to give the Constitution a sensible interpretation.”¹⁴ As for Hughes, some forty years later no less a liberal and Roosevelt devotee than William O. Douglas would praise the late Chief Justice as one of the seven “most outstanding Justices with whom I served.” Likening his former chief in stature to both John Marshall and Earl Warren, Douglas ultimately credited Hughes with having transformed the Court in its time of crisis into a “‘great rock’ over which all storms break leaving that ‘great rock’ undisturbed.”¹⁵

And so it was with *Parrish*, followed in rapid succession by first *Jones and Laughlin* and then *Steward Machine* that the conservative economic trappings of the otherwise moderate Hughes Court finally succumbed via contemporary realities to economic liberalism. What had been a tentative five to four conservative majority now gave way to a similarly narrow majority favoring the liberals. Just as a “switch in time” could go one

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way in one case, however; so could a similar switch go another way in another case. To this end then, with Justice Roberts at least for the time being on the side of the liberals against the conservatives, Hughes' next great task was to convince those remaining conservatives of the hopelessness of their continued resistance to change.

On May 18, 1937, just five weeks after the Court's decision in *Jones v. Laughlin* recognized the constitutionality of the NLRB and just one week before the Court would likewise in *Steward* recognize the constitutionality of Social Security, Justice Willis Van Devanter submitted his resignation from the Bench, effective June 2nd. The Roosevelt Court in name was soon to become the Roosevelt Court in fact. Unfortunately, with Roosevelt's selection of Hugo Black to succeed Van Devanter on August 12, 1937, the Roosevelt Court was to be born into the same morass of controversy which had just marked the Laissez Faire Court's demise.

The choice of Hugo Lafayette Black to become Franklin Roosevelt's first appointee to the Supreme Court was never a matter of inevitability. As Tom Corcoran and Harold Ickes understood it, "The Van Devanter resignation had been engineered by Chief Justice Hughes, Senator [Burton K.] Wheeler, and Van Devanter, with Justice Brandeis helping..." all "in connection with the boon for Joe Robinson." The Senate's majority leader at the time of the Court-Packing controversy, Robinson had led the administration's first fight for the reorganization bill and had additionally "established a unique record of success in the handling of other New Deal legislation."¹⁶ Noting a "long-standing desire on the part of Senator Robinson to round out his lengthy career in public life by service on the Supreme Bench," FDR confidant James Farley subsequently denied later charges of presidential ingratitude by asserting that Roosevelt had in fact promised the seat to Robinson only to be subsequently precluded from making the official announcement by the Senator's "unexpected and unforeseen death."¹⁷

In any event, with Robinson dead, Roosevelt's attention focused on four potential candidates: Assistant Attorney General Robert Jackson, Senator Sherman Minton of Indiana, Solicitor General Stanley Reed, and Senator Black. Though all four men were known to be strong defenders of Roosevelt's New Deal programs, Jackson (who would subsequently be chosen for the Court by Roosevelt in 1941) was quickly dropped from consideration for fear that he lacked adequate support in the Senate. Reed at this point was dropped as well (though he would in fact be chosen a few months later as Roosevelt's second appointee) for concern that he was "without much force or color."

While Minton was seen as "a real fighter for New Deal policies," and as "one of the outstanding men on the floor of the Senate in the debate over the Court bill" (he would subsequently be named to the Court by Harry Truman in 1949), Roosevelt finally decided on Black as his nominee. According to Jim Farley, Roosevelt chose Black over Minton because he "had served the New Deal longer and more zealously."¹⁸ Ickes was to add that though Roosevelt believed Black was not "as able a lawyer" as the other potential nominees, as an incumbent senator coming up for re-election in a state for which he was "altogether too liberal," Black was facing "a hard fight" against which he was considering

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retirement. Coupled with this was Roosevelt's desire to rebuke those Senators who had opposed his Court reorganization plan and his certainty that even his opponents in the Senate "would be under pressure of Senatorial courtesy" to accept Black as his nominee.¹⁹ On August 12th then, Roosevelt was to scrawl out in pen, "I nominate Hugo L. Black of Alabama to be an Associate Justice on the Supreme Court." To Farley, he was to gleefully exclaim, "And they'll have to take him, too."²⁰

And Roosevelt was correct. Though denied the immediate confirmation usually at that time granted a United States Senator by his colleagues, Black quickly overcame the feeble objections of California's Hiram Johnson to win Senate confirmation on August 17, just five days after having been named by Roosevelt.²¹ He was commissioned on the eighteenth, and took both his constitutional and judicial oaths one day later on the nineteenth. With that, the nation's newest Supreme Court justice took what he considered to be a well-deserved vacation to Europe. He was scheduled to return so as to formally take his seat at the beginning of the Court's next session on October 4th.²² Before that would happen, however, Roosevelt was forced to confront his second great judicial controversy in less than eight months.

In the weeks between Black's confirmation to the Bench and the opening of the Court's 148th Fall session, the nation was riveted by revelations that its newest Supreme Court justice, as a young Birmingham attorney in 1923, became a member of a local branch of the Alabama Ku Klux Klan. While Black subsequently resigned from the Klan two years later, records revealed that he became reaffiliated with the organization in 1926 during his first successful run for the Senate.²³

While Black's friend and colleague William Douglas was in latter years to attempt to downplay the controversy surrounding his fellow liberal's "technical and brief membership in the KKK" as merely a "facade" contrived by Black's conservative opposition,²⁴ the fact remained that Black's prior affiliation with the Klan had been real and Black actively enlisted Klan support for his 1926 run for the Senate. Black himself was to further aggravate the situation by failing to reveal these facts (though at least the latter was generally suspected) either to the President who had nominated him or the Senate which had confirmed him. Upon his return from Europe, where he had doggedly refused to make any press comment as to the revelations, Black was to do both himself and his President even further damage by making a one time only radio address wherein he "renounced, but did not denounce the Klan by name." With that, Franklin Roosevelt's first appointee to the Supreme Court refused to make any further comment on the subject. As far as Justice Hugo Black was concerned, "the case is closed."²⁶

The case, however, was not closed. Although some in Congress tried unsuccessfully to find adequate grounds for Black's immediate impeachment, Roosevelt was widely castigated "for a choice peculiarly his own; for consulting none of his usual advisors...; for making no move to investigate the suspicions" previously raised against Black during his Senate hearings. With regard to Roosevelt's future plans for the Court, former Roosevelt aide Raymond Moley was to go on to note:

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“the cause of liberalism, under whose banner thousands upon thousands of citizens have been struggling for thirty years was renounced when Hugo Black took his place on the Supreme Bench. His presence there will, for a generation, confuse the objectives of liberalism to which Black gives lip service, with the anti-liberal methods which his career has exemplified. It will delay honest Court reform, handicap sound labor legislation and lead liberals into the quagmire of sophistry.”²⁶

With all of that said, however, the storm abated and the nation returned to a peculiar degree of calm. As 1937 passed on to 1938, Franklin Roosevelt could look back over the past year with ample reason for satisfaction. For all of the abuse he suffered over his Court Packing Plan, he nevertheless achieved the conversion of Justice Roberts to the liberal fold and thus set the Court on the path to economic reform with *Parrish* and *Jones & Laughlin* and *Steward*. And for all of the subsequent harm suffered over Black, Roosevelt nevertheless was to increase this new liberal majority from five over four to six over three. Thus in a matter of just a few short months, Franklin Roosevelt demonstrated an incredible ability of obtaining victory through ham-handedness that future presidents could only dream of.

After the Storm: The Solidification of the Roosevelt Court and the Ultimate Triumph of Economic Liberalism, 1938 - 1941

Hugo Black, of course, soon began making full restitution for his Klan past and ultimately emerged as one of the Court's greatest civil libertarians. Initially, however, his first days on the High Bench were to be nervous ones. In one of his first cases, *Alabama Power Company vs. Ickes*, a case wherein the Court unanimously upheld the rights of Congress to aid municipalities in establishing publicly owned power systems, Black entered a terse “Mr. Black concurs in the result” as his contribution to constitutional debate.²⁷

Two days after *Alabama Power*, however, on January 5, 1938, just three months after Black had replaced his conservative colleague Van Devanter on the Court, Justice Sutherland, by letter to the President, announced his intention to retire from the Bench effective January 18th. Now all of a sudden, the process of selection was to begin again. This time, however, Roosevelt was apparently unwilling to take any chances. Having previously considered Stanley Reed for the seat given up by Van Devanter, Roosevelt on January 15th, formally nominated his Solicitor General for the seat being vacated by Sutherland.²⁸

Compared to the controversy created over Black, Reed's elevation to the Court was low key and practically unnoticed. A former Kentucky state legislator who had been brought to Washington in 1928 to serve on Herbert Hoover's Federal Farm Board, Reed was viewed by many to be a “conservative” counterweight to the “radical” Black. From the Farm Board, however, Reed had nevertheless caught the eye of Roosevelt's Justice

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Department and, as Solicitor General, he was to argue most of the President's New Deal legislation before the High Bench. While Douglas later described Reed as a conservative on such issues as civil rights, as far as "social and business problems" were concerned, Reed was a Roosevelt liberal. The Hugo Black affair nevertheless had its impact and after a confirmation hearing wherein the nominee was repeatedly asked to reaffirm his support for the Thirteenth, Fourteenth, and Fifteenth Amendments, Reed was confirmed to the bench on January 25th. One week later, on the thirty-first, he took his seat as Franklin Roosevelt's second appointee to the Bench. The liberals' hold on the Court now stood at seven to two.²⁹

Due to his late entry onto the Bench, Justice Reed did not participate in many of the early decisions reached by this new liberal Court.³⁰ For the most part, however, the 1938 Court was to be a court with Chief Justice Hughes clearly at the helm. Just as he shepherded his brethren through the Court Packing crisis of 1937 to personally write both *Parish* and *Jones and Laughlin* (at the same time assigning *Steward Machine* to Cardozo) so too, did Hughes take the personal lead in drafting the Court's major economic decisions of 1938.

Thus in cases such as *Electric Bond and Share Co. v. SEC*, with only Justice McReynolds in dissent, the Court began chipping away at the old *Dagenhart* restrictions to federal regulation by upholding the registration provisions of the Public Utility Act of 1935.³¹ The Court also, in *United States v. Bekins*, all but reversed its prior anti-regulatory ruling in the 1936 case of *Ashton v. Cameron County* by upholding a municipal bankruptcy act little changed from the one it had earlier declared unconstitutional.³²

Justice Butler had joined McReynolds in dissent in *Bekins*. They were also to form a two-man dissent in *Santa Cruz Fruit Packing Company v. NLRB* wherein the Court's earlier ruling in *Jones & Laughlin* was expanded to cover smaller-scale intrastate operations.³³ At the same time, in the case of *South Carolina Highway Department v. Barnwell Brothers*, Justice Stone writing for a unanimous Court, continued the Court's retreat from *Adkins* by upholding a state law which had stringently limited the width and weight of motor trucks in South Carolina.³⁴

This is not to say that the Supreme Court was now thoroughly a Roosevelt organ. In *Consolidated Edison Company v. NLRB*, for example, Justices Black and Reed found themselves in a partial two-man dissent in the Court's ruling further expanding the powers of the NLRB.³⁵ As the pace of the New Deal litigation reaching the Court began to quicken in 1939, there were other cases, largely NLRB-related, in which Black and Reed found themselves in dissent. In *NLRB v. Colombian Enameling and Stamping Company*³⁶ and *NLRB v. Sands Manufacturing Company*, for example, Black and Reed objected to the Court's decision to set aside Board findings that employers had refused to bargain collectively with representatives of their employees. The Court's ruling, they contended, tended to nullify the congressional effort to have the problems of industrial conflicts "administered by more specialized and experienced experts than courts had been able to afford."³⁷

Against these sort of cases, however, Black and Reed were to find themselves increas-

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ingly with the Court majority against the two remaining conservatives. Consequently, in cases such as *Currin v. Wallace* and *Mulford v. Smith*, Justices Butler and McReynolds found themselves increasingly in isolation as the Court ruled seven to two not only to uphold the legitimacy of the Second Agricultural Adjustment Act of 1938,³⁸ but of other legislative acts that were to follow.³⁹

As the Court's composition began to change then, a clear pattern began to develop wherein the Roosevelt agenda won out in all but the most technical aspects. As the President himself was to boast in a June 1938 "fireside chat,"

"the attitude of the Supreme Court toward constitutional questions is entirely changed. Its recent decisions are eloquent testimony of a willingness to collaborate with the other two branches of government to make democracy work."⁴⁰

With Justice Cardozo's death a few weeks later in July and Brandeis's retirement in February 1939, Franklin Delano Roosevelt was to be able to change the composition of the Court even further with the appointments of Felix Frankfurter and William Douglas. With two liberals, however, appointed to succeed two other liberals, the initial effects on the Court overall were to be minimal. With the death of Pierce Butler in 1939 and the subsequent retirement two years later of both Justice McReynolds and Chief Justice Hughes, Franklin Roosevelt's lost battles of 1937 were to be quickly forgotten as the initial triumph of economic liberalism pushed on to the uncompromising destruction of the last remaining vestiges of *laissez faire*.

In his later reminiscences of the First New Deal, former Roosevelt aide Raymond Moley was to recall a May 1933 conversation with his former boss while working on the President's NIRA message to Congress. Contrasting Theodore Roosevelt's advocacy of government partnership and intervention in business with Woodrow Wilson's preference for limiting the role of government to merely restraint of unfair business practices, Franklin Roosevelt, "despite his admiration for Wilson," considered himself "essentially the heir to the policies of T.R." In his appointment of Felix Frankfurter to succeed the late Justice Cardozo, however, Roosevelt selected a disciple of the Brandeis school of liberalism which was essentially heir to the policies of Wilson. All this was not to become understood until later on, however, when the New Deal economic reforms had been set into place. In the meantime, Roosevelt's primary concern was to get these reforms enacted through a Court thoroughly dominated by his appointees.⁴¹

Had it not been for the Klan controversy, the nomination of Felix Frankfurter for Associate Justice would have easily been the most controversial of Roosevelt's Court appointments. An Austrian-born Jew who had first entered public life as an aide to Taft's (and later FDR's) War Secretary Henry Stimson, Frankfurter, since 1914, had served as Professor of Administrative Law at Harvard. Known to have been a devoted protégé of Louis Brandeis, he was largely expected to succeed to Brandeis' chair once that Justice

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retired from the Bench. By late 1938, however, with Brandeis giving no indication of retiring, and with his originally intended nominee Frank Murphy opting instead to run for re-election as Governor of Michigan, the pressure to appoint Frankfurter to succeed Cardozo intensified.⁴²

Known to have been opposed by such "orthodox" Democrats as Postmaster General Jim Farley, Vice-President John Garner, and Attorney General Homer Cummings, Frankfurter nevertheless enjoyed the enthusiastic support of such ardent New Dealers as Tom Corcoran and Harold Ickes. Mobilizing such diverse forces as Senator George Norris and Murphy (who having lost his bid for re-election accepted instead Roosevelt's appointment as Attorney General) to plead Frankfurter's cause, the New Dealers were further aided by the fact that Frankfurter and Roosevelt had maintained a regular correspondence since at least 1928. Moreover, Frankfurter was believed likely to carry on the liberal tradition of the late Justice Cardozo while at the same time being acceptable to the Senate. Finally, on January 5, 1939, Franklin Roosevelt succumbed to pressure and selected the Harvard law professor as his third nominee to the Bench. What was to follow would be the most grueling confirmation process of all Roosevelt's appointees.⁴³

While few who really knew him thought of Frankfurter as "revolutionary," the Frankfurter confirmation hearings were to nevertheless preface the style of the more virulent McCarthy-type hearings of the 1940's and 50's. Accused by many as being the "father of the NRA," Frankfurter was said to correspond "more to the theories of Russian Communism instead of upholding the liberal ideals of the founders of this country." As a member of the American Civil Liberties Union, he was further accused of supporting a "subversive" organization which "advocates the overthrow of our Government by force and violence." Damned as "one of the brilliant minds in connection with the 'red' movement," Frankfurter was further said to be "imbued with collectivist ideas of government" and that he seemed "equally in favor of economic planning."⁴⁴

While most of the charges against Frankfurter seemed to follow in this vein, many of his detractors made little attempt to hide their underlying opposition both to his foreign origins and, especially to his religion. Moreover, many made clear that they opposed Frankfurter for sharing similar views as those of Justice Brandeis and some expressed even an opposition to Justices Hughes and Roberts as "radicals."⁴⁵ With this then, for all of its intensity, the opposition against Frankfurter could not seriously challenge his confirmation and he was formally to take his seat on the Bench on January 30th. Ironically, for his supporters and detractors alike, Frankfurter was soon to emerge as one of the Court's leading conservatives.⁴⁶

Ironically as well, within a month of Frankfurter's confirmation, Justice Brandeis announced his retirement from the Bench effective February 13th. With the Wilson-styled liberal Frankfurter already in place on the Bench, Roosevelt now turned to Securities and Exchange Commission Chairman William O. Douglas as his next nominee. Viewed as a "dyed-in-the-wool liberal" who could be expected to maintain Roosevelt's liberal majority on the Court, Douglas's only perceived handicap was that, although

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born in Minnesota and raised in Washington State, his subsequent residence in Connecticut as Professor of Law at Yale disappointed many who had hoped that a "real" Westerner would be appointed to restore the Court's previous geographical balance of power.

Chosen over Iowa's Law School Dean Wiley Rutledge (who would subsequently be named to the Court by Roosevelt in 1943), Douglas easily won confirmation and was elevated to the Bench on April 17, 1939. He was to serve there for the next thirty eight and one half years before finally retiring as the last surviving Roosevelt appointee on November 12, 1975.⁴⁷

In the meantime, the Court was to continue its advance towards the Left. By the beginning of its Fall session in October 1939, Justice Butler had fallen ill and consequently did not sit in on any of the cases under consideration. He was to die on November 16th. Two months later, Attorney General Frank Murphy was confirmed as Franklin Roosevelt's fifth appointee to a Supreme Court which now numbered eight liberals, the one last conservative holdout being Justice McReynolds.

Murphy was not to become one of Roosevelt's more distinguished appointees. Having previously served as both Mayor of Detroit and Governor of Michigan, he had also gained federal experience first as civil governor of the Philippines and later as Roosevelt's second Attorney General. Appointed to the Bench largely as a Catholic to succeed the deceased Catholic Butler, Murphy was deemed neither by temperament nor by training to have the qualifications necessary to be a judge. Nevertheless, by 1940, Roosevelt was to consider the Court a safer place for Murphy than the Cabinet. With justices such as Frankfurter already there to "keep him straight," Murphy's appointment was seen to have solidified Roosevelt's victory over the Court. As Harold Ickes was to note, "regardless of who may be President during the next few years, there will be on the bench of the Supreme Court a group of liberals under aggressive, forthright, and intelligent leadership."⁴⁸

As for Justice McReynolds, with Butler's death, he now found himself increasingly isolated. In the 1940 case of *NLRB v. Waterman Steamship Corporation*, he was willing to join in the Court's unanimous reversal of its previous position in *Colombian Enameling and Sands Manufacturing* to instead adopt the position earlier expressed in Reed and Black's dissent calling for judicial deference to administrative rulings.⁴⁹ In *McCarroll v. Dixie Greyhound Lines*, he even enjoyed a rare final victory, writing for a five to three Court that an Arkansas statute which required busses and trucks entering the state to pay the state gasoline tax on all gasoline over twenty gallons which they had in their tanks at the time was invalid as an unconstitutional burden on interstate commerce.⁵⁰

For the most part, however, from 1937 on, McReynolds was to find himself increasingly in lonely dissent. With Roberts' conversion followed by Van Devanter and Sutherland's retirement followed finally by Butler's death, McReynolds, by 1940, had essentially become an anachronism. While Roberts and occasionally Hughes were sometimes willing to join with him in a dissent, that occurrence was becoming more and more

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rare. Hence in the case of *Sunshine Anthracite Coal Company v. Adkins*, McReynolds was to find himself the lone dissenter as the Court which had just four years earlier invalidated the 1935 Coal Act in *Carter* now ruled eight to one to approve the similarly-worded Bituminous Coal Act of 1937.⁵¹

By the end of 1940 then, it had become clear even to McReynolds that further resistance to the new Court's liberalism was useless. With Franklin Roosevelt's unprecedented election to a third term in November, McReynolds could only expect four more years of further erosion. Consequently two weeks after Roosevelt was sworn in for a third term, McReynolds was to step down from the Bench effective February 1, 1941. He was not to be replaced until Robert Jackson was sworn in to succeed him five months later. In the meantime, the Court underwent a virtual catharsis in constitutional law which would surpass anything seen since Justice Roberts' "Switch in Time" of four years earlier.⁵²

On February 3, 1941, just two days after McReynolds' retirement, the Court came out with its ruling in the case of *United States v. Darby Lumber Company*. In an eight to nothing decision written by Justice Stone, the Court overturned its 1918 ruling in *Dagenhart* as well as its 1936 ruling in *Carter* by declaring that the 1938 Federal Fair Labor Standards Act provisions fixing both minimum wages and maximum hours for employees engaged in interstate commerce were constitutional within the meaning of the Fifth and the Tenth Amendments. Asserting that the Tenth Amendment was not a limitation upon the authority of the National Government to resort to all means reasonable for the exercise of what it considered to be a granted power, the Court went on to declare further that the wage and hour provisions of the federal act did not in effect violate the due process clause contained in the Fifth Amendment.⁵³ Four months later, in the cases of *California v. Thompson* and *Olsen v. Nebraska*, the Court similarly opened the way for greater state regulatory authority by overturning the Taft Court's 1920's restrictions in *DiSanto v. Pennsylvania* and *Ribnik v. McBride* respectively.

Writing for a unanimous Court in *Olsen*, Justice Douglas held that Nebraska's statute limiting the amount of the fee which may be charged by private employment agencies was consistent within the context of the Fourteenth Amendment. Rejecting all claims that such a restriction was a violation of due process, Douglas maintained that "the wisdom, need, and appropriateness of this legislation are for the states to determine."⁵⁴

With *Olsen* thus overturning *Ribnik* and with Stone drafting a similar opinion in *Thompson* to overturn *DiSanto*,⁵⁵ the Court then turned its attention to *Coppage v. Kansas*, the White Court's 1914 ruling wherein states were prohibited from proscribing the use of anti-union "yellow-dog" contracts. On April 28, 1941, the very same day that *Ribnik* and *DiSanto* were overturned, the Court additionally overturned *Coppage* in the case of *Phelps Dodge Corporation v. NLRB*.

Again writing for a unanimous Court, Justice Frankfurter declared that, under the Wagner act, the government could lawfully require a corporation to "instate" applicants

for employment who had been denied jobs because of their union activities and affiliations. Theorizing that a refusal to hire was just as effective an anti-union measure as the actual discharge of an employee, the Court went on to uphold the government's authority to require offending corporations to provide "back pay" to the injured job applicants from the time they had applied for work until they were finally offered jobs.⁵⁶

Thus in the space of less than five months time, the Hughes Court was to complete the process begun four years earlier with *Parrish* and consequently all but completely eradicate the more notorious laissez faire rulings from the era of the Nine Old Men. A few months later, in the case of *Edwards v. California*, the Court went even so far as to invalidate the Taney Court's 1837 ruling in *City of New York v. Miln*, holding now that Congress's authority over interstate commerce prohibited states from passing laws excluding indigent persons from their borders. In a decision intended as much to expand personal civil liberties as to restrict state regulatory powers over Congress, the Court thus began to reflect a shifting concern away from economic to social liberalism.⁵⁷ It would be left, however, to the Supreme Court of Harlan F. Stone (1941-1946) to begin work on this process. By the time *Edwards* was rendered on November 24th, the Hughes Court had passed into history.

Aftermath : The Roosevelt Court and the Changing Nature of American Liberalism

On July 1, 1941, Charles Evans Hughes retired from the Bench after 11 years as Chief Justice. Choosing Hughes' liberal Republican colleague to succeed him, Franklin Roosevelt in the ninth year of his Presidency thus was in the position to name two additional members to the Court for a grand total of eight of the nine existing seats. Replacing the sole surviving veteran of the once infamous "Four Horsemen" McReynolds with his loyal Attorney General Robert H. Jackson, Roosevelt went on to fill Stone's former seat with South Carolina Senator James Byrnes. By the end of 1941 then, the only non-Roosevelt holdout on the Court was Hoover-appointed Owen Roberts of "Switch in Time" fame. No doubt mindful of the way FDR had totally transformed the Court into his own image, Roberts stubbornly refused to retire until four years later when Roosevelt's death in 1945 left the matter of Roberts' replacement in the hands of Roosevelt's successor, Harry S. Truman. In the meantime, with Byrnes' premature resignation in 1942 to become FDR's wartime director of economic stabilization, Roosevelt had one last opportunity to place his stamp on the bench with the appointment of the more liberal Riley P. Rutledge in 1943.

By this time, the issue of economic liberalism had fully been addressed and settled in favor of government regulation. By 1943, there was no longer any question as to where the Court stood on the government's ability to regulate the economy. Now, however, the Court was free to debate the issue of just how far government could go to achieve its intended goals. A second, equally pressing issue was to be how this increase in govern-

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ment power in economic matters would extend itself into the area of social concerns. Having won his war in transforming the Supreme Court into a bastion of economic liberalism, Franklin Roosevelt died before the next great battle was to begin. In the decades following FDR's death and the end of World War II, with the issue of economic liberalism firmly settled in Roosevelt's favor, the Court could now concentrate its liberalism in the areas of civil rights and liberties. This struggle was to be every bit as dramatic as Roosevelt's just won struggle over laissez faire and the "Nine Old Men."⁵⁸

Notes

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2. For the text of Roosevelt's February 5, 1937 Message to Congress see: Alfred Haines Cope and Fred Krinsky, *Franklin D. Roosevelt and the Supreme Court* (Lexington, MA. 1969), 18, 20.
3. "The President's Plan," *The New York Times*, February 14, 1937, sect 4: 8. For additional examples of public response see also: Herbert Hoover, *The Memoirs of Herbert Hoover, 1929-1941: The Great Depression* (New York, 1952), 332 - 334, 374 - 381; Harry Truman, *Memoirs by Harry Truman, 1945: Year of Decision*, (Garden City, New York, 1955), 153- 154; Robert H. Jackson, *The Struggle for Judicial Supremacy*, (New York, 1941).
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9. *West Coast Hotel Company v. Parrish*, (1937) 300 US 379.
10. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, (1937), 301 US 1-5.
11. *Steward Machine Company v. Davis, Collector of Internal Revenue*, (1937), 301 US 547 - 550.
12. *The Secret Diaries of Harold L. Ickes, Volume II, The Inside Struggle: 1936 - 1939*, (New York, 1954), 136 - 137.
13. *Roosevelt and Frankfurter: Their Correspondence*, 392 - 397.
14. "Congressional Record Citation to Nomination Confirmation of Stanley F. Reed to be Associate Justice of Supreme Court, 1939" *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee 1916- 1975*, 4:21; See also: Andrew L. Kaufman, "Benjamin Cardozo" in Leon Friedman and Fred L. Israel (eds) *The Justices of the United States Supreme Court, 1789 - 1969: Their Lives and Major Opinions*, (New York, 1969, vol III, Footnote 1, 2299.
15. William D. Douglas, *The Court Years: 1939 - 1975, The Autobiography of William O. Douglas*, (New York, 1980), 41 - 42.
16. Ickes, 153, 182 - 183.
17. Farley, 82 - 83, 96 - 99.
18. James A. Farley, *Behind the Ballots: The Personal History of a Politician*, (New York., 1938), 331 - 333.

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26. Raymond Moley "Imperfect Contrition," *Newsweek*, 10 (October 11, 1937) 44. See also: Raymond Moley, "An Inquisitor Comes to Court," *Newsweek*, 10 (August 21, 1937) 40.
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28. "Judiciary: No.2," *Time*, 31-1 (January 24, 1938) 10.
29. "Judiciary: 77th," *Time*, 31-1 (February 7, 1938) 10. See Also: "Congressional Record Citation to Nominee of Stanley F. Reed," 16 - 21.
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32. *United States v. Bekins* (1938) 304 US 27.
33. *Santa Cruz Fruit Packing Company v. NLRB*, (1938) 303 US 453.
34. *South Carolina Highway Department v. Barnwell Brothers*, (1938) 303 US 177.
35. *Consolidated Edison Company v. NLRB*, (1938) 305 US 197
36. *NLRB v. Colombian Enameling and Stamping Company*, (1939) 306 US 292
37. *NLRB v. Sands Manufacturing Company*, (1939) 306 US 332.
38. *Currin v. Wallace* (1938) 306 US 11
39. *Mulford v. Smith*, (1939) 307 US 38.
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53. *United States v. Darby Lumber Company* (1941) 312 US 100
54. *Olsen v. Nebraska*, (1941) 313 US 236.
55. *California v. Thompson*, (1941) 313 - US 109.
56. *Phelps Dodge Corporation v. NLRB*, (1941) 313 US 177.
57. *Edwards v. California*, (1941) 314 US 160.
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