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Nine old men and one New Deal -- the Supreme Court crisis of 1937 -- a political history

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NINE OLD MEN AND ONE NEW DEAL;
THE SUPREME COURT CRISIS OF 1937;
A POLITICAL HISTORY

by

Dwight Daniel Darrow

Submitted in Partial Fulfillment
of the Requirements
for the Senior Scholars Program

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1979
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Abstract

Nine Old Men and One New Deal; Franklin Delano Roosevelt and the Supreme Court Crisis of 1937, a political history, is a review of the development, causes, and resolution of the Supreme Court Crisis of 1937.

The Supreme Court Crisis of 1937 resulted from the expression of divergent social and economic theories by the Supreme Court and the President. This work explores the conflict that resulted from this expression, and reviews the resolution of this conflict.

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Preface

This paper represents one product of a continued interest of mine in the New Deal era. Specifically, my interest in the Supreme Court Crisis issue began three years ago, and this work is a partial result of that interest. I must emphasize, and perhaps apologize, that this work is really in unfinished form. Time constraints have prohibited a complete revision which would tighten up the language, and style of the writing. Further and more complete research is needed in order to extend to the paper additional insights which would provide a more thorough explanation of the issue.

The purpose of the paper is to explain the Supreme Court Crisis of 1937. In this respect, readers may have a difficult time with the work because desire for a firm position to be taken, a theory to be proven, remains unfulfilled. I hope to have provided an insight into an extremely complex and important issue. Paul Conkin, author of The New Deal, wrote, "as yet, no historian has seriously studied the Court Fight. Much the pity, for here was probably the most important issue to arise in the New Deal." This paper will serve as my beginning of a serious study of the Court Crisis. The issue is important, not only in relation to the New Deal, but is also important as an example of the manner in which our governmental system functions. This paper has explained the reasons for the formulation of the issue, and has hinted at the implications of the issue.

This paper has also an academic purpose. As a Senior Scholar project the paper is important for the refinement of
writing and research skills. The Senior Scholar Program is worthy in the respect that the investigation of such issues can be undertaken by a student with the help and support of a faculty member. The Senior Scholar Program does have flaws, and if the continuation of such academic investigation is to be insured, a more supportive role by the College Administration, in a monetary sense, will have to be secured.

I would like to thank some very special people without whose support this project may never have reached conclusion. My thanks go to my tutor, Professor Calvin MacKenzie, who was supportive, willing, and who has brought back to his department the love and sense of the real purpose of teaching. I would also like to thank Professor Clifford Berschneider for his interest in me and my work and for his careful critiques of the paper. I would like to thank Laurel Johnson for her attention to and critique of the paper during its early stages of development, and to Mark Hubbert and Gayle Amato for their help in typing the much revised first draft of the paper. My final and most grateful thanks go to Susan Murphy, the skillful and accurate typist who has been so diligent, courteous and kind to me and my endeavor.

Dwight Daniel Darrow
May 2, 1979
Chapter One
The Problem and the Crisis

On Inauguration day, January 1937, Harold L. Ickes wrote that,

the Chief Justice, when he came to that part of the oath which required the President to protect and defend the Constitution of the United States, spoke slowly and with especial emphasis. It was noteworthy also that whereas the Vice-President had simply responded with "I do," the President gave the full answer and he, too, spoke with slowness and particular emphasis when he declared that he would protect and defend the Constitution of the United States.¹

The two men solemnly faced each other on that rainy January day. Much had passed between them in the preceding four years, much would pass between them in the next eight months. On the one side of the podium stood the re-elected President Roosevelt. He was first elected to office during the nation's most severe economic crisis, during those first four years of office he formulated a plan of national recovery. The election of 1936 swept him back into office, the people's mandate was clear; more of the New Deal. The New Deal was a legislative program which enunciated a new economic order, a new active role on the part of the central Federal government. It was that New Deal, it was Roosevelt, which had brought the country back from the depths of depression. This opinion was now solidified in Roosevelt's mind; the people had spoken, they were "with him."

On the other side of the podium on that stormy January
day stood the stalwart Chief Supreme Court Justice Charles Evan Hughes. He represented the Supreme Court of the United States of America, which by reason of the life tenure of the Justices, represented the old economic order. Roosevelt labeled those Justices who represented the old economic order as, "partisans of a particular economic and political philosophy held by the man who appointed them." The Judicial branch and the Executive had clashed and were again to clash, embroiling themselves, the legislative branch and people in a bitter prolonged dispute which just may have been the most acute Constitutional controversy of our times.

Whereas the President and his New Deal stood for a strong, powerful and active central government, the Supreme Court Justices, by a slim majority, kept enunciating their belief in a limited relatively powerless Federal government. As Wesley McCune, author of Nine Young Men, observed, "Never before Franklin Roosevelt's time had the Court taken almost the entire governmental program of a contemporary President plus his (the pronoun is accurate) Congress and vetoed it law by law as the Supreme Court Justices did with the first New Deal."

Roosevelt's reaction to the repeated invalidation of his New Deal legislation, beginning with the invalidation of the 'Hot Oil' code in the National Industrial Recovery Act in January 1935 and culminating with the invalidation of the National Recovery Act in June of 1935 and of the Agricultural Adjustment Act on January 6, 1936, was the Court Reorganization Plan of 1937. The reasons for the Court Reorganization Plan proposal can be traced as far back as 1928 when the old economic
order failed. Principally, the Court Reorganization Plan can be seen as a reaction to the United States Supreme Court's invalidation of New Deal legislation. This legislation was itself a product of the circumstances of the times in which Roosevelt assumed the powers, duties, and responsibilities of the Presidency.

In order to understand more fully the significance of the Constitutional crisis precipitated by the Court Reorganization Plan proposal, it is necessary first to recapture the mood of the times. Here we must recreate the historical setting, we must present the immediate sense of urgency, the desperation, the despair that pervaded the American people during our country's most tragic economic faltering. We must also recreate the sense of hope that was offered by Roosevelt, and him alone. A sense of hope began to uplift and raise this nation's people during the first hundred days of Roosevelt's Presidency when the New Deal was formulated and hurriedly passed into law. The inroads that the New Deal legislation made toward solving the nation's pressing problems are important in the evaluation of the Supreme Court's invalidation of those laws. The Supreme Court can be viewed as impeding the successful solution of the nation's problems. The Court Reorganization Plan was Roosevelt's reaction to what he perceived as an obstruction to the nation's recovery in the 1930's.
By the year 1928, it was apparent that a sickness had begun to pervade the United States' economic structure. This sickness grew with a terrifying speed, clutching first at the throat of the American economy, then at the American spirit. By the year 1930, the one word that would best describe both the nation's economic outlook and the mood of the American people was despair. The depression had dropped upon the nation quickly and suddenly giving no warning. Not anticipating what would soon make a mockery of his words, President Hoover in the early hours of the depression stated that the nation's economic outlook was "rosy." On July 28, 1932, the same day that General MacArthur was forcibly evicting from the nation's capital thousands of veterans who were asking for immediate payment of their bonus allowance, the daily newspapers were announcing that an expected increase in trade would occur in ninety days. This trade increase was to end the depression and simultaneously put an end to the nation's economic woes.\(^5\) The arrival of such an increase in trade did not come in ninety days nor in a hundred nor in three hundred.

The belief that the depression would soon depart, was caused by the speed with which it struck. Many people refused to believe that the economic decline would last or that its effects would be harmful in the long run. However, for the fifteen million people who had lost their jobs by 1932, the depression was an awesome reality, its end nowhere in sight.

Only a few years before Franklin Roosevelt's inauguration
in 1932, the United States' economic system seemed to be standing on firm ground. During the 1920's, the United States had enjoyed one of its largest economic booms. One indicator of the prosperity of the times and the trust that the American people had in the nation's financial institutions, was the amount of money expended in the Stock Market. We say expended rather than invested because of the commonly held belief that, if one were to spend a little, the stock market would return, without fail, a substantial increase in one's original outlay in cash. The market was seen as a money tree. Get-rich-quick schemes abounded, shady practices and dealings facilitated windfall gains for some and devastating losses for others. The stock market speculator believed that the market would always pay-off. The "house" could never run short, the gamble was seen as a sure thing or so it seemed.

Whether or not the market was a sure bet, the fact remains that during the late 1920s the trading activity on the stock exchange increased a hundred-fold. In the year 1920, there were a mere 29,609 stock brokers in the New York exchange. By 1930 the number of brokers increased to an impressive 70,950.

One reason for the tremendous advance in trading activity was the practice of purchasing stocks on margin. Buying stocks on margin is similar to buying a house with a mortgage from a bank. The investor had to pay in cash a fraction of the stock's real value. The rest of the value of the stock would be paid at a later date. This practice can be sound, if the credit for such
purchases does not become over-extended. What began to occur was a situation in which the investor would purchase far more stock than he had any possible means of paying for in cash. Making matters worse was the fact that investors would trade unpaid-for stock for more unpaid-for stock, sell that stock for cash, then use the accrued cash to buy more stock on credit. Carrying this process on for a length of time, investors completely over-extended their credit, and by doing so they ruined the real value of the stocks they bought and traded.

Another indicator of the public's faith in the nation's economic system was the esteem in which it held the nation's industrial leaders. Henry Ford and the men of Madison Avenue and Wall Street were regarded as economic wizards. Modern technology was developing, spreading its wonders throughout the country. The economy was growing, everything did indeed seem "rosy."

But this economic "rose" was soon to wilt.

There were several factors which helped precipitate the depression. The buying and selling of unpaid-for stock resulted in a gross over-extension of credit. The get-rich-schemes helped promote an aura of uncertainty in the economic sector. The temporary boom of the 20's caused a tremendous rise in the production of durable goods. Combined, the factors would increase the severity of the pending economic decline.

The dramatic rise in the demand for durable goods created an enormous productive effort in this sector. This effort created employment for a considerable number of the work force in the
sector. When lending institutions and businesses realized the amount of credit over-extension that existed, they suddenly made a demand for cash. This, in turn, caused a money pinch for the average consumer. The consumer's first austerity measure was an immediate reduction in the purchase of durable goods purchases. The result was a huge amount of unemployment in this area when money got tight.

The pace of the depression quickened. Business after business failed; stores and factories had their windows boarded up. Eighty-five thousand business failures occurred between the years of 1930 and 1932. The nation's payrolls were reduced by an astounding forty percent. The economic sickness spread its cancerous growth until it had critically weakened the country's financial institutions. The nation's economic heartbeat continued to falter, economic calamity bled from every institutional pore. The number of banking institutions that shut their doors, between January 1, 1930, and March 6, 1933, numbered well over five thousand. During this period some $3,461,851,000.00 was lost to depositors as a result of bank failures. Millions of people lost their life's savings. The money that was deposited by trusting clients in the vaults of the nation's banks had simply disappeared because of the over-extension of credit. The money lent out could not be returned, the loan recipients simply did not have the funds. The banks were forced to close; the depositors were forced to suffer.

The political history of our nation's banking system shows that the nation's banking system was built on a tenuous financial foundation. Beginning in New York in the 1830's, an alliance between entrepreneurial interests of the country and antibank
Democrats created our free banking system. Free banking, meaning a banking system founded on the principle of no governmental interference had become an American trademark. Most states had passed free banking laws by the late 1830's that permitted any group able to meet a simple list of financial requirements to organize a bank. The newly created free banking system financially institutionalized the principles of laissez-faire; the system also justified the creation of hundreds and hundreds of banks. The free banking system destroyed for years the Hamiltonian belief in the need for a federally supervised banking system. This led to an over extension of credit, credit which far exceeded the nation's requirements and was to show conclusively, when the free banking system collapsed, the need for the institutionalization of Hamiltonian doctrines. It was not until the Roosevelt administration that a reversal from "free banking" to supervised banking took place. Roosevelt saw the need to act, and did so, bringing the national government into what had been previously considered the realm of the private individual.

The effect of the bank failure on the depositor was tragic. For those who diligently set aside money for a rainy day, the day was at hand but the money was not. Confusion, panic and bewilderment was a common reaction by those affected by the banking crisis. Worried depositors watched their home banks with a cautious eye. At the first sign or rumor of closing, depositors would rush to the banks before the doors closed on their savings.
The bank clients were so edgy, so wary of the banks, that, in some instances a panic by the depositors would cause such sudden and large withdrawals that even banks on firm financial foundations were forced to close.

The first governmental reaction to the banking crisis came in the form of banking holidays. Through official proclamation, state governors decreed that all banks in their respective states would close their doors. This action was initiated by the state governors independent of the actions of other governors. After the bank closures, state investigators would determine the solvency of the bank. If the bank was found to stand on firm ground, then the doors of the bank were reopened. Upon his inauguration to the presidency, Roosevelt took the same steps as the governors to meet the banking crisis. Roosevelt declared a national banking holiday. Through executive decree he meant to stop any further bank failures until new legislation could be enacted to deal with the problem in a more permanent manner. In this respect, the national banking holiday was only a stop-gap measure, an effort to deal quickly with a very pressing crisis.

The traditional ideas and philosophies held towards banking were concepts to be replaced by the ideas of Roosevelt's New Deal. The Banking Act of 1935 was a reaction to the banking crisis that faced Roosevelt the day he assumed office. The main part of the Banking Act consisted of the establishment of the Federal Deposit Insurance Corporation. The F.D.I.C. was to be a regulatory agency, empowered to create regulations and bank
policies that would prevent the future loss of monies to bank
depositors. The Banking Act was to establish further banking
regulations, which, through operation with the Federal Reserve
Board, would work to prevent future bank failures.

The Roosevelt administration sought to insure that the
3,461,852,000 dollars lost to depositors was to become a historical
fact, not a present or future part of bank operations. In one
respect the Banking Act was a measure designed to restore public
confidence in the nation's banking system. By assuring the
safety of deposits, and establishing a regulatory reorganization
of the banking system, Roosevelt hoped to re-establish the nation's
investment and banking system on a sound basis.

Roosevelt felt that, as trustees of the public good, bankers
and other financial leaders must act in an honest and respon-
sible manner. Public trustees were not to gamble with
"public" money, or use the money entrusted to them to harm the
public-at-large. Roosevelt believed that the public trustees of
the day were harming the public, and took steps to put an end to
the "devices of financial chicane".

In his first administration, Roosevelt began to take im-
mediate steps to propose measures that would in some way regulate
the nation's investment sector. One of the investment measures
enacted was the Securities and Exchange Act of 1934. The legisla-
tion was enacted in response to the deteriorating situation of
the nation's investment system. Roosevelt regarded the existing
situation in the investment sector as a national concern. The
effects of credit over-extension, and the manipulation of stock
prices, were viewed by Roosevelt as placing a burden on inter-
state commerce, and adversely affecting the general welfare of
the nation.\textsuperscript{14} Roosevelt felt that because of the ramifications
of the investment crisis and the effect of the crisis on the
entire economy, that only federally-sponsored national solutions
would solve the problem.

The Securities Act was designed to replace previous laws and
duties administered by the Federal Trade Commission.\textsuperscript{15} The Sec­
urities Act was an attempt to create one uniform law that would
deal with all facets of securities exchange. Before the enact­
ment of the securities measure, regulation of security exchanges
was done under the auspices of various individual state regula­
tory laws. These laws were referred to as "blue sky" laws.
They required licenses and permits before a broker was allowed
to sell or buy securities. The state regulatory laws because of
differences in laws from state to state were ineffective in
stopping the sudden flooding of the security market with unwanted
stocks. This and other forms of price manipulation were allowed
to continue under the fairly lax state laws.

Section seven(a) of the Securities Act dealt with the
over-extension of credit by banks to investors and brokers. In
order to prevent the continued over-extension of credit for sec­
urites procurement, the Federal Reserve Board was empowered to
establish rules and regulations concerning amounts of credit that
could be extended for purchases of stock.\textsuperscript{16} The Federal Reserve
Board was given, in effect, the power to determine the margin of
credit that could be given for securities procurement.

Borrowing money, either directly or indirectly, on securities holdings was prohibited for any member of the securities exchange under section eight of the law. This section sought to further limit the amount of credit that could be introduced into the stock market. It prohibited the development of a two-staged credit extension. Before the law's enactment, bankers and investors could buy stock on margin and then borrow cash using their stocks as collateral.

Sections seven and eight served to return the use of credit to a more sound, controllable financial level. These sections were regulatory advances by the federal government into an area of traditional local control. This type of regulatory legislation was to become a model for future New Deal legislation which sought to institute controls and regulations over the financial working of the nation's economy. Roosevelt's economic beliefs, unlike the economic philosophy of Hoover, held that the crisis that had evolved came from more than a lack of confidence by the people in the financial system. Roosevelt believed that the nation's financial structure, the traditional operating concepts of the investment sector, needed to be changed. The crisis at hand was seen to mandate such a change.

An example of a change in the traditional operating concepts of the investment sector made by Roosevelt is the administration of the Reconstruction Finance Corporation under Roosevelt's government. Under Hoover, the Reconstruction Finance Corporation was
designed to benefit those at the top of the economic order. This means that funds were meant to be allocated to large corporations and lending institutions, rather than individuals. By helping the top of the economic hierarchy, the nation's large financial institutions, it was believed that the benefits of such relief would trickle down to the lower economic levels of the economy. The purpose of the R.F.C., during the Hoover Administration, embodied the personal economic theories of President Hoover. Hoover's economic theories contrast sharply with Roosevelt's belief that the little man, the individual, the man at the bottom of the economic ladder, should be assisted first. This, Roosevelt argued, would prop up the entire economic order from its foundations. Roosevelt put this theory in operation when he reorganized the R.F.C. Instead of lending money to the large financial institutions, and increasing the debt of those institutions, as did the R.F.C. under the Hoover administration, the R.F.C. under Roosevelt enlarged the operating capital of the banks by buying preferred bank stock. This bolstered capital structure, creating more available funds for the institutions, thereby freeing more funds for loans and payments to depositors.

Under the Hoover administration, a considerable number of problems became associated with the administration of the R.F.C. The R.F.C. was enacted to lend money to banks and other financial institutions. The loans given to these institutions were supposed to loosen up the flow of currency and allow banks to pay depositors interest on their deposits. Increased loan activity was the
expected result. This would then add impetus to the recovery of the economy. The R.F.C. did not achieve its expected results primarily because the agency's Board of Governors set their interest rates far above the market level. In effect, the financial institutions had to pay more in interest to gain funds from the R.F.C. than they would if they borrowed from private lending institutions. The case of the Reno Nation Bank loan clearly illustrates the high cost associated with borrowing from the R.F.C. In order to secure a 1.1 million dollar loan the Reno bank had to offer the R.F.C. some 3 million dollars as collateral to cover interest payments. The over-all effect of the R.F.C. under the Hoover administration was a failure to stimulate an increase in commercial credit, and a premature assertion that financial stability had been restored. 19

The administration of the R.F.C. under Hoover clearly shows the failure of traditional economic theory. Roosevelt diverged from traditional notions. His governmental policies were aimed at helping the masses, in effect keeping his pledge to remember the forgotten man. It must be noted that even thought, "the old economic order (and the old economic practices) had been replaced in 1933 in the Congress and in the White House"20 these same economic theories and beliefs were maintained and upheld by five of the nine Justices on the Supreme Court. The adherence by the Supreme Court to an outdated economic theory would place it in direct opposition to Roosevelt and the new progressive economic theory of the New Deal.

In another area of economic activity a Senate investigatory
committee found that in 1932, some thirteen holding companies controlled over seventy-five percent of the privately owned electric companies. The committee further reported that of the thirteen, three controlled forty percent of the privately owned electric companies in the nation. The Administration's reaction to the situation, a situation confirmed by the Senate report, was the proposal of the Public Utilities Holding Company Act. James Morley, a Presidential aide, expressed the administration's view that the growth of the holding companies had little relation to business or economic need. The holding companies, especially the public utilities holding companies, existed and multiplied only because of a manifest desire for exorbitant profits.

The public utilities holding companies were virtually immune from existing laws in 1932. Felix Frankfurter, a Roosevelt advisor, suggested that the President enact a new law, one specifically aimed at the holding companies. Only in this manner could such companies be brought within the jurisdiction of federal law.

The Public Utilities Holding Company Act had to meet Roosevelt's personal requirements for the establishment of stringent regulation of, and control over, the public utility holding companies. One section of the proposed act was so stringent that it provoked a bitter fight within the Senate when brought up for vote.

The act was divided into two main parts. The first part attacked the existence of the utility holding company as an
institution. This part of the act contained the controversial section ten, which sought to eliminate all public utility holding companies. This section would prove to be so controversial that only through its removal would the law pass. The fight over the death sentence clause served to show that members of Congress would only go so far in supporting New Deal doctrines.  

On August first, the House of Representatives voted against provisions encompassed in the first part of the measure. The controversial section ten, the so-called "death sentence clause", became the one major obstacle to passage of the bill and because of this section, the Congress enacted the Wheeler-Rayburn bill. This bill was a compromise piece of legislation, containing a more subtle death sentence clause. Under the provisions of the Wheeler-Rayburn bill, holding companies that were more than twice removed from the actual operations of the utility were disbanded. The Securities and Exchange Commission was empowered to break up all holding companies which they determined to be against the best interests of the general public.  

Other than the change of wording in section ten, the Public Utilities Holding Company Act and the Wheeler-Rayburn Act were almost identical in purpose. The Public Utilities Holding Company Act which finally did emerge from the legislature fit the model of New Deal legislation by further opening the door to governmental intervention in what had been previously considered as local concerns. It also sought to help the common man. With the utilities law,
the Roosevelt administration was to begin to hear the protests of the old order. The final version of the Public Utilities Holding Company Act was to be struck down by courts of law across the nation. The final spokesmen for the old order, the spokesmen for the men of property who were opposed to and feared New Deal ideologies, would be the courts. The Supreme Court would act as the chief spokesman for both the old order and the courts.

With the questioning of the Public Utilities Holding Company Act, the gauntlet was thrown, and the fight between the New Deal and the old order began to be clearly seen as an issue of differing philosophies. The battlelines would be drawn around those differences. The issue of the proper role of governmental operation in the nation's economy was to be reargued and redefined through the court's decisions on the National Recovery Act, the Agricultural Adjustment Act, the mortgage moratorium laws, and Railroad Retirement Acts.
CHAPTER TWO
Laws for Human Relief

The decay and virtual collapse of the nation's financial institutions was perhaps a smaller, less important crisis than the crisis of human need. The soup lines in New York's bowery were drawing over two thousand patrons for each meal in 1933. This example serves only to begin to indicate the amount of human poverty and suffering that occurred during the years of the Depression.

With millions of unemployed, and hundreds dying across the nation from lack of food, it became all too horribly apparent that the nation's system of public relief was totally inadequate. Our traditional notions of public relief come from Elizabethan England. These Elizabethan concepts held that public relief was a concern of the local governments. The unemployed were blamed for being without a job. They were given the means for a subsistence living, however, all aid given to the unemployed carried the social stigma of a gift to freeloaders. The desperate plight of those caught in the economic collapse can be seen in the letter to the editor published by The Nation on May 31, 1933:

I am a married man with two children. I have worked steadily and saved some money so that I could give my children a proper education and teach them to be honest, upright citizens. A few years ago I purchased a home and was... happy.

I lost my home because I lost my position and could not meet my mortgage payments. I tried to borrow on my insurance and could not secure cash.
What am I to do to keep my family from suffering? Am I to become a vagrant and be sent to jail? Am I going to be driven to steal or commit some other crime because I have been an honest, law abiding, hard working citizen? I am not signing this for the reason that I may be termed a radical and sent to jail.

This was the plight of many home owners, the people who held jobs, bought insurance, owned a home, and had families - the participants in the Great American Dream. Now that dream had been shattered.

Our traditional notions of public relief had effectively precluded the intervention by the national government into public relief compensation or planning. As a result, when unemployment rose to the dangerously high levels of 1932, the federal government refused to act, feeling it was not within its constitutional province to provide for the growing number of unemployed. It should be noted here that President Hoover, when he opposed the allotment of federal funds to state and local governments for public relief, did not do so with malicious intent. It was not, at that time, part of the federal government's operational philosophy to administer such funds. President Hoover did relent at the end of his term, and agreed to provide loans to state and local governments for public-relief. The amount loaned was a substantial $2.222 billion, but even this amount of money did not begin to relieve the crisis. Shortly before Hoover left the office of the presidency, he made the loan a grant.¹ Hoover's departure from office also marked the departure from the traditional beliefs of governmental involvement in social welfare.
Adolf Berle has remarked that upon Roosevelt's inauguration as President, "Conditions decreed the extension of federal power; President Franklin Roosevelt needed it to carry out his plan for social-economic reconstruction of the Country." Roosevelt, during his first four months in office, would embark upon what would later be described as "fifteen weeks of whirlwind changes in the old order, of experimental process, of legislative novelties, and of practically unchallenged executive domination of the colossal organism we call the federal government." The first Roosevelt Congress would accomplish much: pass banking and relief measures; prohibit gold hoarding; pass the Economy Act; cut the budget by one billion dollars; reduce Veteran's compensation by 320 million dollars; legalize 3.2 beer; devalue the nation's currency.

More importantly, the Congress would save the homes of millions from bank foreclosure by enacting the Home Owners Loan Act; create the Civilian Conservation Corps which would employ 275,000 young men; allot five-hundred million dollars for Unemployment Relief; and create the Public Works Administration which would employ an additional 3.3 million men. During their 1934-36 terms, Congressmen would enact an all-encompassing New Deal law, a synthesis of the New Deal—the National Recovery Act. The invalidation of this act, which was recognized by Roosevelt as an invalidation of the entire New Deal, precipitated the Court Reorganization Plan which projected Roosevelt and the Supreme Court into a head-on clash.
Banks were foreclosing on homes and private property with what seemed to be a ruthless, relentless drive. Those who had paid a substantial part of their mortgage suddenly found themselves in a far worse bargaining position than those who owed the banks a higher percentage of their mortgages. Economically, it was in the banker's best interest to foreclose on property that was almost paid for. The return or profit made on selling property that was almost paid for when foreclosed upon was much greater than on properties which still had high outstanding mortgages.

Foreclosures on homes soon became unrelated to the bank's need to establish liquid assets. Banks in need of funds for the issuance of new loans could borrow from the R.F.C. The real reason behind property foreclosures was that they became a means of securing higher profits for the banks. When the plight of the home and property owner came to the attention of President Roosevelt, he requested the Congress to act, out of what he termed a "moral obligation" on behalf of the homeowners.

The first act on the homeowners' behalf was the Home Loan and Bank Act. This allowed homeowners to receive new mortgages from specific lending institutions if the debt of the homeowner was less than forty percent. The chosen institutions were usually found in larger cities, and many of the homeowners debt was over 40%. These restrictions served to hamper or negate any effective action that the law might have had. As a result, this act was supplemented by the Home Owner's Loan Act. Through this act, the Home Owner's Corporation was created on June 13, 1933.
The Loan Corporation was given some two hundred million dollars in cash and two billion dollars in bonds to help prevent foreclosure on individual residences and small, owner-occupied boarding houses and apartment buildings valued at less than $20,000. Of this total, $923,416,733 were lent to save 306,887 homes from foreclosure. Over $100 million of the money lent went to pay delinquent state and local taxes. Payment of these taxes allowed localities to meet payrolls for municipal workers. Some twenty million dollars of the money borrowed was used for home repairs. Together with the money paid in taxes, money used for home repairs greatly benefitted the local community's financial and employment situation. The great majority of the money loaned was used by the house owner to pay off his private bank mortgage. Payments to private lending institutions allowed such institutions to reopen, and in many cases allowed banks to make substantial payments to their depositors.

President Roosevelt had taken steps to insure that homeowners would be able to keep their homes, and to insure that banks would be established on a new firm foundation. At the same time, Roosevelt was formulating measures that would begin to alleviate both the causes and effects of human poverty. There existed a number of crucial employment-related problems that had to be dealt with. The trouble spots of unemployment, underemployment, and unfair hours and wages had to be given attention.

The primary victims of the economic turbulence were the young and those workers who held seasonal or less secure job positions. The aimless, drifting unemployed became a serious
threat to the peace and security of many local communities. Traditional relief programs could not adequately deal with the multitudes of unemployed. The frustration, the desperation caused by the depression could not be met by traditional relief programs. This frustration and desperation constituted the main threat to community security. The nation's youth, along with their parents, felt a strong sense of stagnation and failure. This feeling was dangerous to more than just the community. Because it came from the youth, the future of America, it threatened the nation's future.

President Roosevelt took an active interest in the plight of the nation's youth. The interest may have been caused by his sense of the urgency and potentially dangerous situation of large numbers of able-bodied, unemployed young people. On March 31, 1933, Roosevelt signed into law a measure that created the Civilian Conservation Corps. The purpose of the corps was to provide a federally-funded and supervised job to every young man who did not wish to continue school after his sixteenth birthday. Over a quarter of a million young men were given jobs working on various land-use projects. In this respect, the C.C.C. had a dual function: to employ a segment of the nation's youth, and to begin a national program of land use conservation.

The C.C.C. fell under the administration of four executive departments. The Department of Labor was charged with the responsibility of enrolling and selecting C.C.C. recruits. The Department of War ran the daily activities in the C.C.C. camps. In this respect, life in the C.C.C. took on a military flavor,
complete with bugle, work and dress uniforms, and passes to visit nearby towns. The Department of Interior and the Department of Agriculture created and supervised the various land-use projects for the corps.

The C.C.C. provided benefits to both the young men and their parents and families. The C.C.C. youth were given a daily wage, half of which was sent home to their families, and they received room, board and job training. The program was designed to remove the youth from their impoverished surroundings, and to provide them with a new sense of self-confidence and a desire to succeed in the work place. The corps was, in this respect, an anti-stagnation program. It provided a very crucial part of the nation with work experience, and most importantly, with something to do. The C.C.C. also served to provide a much needed boost in morale for at least this one segment of the population.

While a form of relief had been instituted for some of the nation's youth, other measures were being formulated to give relief and employment to the other sections of the nation's unemployed. The nation's first relief organization was embodied in the Federal Emergency Relief Administration, which was established on May 12, 1933. This program directed federal funds to states, who in turn distributed the money among the needy as they saw fit. Co-existing with the F.E.R.A. was the Civil Works Administration. Established in November of 1933, this program channeled federal money directly to the nation's needy.
Critics of the two measures complained that the federal government was promoting a national dole. They also argued that this type of relief was degrading to recipients and did not provide any kind of impetus to the average recipient to find work. As a result of these major complaints the F.E.R.A. and the C.W.A. were discontinued in 1935 after having spent three billion dollars.\(^{15}\)

A public works program was launched under the National Industrial Recovery Act, in the summer of 1934. The Public Works Administration was established under this program to replace previous relief programs. Under the administration of Harold L. Ickes, then Secretary of the Interior, the P.W.A. allotted 3.3 billion dollars to 13,266 federal projects and 2,407 non-federal projects. One of the more famous projects was the Tennessee Valley Authority. Although all projects were not as large as the T.V.A., 99% of all counties in the country had at least one public works project.\(^{16}\)

The Roosevelt Administration sought, through the P.W.A., to prime the nation's economic pump. By establishing a nation-wide building program, the Roosevelt administration hoped to add the impetus needed to bring about national economic recovery. The over-all effectiveness of the program was somewhat limited under the administration of Ickes because of his insistence not to allow the disbursement of any funds for illegitimate purposes. Ickes was nicknamed "Honest Harold" by the newspapers of the day. His fear of scandal pervaded the disbursement of funds to such an extent that allocations were given only after careful and drawn-out review of projects.
Growing dissent began to be heard about the direction and role of the executive branch in the nation's economic sectors. One Congressman from the State of Maine voiced his objections that the measures would lead the "masses" to believe that it was the duty of the government to put everyone who is unemployed on the federal payroll. The role that the Roosevelt administration intended to assume was made clear at the very beginning of the administration's term. In his inaugural address, Roosevelt made known his intentions when he said, "I shall ask Congress for the one remaining instrument to meet the crisis - broad executive power to wage a war against the emergency, as great as the power that should be given if we were in fact invaded by a foreign foe." Roosevelt was given broad executive power, albeit with growing reluctance on the part of the Congress. The Congress gave such power as a result of the intensity of the existing crisis and of the immense pressure by the public for the enactment of relief measures. The Judiciary would serve to intensify the dissent. The Judicial branch of government would set aside the pressure of public opinion and would question the propriety of the assumption of new power by the executive branch of government.

With the exception of the Public Utilities Holding Company Act, the measures discussed above remained unchallenged in the courts of the country. These measures were, on the whole, stop-gap in nature, direct responses to specific problems. Roosevelt would eventually cause the intensification of dissent from both the legislative and judicial branches of government, when he went beyond reacting to immediate problems and formulated
comprehensive national economic recovery plans.

Dire situations still faced the American business and labor sectors. Traditional economic forces of supply and demand, of a self-balancing market had failed. There existed much demand for goods and necessities, there was also a surplus of goods in some sectors, like fooatuffs, however, the market could not right itself, the economic pump needed another way to be primed. Wages fell to levels where only the extremely desperate would take the jobs at the offered pay. The low wages and long hours did not effect the prices of most goods. Any rise in prices in many cases brought a decline in wages; the system could no longer adjust itself to price and wage disparities. The market system needed a strong and visible hand to force price and wage levels into a more equitable relationship. In order to correlate wages and hours with price levels, Roosevelt proposed the enactment of the National Recovery Administration. The N.R.A. was to establish "codes of fair practice (which) would eliminate eye-gouging and knee-groining and ear chewing in business." ¹⁹

The National Industrial Recovery Act was signed into law by F.D.R. on June 16, 1933. The act gave the executive branch of government discretionary powers in approving industrial codes to have effect for a period of two years. By 1938, some four hundred and twelve codes were signed into law. It was estimated that the codes had been responsible for the reduction in unemployment figures from thirteen to ten million. Unemployment was reduced by limiting the numbers of hours many employees could work and increasing pay for those shorter hours. ²⁰ The President described the act as: "the most important and far reaching legislation ever enacted by the American Congress." ²¹ He believed the act to be
the mainspring of the New Deal program. The measure embodied the hopes and aspirations of the New Deal. The N.I.R.A., and specifically the N.R.A., would become synonymous with the New Deal.

The measure was new, and conservatives called the measure radical while liberals criticized it for not being far reaching enough. Aware of the growing fervor about his over-all economic policy, Roosevelt had preferred to push through crisis-oriented bills before asking for the broad reconstruction measures, like the N.R.A. During the N.R.A.'s enactment, the debate on the floor of the two legislative chambers had been prolonged and bitter. The final act was actually a compromise among many different factions and theories. It called for industrial representatives to write their own codes of fair practices. These codes had to be approved by the President. All codes written under the auspices of the act were exempt from anti-trust laws. Monopolistic practices were still banned by law, although as a result of code-making, enforcement of anti-monopoly laws would be impossible. The underlying theme of the act was to have businesses of all kinds join in a voluntary self-government program, "to become one happy family," to act cohesively in order to ward off the financial threat that faced the nation. Section seven(a) of the N.R.A. offered labor a guarantee (although critics claimed a vague one) of the right to bargain collectively, choosing their own representatives to talk to employers. The act established provisions or guidelines for wage and hour standards that would be incorporated into all codes. The codes also sought to abolish
sweat shops, child labor, and to make obligatory free access by the government to the financial records of businesses. In actual operation the codes further provided for uniform prices, some codes limiting production while others assigned industry-wide quotas. Under the direction of General Johnson, the N.R.A. "burst on the American people like a call to arms." Symbolized by the "blue eagle," the N.R.A. had immediate public approval. General Johnson traveled from city to city, cajoling, pleading, and demanding industry leaders to sign code agreements. In the beginning the public and industry rallied to the cause. As long as a national emergency was seen to exist, the codes would be formulated and followed. The song of the day was, "Happy Days are Here Again".

Actually, what was really on the upswing was not the nation's economy, but the numbers, strength and support of the critics of the N.R.A. and of the Roosevelt administration. Dissent was being voiced because of the fact that Roosevelt's economic policies were leading the government into, what had been previously been considered as, the private sector with, what conservatives thought was, a terrifying speed.

The National Recovery Administration was the backbone of the New Deal. To some it stood for help and rescue from troubled economic times, yet to others the N.R.A., and the industry codes which the administration compiled and enforced, was an ominous symbol of government intervention into the affairs of private citizens. The N.R.A., because of its omnibus nature, extended its influence in varied sectors of the economy. This extension was done bit by bit, code by code, industry by industry - and the N.I.R.A. was invalidated in much the same manner. Even
though "symptoms of deep social unrest, following economic collapse, were insistent and could not be ignored," the judicial branch of our government repeatedly invalidated New Deal legislation for reasons of unconstitutional delegation of legislative powers to the executive.

The Courts began to disassemble the National Recovery Administration, and invalidate the National Industrial Recovery Act, with their ruling in the "Hot Oil" case. On January 7, 1935 in the case of Panama Refining Company v Ryan, the Supreme Court of the United States of America declared section 9-C of the N.I.R.A. unconstitutional. The January 1935 decision foretold the May 1935 invalidation of the entire N.I.R.A. that would mandate the cessation of the National Recovery Administration's activities.

The history of the invalidation of the N.I.R.A. is interesting in that it clearly shows the divergent economic theories held by the Courts and the Executive. The history of the N.I.R.A. really begins in the time span between 1933 and 1935. During this time, the overproduction of oil was seriously threatening a collapse of the price structure in the oil market. This in itself is an example of the failure of traditional Smithian economic notions of a self-righting, self-adjusting market. Oil was then, as it is today, an important national commodity. A collapse of the oil price structure, and therefore a threat of cessation in oil production, was viewed by the Roosevelt administration as a national concern. Under the National Industrial Recovery Act, Congress had given to the President the power to prohibit the interstate transportation of petroleum produced in excess of the amounts permitted by N.R.A. code. Through this delegation of
power by the Legislative to the Executive branches of government, the price structure of oil had been stabilized. The so-called "hot oil" production code was a voluntary code written by the oil industry at their own request. The N.R.A. was given the task of enforcing agreed-upon codes. The idea of industries formulating their own codes or standards of fair trade and practices was in keeping with the administration's philosophy that it was not the purpose or the function of the N.R.A. to organize either industry or labor. Only as a result of the national economic crisis was the Federal government given, and willing to assume, powers to bring about solutions to the economic crisis. The United States Supreme Court disagreed with the administration's philosophy, and invalidated the assumption of new powers.

On January 7, 1935 in Panama Refining Company vs Ryan, the Court invalidated a part of the N.I.R.A. The Court held as unconstitutional the delegation of power given to the President under section 9-C of the N.I.R.A. Section 9-C had authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum as he saw fit. Brushing aside the interstate commerce question, the Court stated that the confering of power upon the President, without the prescription of a policy or standard to guide the decision, was an unconstitutional delegation of power. The immediate effect of the Supreme Court's decision was a dramatic increase in the movement of 'hot oil'. Congress would pass a substitute measure, the Connally Act, in 1936. This act sought, in a different legislative fashion, to regulate oil production. Popular opinion ran
strongly against the Court's decision. *Time* magazine argued that "when industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

Roosevelt was taking steps to prevent any further economic paralysis. Roosevelt's election to the Presidency was seen as a clear mandate to go forward with the programs which he believed necessary to take care of the needy, to draw the country up from the depths of the depression, and to correct the glaring evils in the nation's economic and social system. The President's program required the assumption of new powers in order to meet the nation's needs. Meeting national needs became a "Roosevelt-ism" for extending control over prices and wages.

The courts, with growing frequency, disagreed with the means by which Roosevelt hoped to accomplish national recovery.

Embodied in the N.R.A. were perhaps the most extraordinary measures found in the entire New Deal program. The N.R.A. was an operational symbol of New Deal philosophy. On May 17, 1935 the Supreme Court invalidated this philosophy by declaring the code making the authority of the N.R.A. unconstitutional. The case which decided this was the *Schechter Poultry Company v United States* 295 U.S 495 (1935). Unlike the 'Hot Oil' decision, the Schechter decision was handed down by a unanimous Court. The case poorly represented the N.I.R.A. Codes. A somewhat
jovial Court heard the case. At one point during the proceed-
ings Counsel for the Schechters explained that, "if a customer.
wants half a coop of chickens, he has to take it just like it
is"... to this Justice Sutherland queried, "What if the chickens
are all at one end?" General laughter followed.

In his decision Chief Justice Hughes stated, "Extraordinary
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." The Chief
Justice continued, "...extraordinary conditions do not create or
enlarge constitutional power." No one was laughing now. The
President was infuriated. The President stated, "We have forty-
eight nations from now on under a strict interpretation of this
decision." Roosevelt further lamented, "Is the United States
going to decide, are the people of this country going to decide
that their Federal government shall in the future have no right
under any implied power or any court-approved power to enter into
a solution of a national economic problem or must they be de-
cided only by the states?" Under an interpretation of the
Supreme Court's opinion, the Federal government had no such power.
The Court held that transactions involved in selling chickens
within a state were not "in" interstate commerce and only indirect-
ly affected such commerce. The court held that the distinction
was "a fundamental one, essential to the maintenance of our con-
stitutional system, otherwise, no limit would exist to Federal
power, and for all practical purposes we should have complete
centralized government." The Schechter decision made clear that
power to regulate interstate commerce, vested by the Constitution in the Federal Government, will not support a planned economy. The decision threw doubt upon the constitutionality of all New Deal legislation. The Court had ruled that, "production or the manner in which it is conducted does not affect interstate commerce with sufficient directness to warrant Federal regulation unless it places an intentional, artificial barrier in the way of the free flow of commerce." The Court's position was made clear; the Roosevelt administration could have only the most limited usage of the power vested in the Congress through the commerce clause.

The celebrated "Chicken Case" had effectively destroyed the statutory base not merely for the poultry code, but for all codes formed under the N.I.R.A. In a letter to Henry L. Stimson, President Roosevelt acknowledged defeat for the entire N.R.A. program. "It is the 'dictum' in the Schechter case opinion that is disturbing because, again, if the 'dictum' is followed in the future the Court would probably find only ten percent of the actual transactions to be directly related to interstate commerce." As further acknowledgement of defeat, the President ordered the Attorney General to dismiss 412 code violations that were slated for prosecution.

The Schechter decision threatened the entire recovery program. As Roosevelt stated, "The whole line of decisions cast a deep shadow of doubt upon the ability of Congress ever, at any time, to protect the nation against catastrophe by squarely meeting modern social and economic maladjustments." Secretary
of Labor Perkins reported to the President that as of noon, June 13, 1935, fifty-nine establishments had reduced wages and increased hours. Blacks in the deep south were quickly returned to being paid ten cents an hour. By June 25, some 250 pages of documentation were sent to the President listing firms that had broken from code guidelines.

On June 3, 1935, Roosevelt wrote to Ambassador Bullitt, serving in Moscow, "the fact remains that the principles of the N.R.A. must be carried on in some way." In his letter to Henry Stimson on June 10, Roosevelt alluded to how he might be able to carry on with his plans: "I can assure you that I am trying to look at several angles and that I hope something practical can be worked out." That "something practical" would be the Court Reorganization Plan of 1937. Almost two years would pass before the plan was unfolded. During those two years the Supreme Court would strike down more and more of the New Deal.

It may be said that the Schechter decision "broke the camel's back." Research shows that shortly after the May decision Homer Cummings began work on the Court Reorganization Plan. The Schechter decision also exemplifies the differences in governmental outlooks and economic philosophies which were held by the members of the Supreme Court and those that were held by Franklin D. Roosevelt. The Court believed that Congress could not delegate broad powers to the President. The Court held that the Constitution did not permit such delegation of powers, nor did the Constitution permit the assumption of executive powers that were not specifically given in the Constitution. The N.I.R.A. went
beyond the Constitutional boundaries set forth by the Court. The Constitution was what a majority of the Justices on the Court said it was, and the N.I.R.A. was not constitutional in the eyes of the majority of the members of the Court.

On the same day that the Schechter decision was handed down, another decision, perhaps as equally important, was also made public. The Supreme Court, by a 5-4 margin, in the case of Railroad Retirement Board v Alton Railroad Company, further limited the Federal government's power to regulate interstate commerce. The Railroad Retirement Act was an attempt to provide security for railroad employees in interstate commerce, through required contributions by the railroads' companies to a retirement fund. The Court held that all legislation of this nature was unconstitutional. This assertion brought a vigorous dissent from the Chief Justice:

The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pensions act for railroad employees. I think that the conclusions thus reached is a departure from sound principles and is an unwarranted limitation upon the commerce clause of the Constitution.

Hughes made it clear, that in his opinion, Congress had the authority to subject purely intrastate railroad traffic of the nation, to its control.

On January 26, 1936, the Supreme Court, in the case of U.S. v. Butler 297 U.S. 1(1936), held in a five to four majority, that the overproduction of farm products was not directly related to the country's general welfare. The Agricultural Adjustment Act was an attempt by the Federal government to stabilize farm market prices. With the economic collapse of the 1930's, farm produce prices
had fallen to levels far below the farmers' cost of production. In fact, farming income had dropped from $5 billion to one-half billion from 1929 to 1933.\textsuperscript{52} The result was a virtual mass exodus of farmers from their farms. The U.S. entered the dust bowl era. Food became scarce, because of the low prices, and more and more farm land lay barren. The central part of the A.A.A. was the processing tax levied on farm produce processors. Through this tax, the Federal Government sought to pay farmers not to grow certain crops, and heavily taxed those crops produced in excess of government quotas.

The Court invalidated the use of taxing power to achieve regulation in \textit{U.S. v Butler}. Associate Justice Roberts presented the Court's opinion; "At best it (the A.A.A.) is a scheme for purchasing with Federal funds submission to Federal regulation of a subject reserved to the states."\textsuperscript{53} Roberts continued, "Congress has no power to enforce its commands on the farmer to the ends sought by the A.A.A."\textsuperscript{54} "In the general understanding of the term, and as used in the Constitution, tax signifies an exaction for the support of the Government. The tax here provided for was not a means of raising revenue for the support of the Government, but was part of a plan to regulate and control agricultural production, a matter beyond the power delegated to the Federal government."\textsuperscript{55}

As a result of the Schechter decision, power given under the commerce clause of the Constitution to the Congress was severely curtailed. Through the Butler decision, the taxing power of Congress was also limited. Clearly the Federal government was being backed into a powerless situation. The issue was made clear by Associate Justice Stone in his vigorous dissent, "The
present levy is held invalid, not for any want of power in Congress
to lay such a tax to defray public expenditures, including those
for the general welfare, but because the use to which its pro-
cceeds are put is disapproved."56 Stone continued, making clear
his message that he believed the tax to be valid, and that the tax,
held to be invalid by a majority of the Court, was ruled invalid
only because the Justices on the Court were answering to different
economic doctrines. Stone stated in dissent that in his view;

"The present stress of widely held and strongly
expressed differences of opinion of the wisdom of
the A.A.A. makes it important,...to emphasize at the
onset certain propositions which should have control-
ing influence in determining the validity of the act.
(The Court should be guided by two principles in in-
validating legislation) one is that courts are concerned
only with the power to enact statutes, not with their
wisdom (my emphasis). The other is that while uncon-
stitutional exercise of power by the executive and
legislative branches is subject to judicial restraint,
the only check upon our own exercise of power is our
own sense of self-restraint.57

Stone ended with a powerful plea, "Courts are not the only agency
of government that must be assumed to have capacity to govern."58
Many now believed that the Courts were the only ones who would be
allowed to govern. As one concerned voter wrote to the President,
"If nine or even five men, can nullify the will of 125,000,000
people, where is the difference between democracy so brilliantly
painted in your last world-famous speech and the Russian, German
and Italian autocracy?"59 Roosevelt was also unsure where that
difference lay. His recovery program had been weakened, almost
mortally. As he stated, "We were stopped short and thrown back
in our efforts to improve conditions of labor, to safeguard
business against unfair competition, to protect disorganized and
chaotic interstate industries, to provide old age pensions for
railroad employees, and in other ways to serve obvious national needs." Roosevelt waited, he would wait until his re-election in 1936. He had said little, but very soon he would declare war with the Court in a last ditch effort to regain lost power; power needed to run his (the pronoun is accurate, in Roosevelt's eyes) country.

Two other Supreme Court decisions are important in understanding the severe limitation placed upon Congress and Executive powers. In Carter v Carter Coal Company, 298 U.S. 278(1936) the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935. Under the act, also known as the Guffey Coal Act after its sponsor Joe Guffey, a national bituminous coal commission was appointed by the President. The commission was authorized to enforce industry codes; these codes allowed the coal miners to organize in unions, and also regulated the price of coal. A 15% tax of coal sold at the mine was levied on coal producers if they did not follow industry codes. The Court ruled that this type of excise tax was an improper use of the taxing power. "That the 'tax' is in fact a penalty is not seriously in dispute. The position of the Government is that the validity of the exaction does not rest upon the taxing power but upon the power of Congress to regulate interstate commerce." The Court held that the tax was an improper tax, and also held that the production of coal was not an interstate activity and therefore was beyond the power of Congress. "That production, in this case mining, which precedes commerce, is not itself commerce; and that the power to regulate commerce among the several states is not a power to regulate industry within a state."63

The Court moved on from its specific invalidation of the Bituminous Coal Act. The Court handed down a statement spelling out what commerce was and what power Congress had in regulating commerce.
"In exercising the authority by this (the commerce) clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. What is commerce? As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade;... between the citizens of the different states. (Vearie v. Moor 14 How 568-573-574) Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce." 64

In other words, the Court told the legislative and Executive branches that they could regulate only items that were specifically engaged in interstate trade, while these items were in trade. Even then, as in the Railroad Retirement case, industry or items that were in movement between two states were not always within the jurisdictional authority of Congress. The Court, in its attempt to insure that Congress could not regulate "each and every branch where the produce contemplated an interstate market," 65 had effectively stripped Congress and the Executive from all power to regulate any commerce. The decisions were based on such a narrow interpretation of the Constitution that the Government was allowed no latitude in dealing with the existing problems of the day.

The Coal Act that had sought to prevent further disorders which had already resulted in bloodshed and martial law, the act which was established to maintain prices, control distribution, arbitrate cut throat competition, wages, collective bargaining, and sought to put an end to violence, strikes and strife in mining communities, was void. The Court held that states could
not give up their rights to the Federal Government, even though seven states had filed appeals urging the Supreme Court to validate the act. Conditions which had decreed the extension of Federal power were left to fester. The Court held that such extension of Federal power which would solve the problems unsolvable by states, was an improper delegation of legislative power in its "most obnoxious form." 66

The Court was to act once again. In what was considered the final verdict on Governmental attempts to fix minimum wages and maximum hours, the Court held, in Morehead v New York rel Tipeldo 298 U.S. 602 (1936), by a 5-4 decision that states do not have the power to formulate minimum wage laws. Basing their decision on Adkins v Childrens Hospital, the court held that the state "is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid." 67

The decision created "what the President and others characterized as a 'no mansland' which placed the regulation of wages, even of the sweatshop variety, beyond the reach of any government, federal or state." 68 The President attacked the Court's decision in his famed Court and buggy speech, and later wrote, "So, in the year-and-a-half commencing with the 'hot oil' case and ending with the New York minimum wage case, it became quite obvious that the advance of recovery and reform begun by Congress and the Executive in the year of crisis, which its opponents could not stop by the elections of 1934, was being nullified by a barrier which read: The Court Disapproves." 69
The Nation magazine said that, "If someone is bold enough to suggest that, with respect to minimum wage legislation, the Constitution is rather what the judges who stay on the bench longest say it is," then the issue would be seen in its true light. The New York minimum wage law was a local treatment of a pressing problem. In their decision the Court made a terrible mistake, they told the country that they realized the seriousness of the problem but that the Constitution did not allow the government, state or federal, to solve it. On November 3, 1936 Roosevelt was re-elected as President of the United States of America. He swept the country, winning 27,000,000 votes. On February 5, 1937 the President broke his silence and attacked the Supreme Court.
Chapter Three
The Plan

On January 15, 1937, Roosevelt, in a letter to his close confidant Felix Frankfurter, gave an indication that he would soon take drastic action against the Court. Roosevelt, in what may be an anticipation of the bad reaction to his Court Plan, requested Frankfurter to "suspend final judgement" until Roosevelt was able to tell "the story." During the Presidential campaign of 1936, F.D.R. said nothing about the Court. The Republicans associated themselves with the Court. Tension across the country was growing, discontent among the people swelled. On January 6, 1937, in his inaugural message to Congress, Roosevelt gave a slight indication of what he planned when he said, "means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs." "The vital need is not an alteration of our fundamental law but an increasingly enlightened view in reference to it."2

Within the Roosevelt administration it was agreed that further laws, or new words in new laws, or changes in the Constitution, would all be interpreted by the Supreme Court in the same conservative manner. The problem was made clear; it was not the Court as an institution but rather the membership of the Court that had to be changed. As Assistant Attorney General Robert H. Jackson stated:

Judges who resort to a tortured construction of the Constitution may torture an amendment. You can not amend a state of mind, a mental attitude of hostility to the exercise of governmental power and of indifference to the demands which democracy attempting to survive industrialism, makes upon its Government.3

The conflict between Roosevelt and the Court would not involve questions of constitutional interpretation of the role of the
various branches of government, nor would the conflict encompass a national, nonemotional discourse on the proper limits of the Federal Government's power. Such a conflict could have been resolved through a constitutional amendment, through the well-reasoned restatement of executive power and its boundaries in the modern world. The conflict was destined to take a different tone. One author has reasoned, "the fight's course was decided by the fact that the Court had wantonly offended every strongest trait in the President. Perhaps the most immediate of the Court's offenses was its denial of satisfaction to the President's taste of power." Roosevelt's letter to Claude G. Bowers on January 15, 1937 might be interpreted as supportive of the Presidential power need theory suscribed to above. The letter stated in part:

I had a little fun in presenting the message on the State of the Union text, of which by this time you will have received a copy. None of the nine highest members of our judicial branch was present for the occasion, but I have received some intimation that they at least read the remarks which pertained to them. I hope so!

Others believed that "the Court Reorganization Plan of President Roosevelt was the political manifestation of a long-smouldering intellectual revolt against the philosophy of many of the Supreme Court's decisions on Constitutional questions." This latter theory seems to be the more correct one. Roosevelt went over the political solutions to the Supreme Court question one by one in a letter to Charles Burlingham. In the letter, Roosevelt termed a Constitutional amendment as impossible. It would be hard to get 2/3 of Congress and then fight for state ratification. Roosevelt stated, "You could make $5 million easy
as rolling off a log by undertaking a campaign to prevent
ratification by one house of the legislature, or even (prevent)
the summoning of a Constitutional convention in 13 states for the
next four years. Easy money!7 Since no amendment would really
be feasible, Roosevelt pleaded, "You must join me in confining our­selves to the legislative method..." The direction of the fight
was made clear. The conflict would be between President Franklin
Roosevelt and Chief Justice Hughes and the other Justices who sat
on the Supreme Court. There would be no well-reasoned attempts to
bridge the gap between the no man's land. There would be no philo­sophical discussions on the role of the executive in the nation's
economic system that would lead to a rational understanding of the
executive's role. The President would act; his assault would be an
attempt to remove, definitively, the obstacle of conservative judg­ments which he believed blocked the path to the nation's recovery.

The controversy was initiated. The honor and reverence of
the Court would be questioned. The assault began with an explana­tion of the "real" court system. In the magazines of the day, writers
told the public that "the strength of political and economic motives
behind the deceptively impressive logic and rhetoric or judicial
decisions is usually greater than the uninitiated public realizes." Magazines of the day continued to show that Judges"are human and
are moved by the passions that great crises involve," while they
"may seem quiet in the courtrooms, it is the quiet of a storm center,
rarely, however, can one learn the secret history of what occurs
behind the closed doors of the Judicial chambers."8 The Court
fight would challenge the majestic awe traditionally held toward the Court by the people of the country. The people were told that the Constitution does not really provide for the Supreme Court to veto or pass upon the validity of an act of Congress. In fact, proposals made in the Constitutional Congress that would have given the Court this power were voted down. The Court had actually taken upon itself a new-found power. It was this same Court that was rebuking the Roosevelt administration for assuming new power not explicitly provided for in the Constitution. Senator Norris told the Senate that it was a commonly held perception that "the people can change the Congress, but only God can change the Supreme Court." He then made the challenge that "Congress has the power (to change the Court) if it has the courage."

In February of 1937, President Roosevelt addressed the Congress, and unveiled his plan to remove the obstacle that lay in the path of recovery. The Court Reorganization Plan would empower Roosevelt to appoint one new Justice for each Justice over the age of seventy years who did not retire. Roosevelt would also be authorized to appoint fifty new lower Court Justices, one for each Justice over seventy. The Plan would halt injunction proceedings in lower Courts on Federal legislation which was challenged on Constitutional grounds, until the Justice Department had made arrangements for appeal to the Supreme Court. The Plan also called for the appointment of a court proctor, who would keep cases from piling up in the lower courts. 9

Secretary of the Interior Harold L. Ickes recorded in his diary, "The President's message is especially a joke on Justice McReynolds because, as Attorney General in the first Wilson
administration, it was he who advocated the matching of every Federal judge over seventy below the Supreme Court with a younger man." The message may have been a joke on McReynolds, it certainly was a surprise to the members of the Cabinet and to Congressional leaders. On the morning before he read his message to Congress, Roosevelt summoned the Vice-President, members of the Cabinet, Senator Robinson, Speaker of the House Bankhead, Congress­man Rayburn (who was House Majority Leader), Senator Ashurst (who was Senate Judiciary Chairman), and Congressman Summers, House Judiciary Committee Chairman. To these people Roosevelt read his reorganization message. It was the first time they had heard of the idea in this form. Roosevelt had consulted with no one, except for Homer Cummings and a few assistants in the Justice Depart­ment. "At no point did he (Roosevelt) seem to doubt that the tried and true leaders of his party would supinely do his bidding." But as Ickes noted all were quiet, none, except himself, were outwardly supportive of the plan. Soon, Roosevelt's secret formulation of the plan would cause dissension, and rebellion in the House and Senate. "The plan", in the words of Assistant Attorney General Jackson, "did not capitalize more than a fraction of the force of the revolt (against) the Court's philosophy." 

The reaction to the Court Reorganization proposal consisted of a mixture of delight, rage, praise and condemnation. Common opinion was "the plan is put forward with all the artistry of the President's political mind. He ingeniously conveys the impression that all he seeks is a routine and moderate effort to speed up justice and improve the whole federal bench...the brutal fact is
that President Roosevelt would pack the Supreme Court with six new justices all his own choosing."14 The Supreme Court had been packed before, and columnists of the day thought it would be a very simple matter to pack the court again.15 Other commentators thought that "to limit the authority of the court would be to change the form of the American Government."16 Others concurred with statements such as, "although I do not believe the Supreme Court is sacrosanct, I would regard the opinion of a picked, packed court on a position of law with the same lack of respect that I would regard the opinion of a kept woman on a question of virtue."17

The Court Reorganization Plan was criticized most heavily because it was clear that it was not the age of the Justices or the workload of the Justices that Roosevelt sought to remedy. It was the attitudes and the philosophies of the Justices that needed changing. In order to change the philosophical direction of the Court, it was clear that the actual men sitting on the Court needed to be replaced. Roosevelt insisted, even in the face of report after report proving that no relationship existed between aged judges and congested dockets, that his intentions were not to replace the men on the court but to help the system. Roosevelt's solution to the breach between the philosophical direction of the Court and the New Deal was to dilute the power of this conservative element, to remove those conservative Justices from the Court. This attempt failed; we must now ask why.
The Court Reorganization Plan was a corrective measure, it was a result and recognition of the existence and collision of two divergent socio-economic theories. The Court Plan was formulated to resolve the conflict and contest between the two theories. Through the enactment of the Court Plan, Roosevelt attempted to secure the supremacy of his new order while insuring the final obliteration of the other. The New Deal marks a transition period in our society's evolution. This paper has recounted the dramatic events and the effects of the events which marked the beginning of the end for the old order, and the realization of the need for the creation of a new order. The old order was embued with the doctrines of nineteenth century liberalism. This was the liberalism which called for the institutionalization of laissez-faire, the liberalism which advocated the continued infancy of Federal authority, structure and activity. The social and economic theories that pervaded the old order had failed, the guarded economic system had collapsed, the ruggedly individualistic social system was in chaos. From the tragic fall of the old order emerged a new order. The new order represented a demand for a new society through the formulation and operation of new socio-economic theories. Franklin D. Roosevelt formulated a new set of theories, because of the New Deal, and Roosevelt, a new definition of the proper role of government was developed. This role was diametrically opposite to the role of government in classical nineteenth century liberalism.

Our system of government has formulated the means for the gradual transformation and evolution of our society. The President is to create, the Congress to approve, the Supreme Court to insure
that the transformation is gradual and in keeping with the fundamental democratic precepts on which our Constitution rests. During the late 1920's and throughout the 1930's, this system of gradual change malfunctioned. The Justices, who were products of and advocates for the old order, by virtue of their life tenure on the Court, insisted upon the adherence to the old doctrines of nineteenth century liberalism, now thought of as conservative in comparison to the new twentieth century liberalism of the New Deal. Since his election in 1932, Roosevelt, because of the tenacity of the Justices to continue to live or fail to retire, was denied the habitual privilege of appointing new members to the Supreme Court. This denial prohibited Roosevelt from instilling within this final legal tribunal the catalyst for change that new appointees would be. The Justices on the Court were outliving the socio-economic doctrines acquired in their youth.

The anomaly in the evolution of our society was to be rectified by the Court Plan. The Court Plan was designed to allow Roosevelt to force a long-awaited change in the Court's ideological outlook. The purpose of this chapter is to examine the judicial opinions and socio-economic beliefs of the nine men Roosevelt labeled as "the only obstacles in the path of social progress." Through our exposition and analysis of the Justices' biographical data, as it relates to the development of their socio-economic views, we will examine the validity of Roosevelt's statement on January 24, 1936 that;
....the objective of the Court's purpose was to make reasonableness in passing legislation a matter to be settled not by the views of the elected Senate and House of Representatives, and not by the view of an elected President but rather by the private, social philosophy of a majority of nine appointed members of the Supreme Court itself.

Roosevelt's attack on the Supreme Court was not the result of an affront to any love of power held by Roosevelt, rather the Plan was formulated in recognition of a situation in which a judicial tribunal insisted upon giving legal sanction to the socio-economic theories of a small majority of its members. The Court crisis must be regarded beyond the simple tenets that attribute the crisis as an expression of personal animosities between Roosevelt and the Supreme Court Justices. Our analysis will illustrate that the continued expression of the personal theories of the Justices, developed into an institutional conflict. The Court Plan was an action by the current liberal spokesman to repudiate the doctrines of the guardians of the old order.

We will offer evidence to support our contention that the Justices transformed their personal beliefs into institutional beliefs. Our contention will be that "judicial decisions are not brought about by Constitutional storks, but are from out of the travail of economic circumstance." We will provide an examination of the Justices travail of economic circumstance to explain the opposition of the Justices to the New Deal. The existence of divergent socio-economic theories will be seen,
and the development of the Court Plan as an outcome of a four year ideological battle between Roosevelt and the Court will become evident. Our task is to explore the judicial beliefs and backgrounds of the Justices, who were members of the Supreme Court in 1937, to demonstrate both the reality and intensity of the Justices ideological opposition to the New Deal. This chapter will serve to explain the development and existence of a theoretical debate which Roosevelt attempted to win in 1937 with the proposal of the Court Reorganization Plan.

Chief Justice Hughes

Chief Justice Charles Evans Hughes was once described, by his biographer Samuel Hendel, as "a great liberal, concerned with the preservation and extension of public rights against special privilege." He has also been described, by Alpheus T. Mason as an arch-conservative "who proved himself a particularly fertile source of restrictive interpretation, an imaginative adapter of old dogma to serve as a sword against the rising popular demand for effective government." The descriptions rest at opposite poles, yet each represents a valid assessment of Hughes' legal career. It would seem that Hughes' legal opinions should be consistent enough to support the validity of only one description. Amid the confusion and ambiguity, the answer can be perceived. A close examination of Hughes' judicial decisions would indicate that pre-New Deal and a majority of New Deal opinions support the liberal designation. The confusion arises
when Hughes participates in several opinions which invalidated New Deal programs and were thus considered as conservative. It is our belief that Hughes' participation in these decisions occurred mainly because of his attempt to forge an image of Supreme Court solidarity, he therefore voted with the conservative majority for majority sake. Hughes voted with the majority for majority sake only during the period of time when the Court was under heavy criticism for its decisions. It was the few conservative opinions, that Hughes entered into for political reasons, that have earned Hughes the rather derogatory conservative title.

Hughes' childhood development was guided by the strict religious zeal of his father and mother. Hughes' father was a Baptist preacher, his mother was also devoutly Baptist. Together they shaped, instructed, and directed their only child. During his childhood, his father moved the family from town to town, from congregation to congregation. Hughes' father was well liked by all the parishioners, accepting offers to move to new congregations only after he thought that he had served his usefulness to his present flock. The effects of a Baptist upbringing, steeped in morality and emphasizing the importance of education, are probably responsible for the creation of Charles Evans Hughes; child prodigy.

Having studied Greek at the early age of eight, Hughes decided to pursue a career in Law when he was sixteen, a junior in college. Hughes matriculated at the Columbia School of Law when he was twenty, in 1882. Upon graduation he taught for a brief
Hughes became involved with the New York State government's investigations into gas and insurance monopolies and frauds during the late 1890's. In the course of the investigations, Hughes proved himself both an able attorney and a zealous campaigner against concerns which he felt violated the public good. Hughes was elected Governor of the State of New York in 1906, during his term of office, he led the way for state workmen's compensation insurance. He also worked for successful adoption of anti-child labor laws. The Hughes' administration established regulatory agencies which controlled public utility rates and activities. It is important to note that Hughes' actions as Governor began to move the function of government beyond the nineteenth century concepts of laissez-faire economic liberalism, into the twentieth century liberalism of governmental action and protection for and over the governed. The same ideological foundations that the New Deal was built upon. Hughes, however, still retained some of his classical liberalism ideals. His advocacy against the Federal income tax amendment to the Constitution, and his fear of too much Federal and executive authority, or examples of this retention. Hughes would later support the Supreme Court's assumption of power to settle all Constitutional questions as a check on growing Federal authority.

Hughes' effective leadership as Governor, and his political prowess within the Republican party won him a seat on the Supreme Court on October 10, 1910. Between the years of 1910 and 1916, Hughes wrote and participated in a number of opinions which set forth his socio-economic beliefs. In 1916, Hughes resigned from the Court to run as the Republican candidate for presidency of the
United States against Woodrow Wilson, although Hughes lost by a significant margin, the event serves to exemplify his political aspirations.

Hughes' early Supreme Court decisions show the formulation of a rather liberal judicial mind. In the case of Miller v. Wilson, 235 U.S. 375 (1915) Hughes supported a California law which forbade employment of women in selected establishments for more than eight hours a day. Hughes cited the need to enforce the equal protection of laws for women in this case. Speaking further for laws which upheld the public interest, Hughes found invalidate a state law which authorized intrastate rail carriers to provide sleeping cars for whites only. Hughes held, in McCabe v. Atkinson, Topeka, and Santa Fe Railroad, 235 U.S. 151 (1914), that this type of law was a denial of equal protection of laws. These two cases serve to exemplify Hughes' position and belief in the protection of the public good. In these cases that protection included limiting hours of work for women and providing equal accommodations for both races on railroad sleeping cars. The important consideration in both of the opinions is that Hughes recognized, and supported, governmental action to cure existing ills in society's economic structure. Hughes furthered his belief in the use of governmental authority to solve private business problems in, Baltimore and Pacific Railroad v. Interstate Commerce Commission, 221 U.S. 612. In this case, decided in 1911, Hughes voted with the Court to uphold Congressional power to regulate the hours of railroad employees. In the Minnesota Rate case, 230 U.S. 352 (1913) and in Houston East and West Texas
Railway Company v U.S., 234 U.S. 342 (1914), Hughes voted to uphold the validity of Congressional regulation of railway rates. In this case the issue was raised of whether or not Federal authority could be exercised in establishing interstate rail rates, so that order could be brought about in a generally chaotic field. Hughes stated that, "the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the comingling of interstate and intrastate operations." It was Hughes' contention that the power of Congress to control interstate commerce was supreme. Both the Baltimore and Pacific Railroad case and the Houston East and West case offer a firm indication by Hughes of his belief in and support of the use of Federal governmental power to cure socio/economic ills. Both decisions gave broad interpretation to the powers given to Congress under the interstate commerce clause. Both decisions acknowledge the propriety of Federal action in this area, and also acknowledge that Congress has the overriding and supreme power to regulate and control interstate commerce. The distinction between intrastate and interstate commerce has been left undefined; however, Hughes has held that where the two are closely intertwined, interstate characteristics override intrastate characteristics of trade.

These opinions represent fairly liberal interpretations of the commerce clause in the Constitution, as well as a progressive viewpoint regarding the use of Federal authority where conditions deemed it necessary. The opinions would seem to lay a firm foundation for further liberal interpretation, and for the con-
continued expression of what may be considered as liberal viewpoints in a twentieth century sense. Hughes, during the 1930's, became susceptible to abandoning these modern liberal ideologies for more restrictive ideologies, when he became concerned over increasing Federal power. The opinions constitute a definite minority of the total number of opinions that Hughes wrote.

In *Panama Refining Company v Ryan*, 293 U.S. 388 (1935) Hughes wrote the majority opinion for the Court which invalidated, on the grounds of improper delegation of power to the executive, Section 9(c) of the National Industrial Recovery Act. Section 9(c) had given President Franklin D. Roosevelt the power to prohibit the interstate transportation of oil produced in excess of state-fixed quotas. The decision came from a six to three divided Supreme Court. The decision exemplifies a narrow shift in Hughes' public juridical thought. Hughes had previously given Congress broad powers in dealing with interstate commerce concerns. Now Hughes stated that the delegation, to the President, of the power to enforce agreed upon state quotas for the production and interstate sale of oil, was unconstitutional. It should be noted that during his term of office as Governor of New York, Hughes was highly supportive of public regulatory commissions. It could be inferred that Hughes' governmental ideologies allowed for the delegation of power, away from the executive by the legislative, to commissions with partial autonomy from the executive. This theory is further substantiated by Hughes' concern with the increasing amount of Federal authority during the drive for an income tax amendment in the early 1900's. The decision must be questioned, however, in light of the fact that section 9(c) of
the N.I.R.A. gave the President the power to enforce only state-fixed quotas of oil production in regard to inter-state commerce. Control over such commerce had been referred to by Hughes as a "supreme" power in early decisions.

Hughes returned to his more liberal inclinations in Railroad Retirement Board v. Alton Railroad Company, 295 U.S. 330 and in Carter v. Carter Coal Company 298 U.S. 238. In both cases, Hughes dissented with the five to four majority of the Court. In the Railroad Retirement Board case, he held that a statute which provided pensions for railroad employees was valid, and in the Carter case he held the wage and price provisions of the Guffey Coal Act valid. In both cases Hughes sought to maintain Congressional power to regulate interstate commerce. The five member majority of the court sought to limit the Congressional interstate commerce power.

Hughes expounded upon his limited construction of what constituted proper delegation of power to the executive branch of government, and utilized a somewhat narrow interpretation of the commerce clause, in holding the code-making provisions of the N.I.R.A. invalid, in the case of United States v. Schechter Poultry Corporation, 295 U.S. 495 (1935). The Schechter decision, written by Hughes, was handed down by a unanimous Court. The unanimity of the Court tends to infer that it was the nature of the N.I.R.A. as a whole, rather than a shift in the Chief Justices' stand which brought about the decision. The decision established definite limits to governmental activity in the private business sector. Hughes, who was afraid of too much Federal control,
expressed his opinion that the N.I.R.A., if validated, would be the basis for a completely centralized Federally run economy.

It was in the A.A.A. decision (made during a time of public condemnation of the Court, and of accusations by F.D.R. charging the five man conservative majority with violating the expressed will of the American people) that inconsistencies in Hughes' judicial stances can be seen. In United States v. Butler 297 U.S. 1, the Court invalidated the Agricultural Adjustment Act on the ground that it regulated matters reserved to the states by the Tenth Amendment. The Court's opinion was written by Justice Roberts. Justices Stone, Cardozo, and Brandeis dissented. Hughes' actions seem to substantiate the contention that he acted to protect the Court - politically - by voting with the conservative majority in order to create an illusion of Court solidarity. Another five to four decision, especially on such an important issue, might have seriously undermined the Court's reputation and would possibly have alienated many of the few remaining Court supporters. Hughes delegated the responsibility for writing the opinion to Justice Roberts. Roberts was the most moderate of the conservatives, and it can be asserted that Hughes chose the Justice in hope that an opinion written by him would be less severe, and not as far reaching as an opinion from either McReynolds, Butler, Van Devanter, or Sutherland. Thus, Hughes hoped for an illusion of solidarity while trying to insure moderation in the conservative majority's opinions.

Hughes voted, for solidarity sake, with the five man conservative majority in Jones v. Securities and Exchange Commission, 298 U.S.1.
The decision, written by Sutherland and dissented to by Cardozo, Brandeis, and Stone, did little but scold the S.E.C. for not allowing the plaintiff to withdraw an improper registration certificate in order to escape punitive actions by the S.E.C. Since the validity of the Securities and Exchange Act was not questioned, the decision was of little intrinsic importance. It can be stated that Hughes voted with the majority for political reasons. Our inference being that Hughes voted with the conservatives for solidarity sake.

The conclusion, that Hughes joined the conservative forces for political expediency, is supported by the fact that the A.A.A. ruling and the S.E.C. ruling are inconsistent with almost all of the other rulings Hughes wrote or voted for. The broad powers that Hughes had voted against giving Congress in the A.A.A. decision, were powers Hughes had expressed as valid in other decisions. In the case of Home Building and Loan Ass'n. v. Blaisdell 290 U.S. 398(1934), Hughes had stated "while emergency does not create power, emergency may furnish the occasional use of power." Hughes had voted in the A.A.A. case, that even in the face of a severe crisis, the Federal government lacked the power to take appropriate steps to deal with the crisis. Hughes had expressed, throughout his legal career, the idea that the government did have the power to intervene in private business concerns in order to cure inequities in the economic system.

The conclusion is further substantiated in National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1937) where Hughes declared valid the Wagner Act. Hughes wrote
the opinion for the five to four majority. In the decision, Hughes gave a liberal interpretation to what would affect inter­
state commerce. Hughes found that "the fact remains that the stoppage of those operations (production of steel) would have a
most serious effect upon interstate commerce." He further held that in view of the corporation's diverse and wide spread activities, a close relationship existed between manufacturing and interstate commerce. Hughes later agreed to the opinions in Steward Machine Co. v. Davis 301 U.S. 548(1937) and Helvering V. Davis, 301 U.S. 619(1937), which upheld the Social Security Law.

In the final analysis, it can be said that Hughes was of liberal judicial instincts, and the rule to his judicial thinking was broad interpretation of legislative powers. He balked at the delegation of broad powers by the legislature to the executive. Throughout his life Hughes had been associated with the ideology of the New Deal: as Governor of New York, he created regulatory agencies which began to protect the public good almost forty years before Roosevelt directed the Federal government towards such pur­
suits. Hughes was a great liberal a majority of the time - Hughes was also a politician. He was a Presidential nominee, and Governor of the then most important state in the Union. When his Supreme Court was under attack, he bent to political expediency. The A.A.A. deci­
sion must be viewed as part of the political defense Hughes formulated to protect his domain from the vigorous attack of President Roosevelt. We can conclude that in a judicial sense, Hughes was by nature a liberal, however, in a political sense and because of political necessity, Hughes was by politics a conservative.

Unlike those of Chief Justice Hughes the opinions of the four
conservative members of the Court remained consistent throughout their tenure on the Court. The opinions of the conservative Justices are clearly expressions of the Justices' personal socio-economic beliefs. The conservative socio/economic beliefs were created through the travail and circumstance of the Justices' childhood development. All of the four conservative Justices, McReynolds, Van Devanter, Butler and Sutherland were brought up in socio/economic conditions which instilled within them the firm ideals of rugged individualism. All four believed in a restrictive form of Government, and in the notion that any person could, and should, be able to provide and care for themselves. It was this concept that would work to invalidate the New Deal program. It was these traditional, individualistic notions which would collide head-on with the progressive ideologies encompassed in the New Deal which provided for the masses.

**Justice Sutherland**

Justice Sutherland is the one best example of how the adverse circumstances of youth affected the development of personal socio-economic philosophies. In 1864, when he was only two, Sutherland was brought to the frontier Utah territory from his Buckinghamshire, England home. His father was connected with the Church of Jesus Christ Latter-Day Saints. Soon after his arrival in Utah territory, Sutherland's father moved the family to Montana where prospecting for minerals was supposed to be better. The Sutherlands quickly moved back to Utah, where Sutherland's father drifted from job to job, finally becoming improvident when Sutherland was twelve. Sutherland worked at various jobs in order to support his family and himself. He managed to save enough money to finance an
education at what is today, Brigham Young University.

At Brigham Young, Sutherland began to receive formal guidance in the development of his personal socio/economic views. Sutherland's studies were influenced heavily by the teachings and writings of Herbert Spencer. Through his admiration of Spencer's writings, Sutherland formulated rigid ideas about individual rights and the rights of private property. The concept of rugged individualism was steeped in Sutherland. By the end of his studies at Brigham Young Sutherland had formed an outward contempt for those who could not meet the challenge and survive in the austere American Frontier. The beliefs that Sutherland developed during this period would cause him to applaud the Mormon Church's refusal to allow its followers to accept welfare payments.

Sutherland attended the University of Michigan's School of Law in 1883. Here Sutherland was further versed in ideologies of individual rights and the supremacy of the rights of private property. He had come to believe in the Constitution as a divinely inspired document, whose purpose was to limit the powers of Government. Sutherland studied at the University for less than one year. He returned to his native Utah and became a financial success through his practice of law. When the Utah territory became a state, Sutherland was elected as a Republican representative to the State's legislature. In 1922, by virtue of his political activities, Sutherland was nominated to the Supreme Court by President Harding. Sutherland had been Harding's chief campaign strategist; it was Sutherland who convinced the Presidential hopeful to conduct his front porch campaign. Over bitter objection
from some Senators, Sutherland won confirmation and began what would be sixteen years of conservative opinion writing on the Supreme Bench of our land.27

One of the most important decisions that Sutherland participated in was Adkins v. Children's Hospital 261 U.S. 525(1923). This case struck out early governmental attempts at wage regulation. The Court ruled that "...Freedom of contract is, nevertheless, the general rule and restraint the exception: and the exercise of legislative authority to abridge it can be justified only on the existence of exceptional circumstances."28 Sutherland would never see the existence of exceptional circumstances even during the most severe years of our country's economic depression. Sutherland's experiences as a child may well have precipitated the formulation of this philosophy. During what may be called exceptionally unusual circumstances of his childhood, no one had offered him and his family help, no one had thought it to be the proper function of Government to provide such help.

The case of Home Building and Loan Ass'n. v. Blaisdell, 290 U.S. 398(1934), exemplifies Sutherland's lack of sympathy for those caught in economic travail. The Court ruled that, in time of emergency, the State of Minnesota could postpone the due dates of mortgage payments.29 Sutherland protested in vigorous dissent, stating that emergency conditions did not abrogate the Constitutional principle of liberty of contract.30 He noted that during the formulation of the Constitution, conditions of financial distress had necessitated the insertion of the liberty of contract clause.31 Sutherland's dissent shows the effect of the teachings of Herbert
Spencer, and the effects of his belief in the divine inspiration which created the Constitution. Sutherland paid little attention to the severe social conditions of the times. Perhaps the contempt that he harbored as a child, for those who could not meet the challenge of the American frontier, was being expressed again. In any event, Sutherland voted—in the A.A.A., N.I.R.A., N.R.A., N.L.R.B., and the Social Securities cases—to outlaw any legislation which sought to provide for the welfare of the American people.

Sutherland provoked the wrath of President Roosevelt when he spoke for the defense of the separation of powers doctrine in Humphrey's Executor v. U.S. 295 U.S. 602 (1935). In this case, Roosevelt had attempted to fire an administrator of an independent agency. Sutherland viewed this as an unlawful abuse of executive power. Sutherland was able to persuade the moderate Justice Roberts in order to secure a five to four majority in favor of his view.32

Sutherland's opinions were consistent. His socio/economic views were firmly grounded in the doctrines taught to him and supported through the experiences of his youth. Sutherland's views not only transcended into his judicial thinking, they dominated his judicial opinions. Sutherland was aptly called the spokesman for an old economic order of classical liberalism. This was the economic order that he was forced to confront, and successfully mastered as a child in the rugged frontier of the Utah territory. Sutherland would answer to and defend the socio-economic concepts of strict laissez-faire, even in face of a national crisis that demanded governmental intervention into the previously considered private spheres of society.
Justice Butler

Pierce Butler, one of the staunchest conservatives to sit on the Supreme Court during the 1930s, was born in 1866 in the frontier state of Minnesota. Butler was one of eight children, and grew up in a household dominated by a very stern and very religious Irish Catholic father. Butler, like Sutherland, was forced to earn his own way in life at an early age. When he was fifteen, Butler taught school earning enough money to finance his college education. Through the travail of economic circumstance, Butler was instilled with the same sense of rugged individualism that Sutherland had adopted, and both would use this concept in the formulation of their legal decisions. Butler's belief in the notions of rugged individualism came from his austere frontier life. Butler had been forced to "make-it" on his own, he believed that others should also provide for themselves without the help or hindrance of governmental intervention. Butler formulated a very set, very conservative outlook on life. This philosophy of life was given further solidification through his educational process.

Butler attended Carleton College in 1883, working on a neighboring dairy farm to pay his college bills. Between the early morning, and the late afternoon milkings, Butler managed to become an avid reader of Cooley. Cooley's work, Constitutional Limitations, found an especially receptive audience in the mind of young Butler. Cooley espoused the virtues of economic liberalism. His works gave support to the positive value of limited government. Butler was extremely receptive to Cooley's ideologies and quickly adapted them as his own. It can be said that Butler's childhood
experiences on the frontier had shaped and molded his philosoph­
ical perceptions to such an extent, that the ideologies espoused by
Cooley were adopted because of their similarity with his own.

Upon graduation from Carleton (incidentally, at Carleton
Butler failed a course in Constitutional Law) Butler packed his
bags and moved to St. Paul. In St. Paul, Butler read law at a
local firm and was admitted to the Minnesota bar in 1888. Upon
gaining admission into the bar, he established his own private
practice. In five years, Butler's practice had become successful
and well established. Butler found success in specializing in
railway matters, and would soon become the West's foremost rail­
road advocate. Butler's main goal, while representing railway con­
cerns, was to save his clients money, and in this pursuit Butler
is said to have excelled. Butler's representation of the rail­
roads during their expansionistic heyday serves to give an in­
dication of what type of person he was. During this period,
railroads were pushing their way west, claiming land, making
enormous profits, and victimizing many innocent people in their
scramble for corporation supremacy. Butler made his living repre­
senting and defending these corporation interests. Surely it can
be assumed that Butler approved of his clients' activities, and
could do well in justifying them to others, and himself, as
necessary evils in a world of economic Darwinism.

Butler's success as a railroad advocate drew the attention of
Attorney General George Wickersham. Wickersham was the Attorney
General for the Taft administration. He was fond of recruiting
conservative lawyers to carry out the prosecution of the Government's anti-trust cases. Butler's career as a trust buster was relatively unspectacular. In fact, as critics charged, Butler acted with what could be termed half-heartedness in his pursuit of busting-up the large corporate concerns that he had previously advocated for in his private practice.

For various political reasons, including considerations of religion and geography, Butler was nominated to the position of Supreme Court Justice by President Harding in 1923. Taft, who was now Chief Justice of the Supreme Court, actively campaigned for Butler's nomination. The nomination of Butler to the Supreme Court caused a minor uproar in the Senate. Leading the bitter protest against the nomination were Senators Norris, Shipstead, and LaFollette. To these three influential leaders Butler was an "impossible reactionary." Two main issues highlighted the debate of whether or not to ratify the Butler nomination. The issues were Butler's ties with big business and his participation in the firing of several University of Minnesota faculty members.

As a member of the University's Board of Regents, Butler used all of his persuasive powers to have a number of faculty members dismissed from their posts. Butler's motivation for the dismissals was well known, and serves to exemplify the incredibly strong willed personality of Butler. The crime that the faculty members had committed was crossing the vengeful ego of Butler. The faculty members had spoken out against various activities that were being carried out by the corporate interests which backed Butler. Butler used his position as a regent to silence those
who spoke against his clients. The University later rehired most of the faculty, however, the Senate leaders used the incident to substantiate their claims that Butler was an unyielding conservative reactionary, who would use the Court to further the interests of large corporations.

The issue of Butler's ties with big business, probably helped rather than hurt his ratification. Big business carried out an extensive lobbying campaign for Butler. When the 64 - 8 vote for ratification of Butler was announced on January 2, 1923, big business applauded. Presumably pressure exerted by the large financial concerns had a beneficial effect on the outcome of the vote.

As an Associate Justice, Butler continued to represent big business interests. Butler's belief in the principals of laissez-faire is clearly seen in his opinion in the case of Euclid v. Ambler 272 U.S. 365 (1926). Butler argued, in dissent, against all types of zoning laws. He stated his belief that there should exist no controls over the expansion of business in any field of economic endeavor. Butler wrote several emotional anti-tax opinions where he further enunciated his belief in the concepts of laissez-fairism (see, Metler v. Standard Nut Margarine Company 284 U.S. 489, 1923). Butler argued adamantly against State and Federal taxes, using a varied number pretexts to vote against tax laws. His stand on the power of the government to lay and collect taxes further exemplifies his belief that the Constitution sought to insure the existence of a restrained central government.

On racial issues, Butler remained in the reactionary camp.
Even in the relatively unenlightened civil rights days of the 30's, Butler's opinions are highly conservative, almost backward. In the famous Scottsboro case of Powell v. Alabama 287 U.S. 45(1932) Butler refused to recognize the existence of racial prejudice in the trial of several blacks by a white jury. Seven of the Supreme Court Justices clearly saw the existence of racial prejudice in the trial proceedings and ordered a new trial for the accused. Butler also voted to uphold a Texas "white only" primary law. Stating that political parties were merely private clubs, Butler voted in dissent to the Court's invalidation of such laws in Nixon v. Condon 286 U.S. 73(1932).

Butler wrote few of the New Deal opinions; however, he did participate in almost all of the Court's opinions written during the New Deal era. Butler consistently voted against Roosevelt administration New Deal legislation. His famous New Deal opinion was given in Morehead v. New York ex rel Tipaldo 298 U.S. 887(1937). This opinion invalidated New York's minimum wage laws and would be the last piece of New Deal legislation to be declared entirely invalid by the Supreme Court. The Morehead case furthered previous Court rulings which had found it improper for the federal government to establish minimum wages (see, Carter v. Carter Coal 298 U.S. 238). The Court would now, under Butler's leadership, declare it improper, even in the face of severe economic turmoil, for a state government to establish or maintain minimum wages.

In the Morehead opinion, Butler's laissez-faire ideologies are made extremely clear. Butler held that the due process clause of the fourteenth amendment prohibited the regulation of wages
for men and women. Butler's reasoning, in this decision, was greatly influenced by his personal upbringing and the values attained through his youth. The concepts of rugged individualism, impressed upon him during his youth, and the notions of a restrained government, taught to him during his formal educational years, prohibited him from allowing either a state or federal government to formulate financial safeguards for their citizens. In this respect, Butler is perhaps the best example of a New Deal Justice facilitating his own socio-economic viewpoints to control and limit the governing power of the national government. Butler's conservative philosophies not only transcended into his judicial opinions, his reactionary philosophies dominated his judicial thought.

Butler's donkey-like nature, and his consistent attempts to invalidate all New Deal legislation, made him the backbone of the conservative forces on the Court. His 'tortured' narrow interpretation of the Constitution prompted one critic, David Burner, author of The Politics of Provincialism, to comment, "Butler's words certainly quickened their (the Roosevelt forces) efforts to adopt some expedient that would prevent judicial nullification of Congressional legislation." Clearly, the Court Reorganization Plan was such an attempt to negate the conservative effect of men like Butler.

Justice Van Devanter

Like Sutherland and Butler, Willis Van Devanter was born and raised on the western frontier. Like his conservative counterparts, Van Devanter was also faced with economic hardship as a child. He would become imbued with the same sense of rugged individualism that would later place him among the Court's conservative faction.
Van Devanter was born on April 17, 1859 in Marion, Indiana. He attended the Marion public school system and later attended Asbury University (now De Pauw). Van Devanter was forced to finance his own university education when his father became seriously ill and stopped being the family's main provider.

Van Devanter successfully worked his way through college and in 1881, he attended the University of Cincinnati School of Law, where he graduated second in his class. After a brief period of time practicing law in his father's firm, Van Devanter moved, with his father's old law partner John Lacey, to Cheyenne, Wyoming. Lacey had been appointed to the position of Chief Justice of the Wyoming territorial Supreme Court. Van Devanter's move to Cheyenne, and his reliance on Lacey, are examples of two of Van Devanter's personality traits: his preference for the "raw, boisterous" life of the frontier and the importance that he placed upon the presence of a friend in power to help further his own career interests.

Settling in Wyoming, Van Devanter started a partially successful private law practice. He is said to have represented an assortment of clients charged with crimes of an equally varied nature. Van Devanter continued his private practice for almost three years, when he joined the Republican law firm of Charles Potter. The firm's major client was the Burlington Railroad Company, and so, like the two other conservative Justices of the Supreme Court, Van Devanter was destined to join the ranks of those who represented the interests of large corporations.

In 1885, Van Devanter became the right hand man for Francis
Warren who successfully ran for the Wyoming territorial governorship. During the campaign for Warren, Van Devanter proved himself an imaginative, if not devious politician. He was involved in several rather underhanded political incidents. Van Devanter is credited as having been responsible for the creation of the events.\textsuperscript{53} Van Devanter's political history serves to show that he was a man who was politically astute and, in what may be a foreshadowing of actions while on the bench, he was not above reverting to political underhandedness to save his cause.

Van Devanter used accumulated authority, acquired through his association with Warren, to further the interests of railroad clients. In 1893, a number of striking Idaho railroad workers made use of a company locomotive to carry themselves to Wyoming. Van Devanter used his political and legal skills to have the strikers thrown in jail when they crossed the Wyoming territorial lines.\textsuperscript{54} Van Devanter's unsympathetic attitude towards strikers (including their causes and methods) would be repeatedly expressed when Van Devanter became a Justice on the United States Supreme Court.

Van Devanter's support for Warren paid off in the form of an appointment in 1889 as Chief Justice of Wyoming's territorial Supreme Court.\textsuperscript{55} The job of Chief Justice, as Van Devanter soon found, was not as grand or glorious as the title had suggested. Van Devanter was paid a relatively low salary, and was required to ride all sections of the expansive territory to preside over local, mostly petty, disputes. As a result, in 1890 when Wyoming became a state, Van Devanter returned to private practice. His practice turned lucrative when he became the legal representative for the Union Pacific Railroad. Van Devanter would represent
this company in virtually all of its litigation, and would also defend the company against the federal government, when the government leveled serious charges of fraudulent land claims against the Union Pacific.  

Van Devanter’s ties with the Republican Party brought him further political rewards in 1897 when he was appointed Assistant Attorney General for the Department of the Interior. During his tenure with the Department of the Interior, Van Devanter developed what would become a life long specialty of handling land claim disputes. It may be ironic that after seven extremely profitable years of representing the Union Pacific, with its fraudulent land claims and aggressive land acquisition tactics, Van Devanter now saw, and was forced to protect, those who were bring victimized by large corporations like the Union Pacific. Upon seeing the effects of such activities on the victims, Van Devanter developed a semblance of sympathy for Indians and other minority groups.

In the early 1900’s, owing again to his political connections, Van Devanter was appointed as Judge of the 8th Circuit Court. As a circuit court judge, Van Devanter’s legal opinions were conservative and are said to have "rarely reflected the social consciousness" that had enveloped the rather progressive era. In, Portland Gold Mining Company v. Duke 164 Fed 180(8th Cir.,1908) Van Devanter reversed established precedent on the issue of injuries sustained by employees of a company through no fault of the employee. Van Devanter stated that in his opinion that he
believed it to be

a settled rule, as between Master and Servant, the duty of so using a reasonably safe place, of so operating reasonably safe equipment, and of so conforming to any established and reasonably safe practice of work, that injury will not be inflicted negligently, it is the duty of those to whom the work is entrusted, and is no positive duty of the master.68

This opinion is representative of Van Devanter's socio-economic thought. His beliefs as to the proper relationship of employer versus employee, and the rights that employees had against the actions of their employers, were based upon the economic notions of an earlier day. Van Devanter would continue to express such conservative opinions throughout his legal career. It would be the nineteenth century ideologies, regarding the rights of the employed, which would clash so bitterly with what the reactionary Justices believed to be the radical ideologies of the New Deal.

In December of 1910, President Taft nominated Van Devanter to a place on the United States Supreme Court. Van Devanter had two powerful supporters, ex-Senator Warren and the one-time legal counselor for the Carnegie Steel Corporation, Senator Knox. Van Devanter's nomination was opposed by several progressive Senators, including Senator William Jennings Bryan. Bryan described the nominee as:

the Judge that held that two railroads running parallel to each other for two thousand miles were not competing lines, one of the railroads being the Union Pacific.61

Such objections created but ripples against the wave of Senatorial acceptance of the nomination. As one author wrote, "the political, railroad, and judicial interests of the nominee stood him in good stead, and he (Van Devanter) was quickly confirmed."62
In his early years on the Court, Van Devanter delivered several broad interpretations of the commerce clause. In the Second Employers Liability Case 223 U.S. 1(1912), Van Devanter stated his belief that Congress could control almost every phase of carrier-employee relationships. This meant that in 1912, Van Devanter permitted Congress to control all aspects of employment (including working conditions, length of hours, minimum wages) for those employed by companies involved in inter-state transportation, Roosevelt was prohibited by Van Devanter in 1935 to further use those powers. Van Devanter wrote in this opinion:

Commerce is an act. It is performed by men, and with the help of things...Congress can do anything...(with discretion) to save the act of interstate commerce from prevention or intervention or interruption, or to make that act more secure, more reliable or more efficient. 63

Here Van Devanter set forth a broad interpretation of the powers given to Congress through the commerce clause. In Southern Railroad Company v. U.S. 220 U.S. 20(1911) Van Devanter reaffirmed this broad interpretation of commerce clause powers. Van Devanter stated in part, "commerce comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches."64 It was therefore within the powers given to Congress by the Constitution, to control all commercial intercourse and all aspects or parts involved in that commerce. Van Devanter further stated that commerce was, by its intrinsic nature, of national concern, and therefore needed national control (see Mayor of Vidalia v. McNeely 274 U.S. 676, 1931).

These decisions were reached at what could be termed the height of Van Devanter's intellectual capabilities. In 1935,
during the Court's most controversial period, Van Devanter was seventy-six years old, a point that many consider as past his personal intellectual prime. Van Devanter would probably have resigned in the early 1930's if not for Roosevelt's election in 1932. Van Devanter considered the President as "rash" and became determined to remain on the Court to counter F.D.R.'s actions. Perhaps the fact that Van Devanter had passed his intellectual prime, coupled with his belief that Roosevelt was a menace to the traditional American economic order, led to the aged Justices prohibition of extending earlier progressive judicial opinions to include the operation of New Deal Programs.

Van Devanter, while he did not write any of the Supreme Court opinions which decided New Deal cases, always voted against legislation which was liberal in the twentieth century sense. Van Devanter's votes against the A.A.A., Gold Clauses, and Frazie-Lenke are understandable considering his economic views and past legal decisions. His votes against the N.R.A. and the Guffey Coal and Wagner Acts (which contained clauses which sought to control aspects of industries involved in interstate commerce) are reversals of previous judicial decisions. In the last three cases, Congress sought to accomplish ends that Van Devanter had to some extent previously sanctioned in the Southern Railroad case, the Mayor of Vidalia case and the Second Employers Liability cases.

Van Devanter's invalidation of the New Deal must be attributed to old age and his intense personal dislike of Roosevelt. In his last years on the Court, Van Devanter became known as the silent reactionary. He established himself as the
obstacle on Roosevelt's path to social progress. Roosevelt in
turn responded to Van Devanter's efforts to invalidate the New
Deal. He did not attack the Court as an institution but attacked
Van Devanter's opinions. The Court Reorganization Plan was
Roosevelt's attempt to remove the silent, conservative, reaction­
ary from his path.

Justice McReynolds

One Justice, on the Supreme Court in 1937, was the best ex­
ample of a conservative reactionary. This one Justice would always
vote to invalidate New Deal legislation. This Justice holds the
distinction of being the most abrasive, tenacious, hateful con­
servative to sit on the Supreme Court during the New Deal era. This
Justice was James Clark McReynolds.

McReynolds' economic philosophy clearly dominated his juristic
opinions. Our task is made easier in that we only have to identify
these opinions, and trace their development. Representative opin­
ions of the few New Deal decisions that he wrote substantiate the
assertion that he was a conservative, and relied solely on his
private economic and moral beliefs in formulating all of his opinions.

Born in 1862, in Elizabethton, Kentucky, where there remained lingering
traces of a frontier quickly expanded and where there also existed
lingering sympathy for the Confederate cause, McReynolds received
many gifts from his Southern upbringing. One gift was an intense
racial and religious hatred. He would never be sympathetic towards
minority rights (see Powell v. Alabama 287 U.S. 45,1932) and would
also practice his religious intolerance of the Jewish and Catholic
faiths as Justice of the Supreme Court. In the latter respect,
McReynolds refused to talk to Justices Brandeis and Cardozo because of their religious beliefs. McReynolds was a haughty, opinionated man, who would rarely change or bend his beliefs even in circumstances which necessitated a yielding of his one ideology. McReynolds' sense of self-righteousness was formulated during his early childhood. His father nicknamed him "Pope" because of his belief in his own infallibility.

McReynolds enforced his belief of his own infallibility by leading a very spartan life. He never drank, hated smoking, and rarely socialized. His life was dominated by the study of law, similar to the devotion to the study of the bible by a minister. McReynolds, in his own way, loved the law as he construed it.

McReynolds' viewpoints towards the nature of law and man were influenced by the teachings of his college Professor John B. Minor. Minor taught that law was an unchanging, totally coercive entity. Minor also taught Sunday bible classes, and seemed to be able to convey to McReynolds that his ideological doctrines were morally right and far superior than the doctrines of anyone else. Minor once said that he taught the law, he probably meant that he taught the one and only morally correct law.

McReynolds adopted Minor's viewpoints, creating a impenetrable shield of moral righteousness over his arch-conservative juristic philosophies.

McReynolds was never very successful in the practice of private law. He became a legal advisor for the Illinois railway, and thereby continued the tradition of the conservative justices representing large corporate interests. McReynolds became a
Professor of Law at Vanderbilt University in 1900. He preferred to teach law, imparting his conservative doctrines in a highly dignified manner.

McReynolds' political career was not one founded upon popular support. His one attempt at gaining public office through popular election failed. McReynolds was then elevated to public office by inside political connections. His post of Assistant Attorney General, which he assumed in 1903, was gained through the help of Jacob Dickinson, a prominent Nashville lawyer. His friendship with Colonel Edward House, and his support for Wilson in 1912 won him the post of Attorney General. As Attorney General, his tenure as a cabinet member was brief. Apparently, he was unable to get along with anyone else on the cabinet and was quietly kicked upstairs to the Supreme Court in 1914.

During his twenty years on the Court, McReynolds wrote a scant five-hundred and three opinions. The opinions that he did write almost qualify as manifestos of conservative ideology. McReynolds believed in the absolute efficacy of the Sherman anti-trust laws. The anti-trust laws represent the virtual codification of McReynolds' personal economic views. The economic world, according to McReynolds, should be free from government intervention and monopolistic domination. McReynolds believed that the government interfered with business more, and constituted a bigger threat to the free enterprise system, than did monopolies.

In Colgate v. United States 250 U.S. 300, 307(1919), McReynolds stated his belief that companies should be given the freedom to
sell to whomever, whenever, and for whatever price as they pleased. He also believed that companies should be allowed to pay, and treat, their workers as they pleased. He was adamantly opposed to unions and government regulations which protected workers. In the Arizona Employer's Liability Cases 250 U.S. 400 (1919) McReynolds wrote that injuries caused to employees were no fault of the employer.

McReynolds' most famous, or infamous, opinions were made during the New Deal era. During this era he voted against every New Deal measure, citing New Deal programs as infringements on the various rights of private individuals. In Nebbia v. New York 291 U.S. 502 (1934) McReynolds dissented with the Court's opinion, and wrote that the creation of price support systems for milk constituted an infringement upon the right of a grocer to charge as he pleased for milk. In the same opinion, McReynolds contended that the Supreme Court had the power to go beyond deciding whether or not legislation was constitutional. McReynolds stated that the Court had the power to judge the wisdom of laws, a view condemned in a later opinion by Justice Cardozo. In the Nebbia case McReynolds wrote: "Plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power."72

McReynolds attacked Roosevelt's use of power in several cases. In the Gold Clause cases, McReynolds stated that Roosevelt had deprived men of due process and had failed to give just compensation. Describing Roosevelt as "Nero in his worst form", McReynolds,
in dissent, declared that as a result of the Court's decision, in the Gold clause cases, (which upheld Congressional abrogation of the Gold Standard) that the Constitution was gone. McReynolds' opinions on New Deal legislation remained forcefully conservative. McReynolds was always unyielding, his views were solidified and would never change.

This was the man who would become furious at friends who asked him for money during the absolute depths of the depression, the man who believed in the coercive nature of law, who would enunciate, openly, his hate for New Deal doctrines and for President Roosevelt. It was the personality of the man, strong and abrasive, that won him infamy. His hatred of Roosevelt was returned by the President. In a letter to Felix Frankfurter, Roosevelt states:

> At the annual reception to the Supreme Court, I think the Chief Justice pulled a fast one on me. After he had been talking with me himself for ten minutes he got up, said he thought some other members of the Court could have a talk with me and went across the room and brought McReynolds and plumped him down. The Chief Justice has a sense of humor though few people realize it. Thank God no photographers were present.73

Again, the conflict that arose was between President Roosevelt and a specific Supreme Court Justice. McReynolds was an obstacle to Roosevelt's recovery program. Roosevelt sought to formulate a plan that would remove the obstacle, and would do so in a manner that would strike at the Justice's abrasive personality, and hopefully serve to humiliate this foe.

The ideologies of the two men were extremely different. Their personalities were perhaps as equally strong, and each sought vengeance upon the other. The result was the Court Reorganization
Plan, proposed by Roosevelt to deal definitively with the conservative opposition. The plan was devised with McReynolds in mind. McReynolds formulated a plan, while Attorney General for Wilson, to increase the number of Federal Judges, his Federal Court Reorganization Plan was aimed at removing aged Justices. The plan of McReynolds did not include provisions which would affect the Supreme Court. This plan never reached beyond the planning stage and was all but forgotten until Cummings happened across it during research for Roosevelt's Court Plan. The purpose of Roosevelt's plan was not only to remove McReynolds but to embarrass and discredit the conservative Justice.

For our purposes here we have given the label of reactionaries to the "conservative" members of the New Deal Supreme Court. The "liberal" members of the Court have been labeled progressives. Whether or not these labels are by definition correct, the point remains that, in the eyes of the New Dealers, both conservatives and liberals voted and acted in a manner which created a record consistent with the suggested meaning of their titles. As established above, the conservatives voted in all but one case to invalidate New Deal legislation. The conservatives broke ranks in the Tennessee Valley Authority case (Ashwander v. Tennessee Valley Authority 297 U.S.288) when Sutherland, Van Devanter, and Butler voted to sustain the legislation which created the T.V.A. The liberals voted to invalidate New Deal legislation in two major cases: the National Industrial Recovery Act (United States v. Schechter Poultry Corp. 295 U.S.495) and in the Richert Mills case (which held on the authority of the Butler case, which the liberals voted against, to return taxes collected
under the Agricultural Adjustment Act to the taxpayer).

Our purpose in discussing the liberal Justices is to show the development of the socio-economic thought of the Justices, and to explain how and why these philosophies differ from the socio-economic philosophies of the conservative Justices. As with our analysis of the conservatives, we must ascertain if the liberals held true to their beliefs, and if they did, did they do so in a consistent manner. We must also analyze the effect that the liberals, and their opinions, had on the formulation of the Court Reorganization Plan of 1937. We have stated that the Court Plan was formulated with the clear intention of removing, and humiliating, those Justices who had invalidated the New Deal program. The conservatives held only a slim majority on the Court. This margin was usually only one vote on most New Deal decisions. A change of one vote, or the replacement of one conservative Justice, would give a majority to the liberals. With such a slight margin, we must ponder as to whether the liberal Justices had any influence on the formulation of the Court Plan and whether the Court Plan was written in such a way as to insure the continuation of the Court's liberal membership.

Justice Brandeis

The socio-economic views of Louis D. Brandeis are perhaps more dissimilar to the philosophies of the conservative members of the New Deal Court, than the views of any other liberal Justice. While the conservative Justices rallied to the banner of law as a fixed and coercive entity, Brandeis professed a theory of law as a fluid or "living" entity. In his *Truax v. Corrigan* (257 U.S. 312, 1921) opinion, Brandeis enunciated his belief that the
Constitution should be used for social experimentation. Brandeis defined his philosophy of the proper nature of law, in the Truax opinion, when he stated, "the rights of property and liberty of the individual must be remoulded (my emphasis) from time to time to meet the changing needs of society." For Brandeis, law was an operationally useful tool for the shaping and reshaping, of society, or the social order, to insure the protection of the interests of the private individual: the common man.

Contrasted to the conservative's and to much of the business world's beliefs of the proper function of law, the ideology of Brandeis was heretical. As we have set forth, the conservatives believed in a fixed, coercive law. Their law was designed to protect and promote the concepts of rugged individualism and economic Darwinism. Brandeis promoted a theory which professed that law was the protector of the common man, law was the equalizing force among men in society.

The differences in views between Brandeis and the conservatives were, as can be clearly seen, basic ideological ones. The differences of socio-economic thought were created as a result of the circumstances of environment during the Justices' formative years. Brandeis became a man of and for society. He became the famed "People's Attorney", who worked without fee for causes he thought important to the public good. Brandeis was both a sociologist and economist who studied the ills of society and proposed solutions to those ills, solutions which would be implemented largely through the judicial system. It was Brandeis who gave legal effect to the use of data gathered by social and
economic experts in deciding the validity of laws and actions. Brandeis stated in *Truax v. Corrigan* that "consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby" must be made in order to "appreciate the evils sought to be remedied and the possible effects of the remedy proposed." Brandeis did diverge from the conservative thought which dominated the Supreme Court in the 1930's. The question that now arises is, what led to the creation of such thoughts, and, why were they so different from those held by his conservative colleagues.

The differences between the conservative and liberal members of the Supreme Court were many. The dissimilarities were the results of different considerations of geography, youthful environment, and the Justices' intellectual development. These factors affected the formulation of the Justices' socio-economic philosophies. The conservative Justices all came from areas of the nation that were considered, during their youth, as in the western regions of the nation. In these areas, the conservatives shared similar circumstances, including austere living conditions and relatively unstable home lives. The conservative Justices were products of economic travail, they were engulfed with a sense of frontierism that led to the creation of self-imbued doctrines of rugged individualism. The circumstances of their youth, and the resulting socio-economic doctrines formulated by the future Justices during this time, would dominate their juristic thought in a conservative fashion for the remainder of their lives.
From this conservative scenario steps Louis D. Brandeis. His biographical background and the development of his mind differ vastly from that of his conservative counterparts.

Brandeis was born in the same state as McReynolds, however, the similarities between the two men stop there. Parental heritage, economic circumstance, and intellectual development of the two Justices lay at opposite poles. McReynolds was born in the small, backwater town of Elkton, Kentucky. The town was still enamored with frontier spirits and confederate sympathies. Brandeis was born in Louisville, a cultural and economic center. Brandeis' father was an immigrant from Bohemia, who came to the United States with the revolutionary political group, the 48'ers. Brandeis' father was a political genius, a man of culture who harbored a restless spirit, and a man whose heritage was well versed in the struggle for freedom, and social justice for all mankind. These traits were passed along and instilled within Louis, the only child of the Brandeis' family. Throughout his youth the Brandeis homestead would play host to a vast array of talented, young, intellectuals. His father's success as a grain merchant brought stability, comfort, and culture into Louis' world.

Brandeis was schooled in Germany, he returned to the United States where he attended Harvard Law School from which he received his law degree at the age of twenty. Upon his establishment of a practice in St. Louis, Missouri, it became quite clear that Brandeis did not enter the field of law for desire of monetary gain. His
advocacy of issues which affected the public good brought him honor, he refused financial reward. Brandeis opposed the tactics and practices of the corporations that disregarded the well-being, rights or existence of the common man in the corporations mad-dash for financial wealth. Brandeis litigated against corporations like the railroads, which the conservative members of the Court earned their living protecting and defending. Brandeis' legal briefs and opinions became treatises on the proper functioning of the economy and the proper role of the government to insure the protection of the governed. As Brandeis stated in New State Ice Co. v. Liebman 285 U.S. 262, 311(1932) "there must be power in the state and the nation to remould, through experimentation, our economic practices and economic needs." Brandeis advocated for power to protect and provide, powers considered unconstitutional by the conservative Justices.

Brandeis came from moderately wealthy economic circumstance which helped provide him with a sense of culture and society. His schooling gave him international background and experience, he was, in some respects, cosmopolitan. He received from his parents a craving for social justice and liberty, a craving that he transformed into practiced philosophical beliefs founded upon a sense of economic and social justice for all mankind. His beliefs would fit within the governmental mould of the New Deal, in all but one respect. Brandeis could not sanction the creation of an all powerful government which would combine, and control, segments of the society. Brandeis advocated for a protectorate government, in the sense that government should
protect the social and economic rights of its citizens, but not a government that would form a protectorate by amassing the industrial operations of the nation.

Brandeis refused to support one piece of New Deal legislation: the National Industrial Recovery Act. His vote to invalidate this legislation exemplifies another aspect of Brandeis' socio-economic thought, his hatred of bigness. Brandeis stated, in *Quaker City Cab Co. v. Pa* 277 U.S. 389, 410-11(1928) "...that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded." Because of this ideological stand, Brandeis refused to support a New Deal program which sought to combine, protect, and strengthen the nation's business and corporate sector, although Roosevelt saw this combination as the only way to secure national economic security for his country.

After the reading of the N.I.R.A. decision, Brandeis motioned to an administration official to follow him into the disrobing room. Brandeis turned to the official and said that this decision was to serve as a signal to the administration that bigness would not be tolerated by the Court.

On the issue of bigness, Brandeis would momentarily leave the New Deal camp. To Roosevelt, the N.I.R.A. was a "must" piece of legislation. As was seen in the discussion of the Schechter decision, Roosevelt felt it necessary to continue the program in some fashion. Clearly, it was the Schechter decision which put in motion the wheels which formulated the Court Reorganization
Plan. Brandeis' vote to invalidate this piece of legislation seems to have overshadowed, in Roosevelt's eyes, his support for the New Deal. Roosevelt decided to submit to Congress, in 1937, a reorganization plan which rested solely on an "old-age-equals-incompetence" formula. The conservative Justices were, on the average, older than the liberal Justices. Justice Van Devanter was born in 1857, McReynolds and Sutherland were born in 1862. Going by Roosevelt's plan of augmenting Justices with a junior Justice when the Justices reached the age of seventy-five, Roosevelt would have been able to replace Van Devanter immediately, and would have been able to replace Sutherland and McReynolds in a year. As the oldest member of the Court was Brandeis, Roosevelt would have been able to immediately replace or augment him, and, according to the old age equals incompetence theory of the Court bill, Brandeis would have been labeled as the most incompetent, which was by far an improper and derogatory tribute to the Justice's capabilities. At the time of the Court Bill's proposal, Justice Stone was sixty-four and Justice Cardozo was sixty-six. The Court Bill, while trying to single out the conservative Justices, singled out Justice Brandeis as one of the old men who had to go. Roosevelt seemed willing to allow such inferences to be brought to bear against the Court's leading liberal, in pursuit of removing the conservative reactionaries. If the Court bill had passed Congress, and been made into law, Justices Brandeis and Van Devanter would have been immediately replaced or augmented. Roosevelt, in effect, would have been able to appoint two new Supreme Court Justices. The only way that the plan would
have been approved by Congress (more on this subject in the next chapter) would be through the continued efforts of the plan's sole Senate promoter, Joe Robinson. Robinson wanted a reward for his tireless efforts; a seat on the Supreme Court. Robinson was, in the eyes of New Dealers and Roosevelt, a conservative. Thus, Roosevelt would have conceivably had a conservative court, Robinson being a conservative. The new liberal would have balanced the Court at five to four (hoping that Roberts retained his conservative stance) or six to five. The point being that the age formula had a drawback, Roosevelt could still end up with a conservative Court after all his efforts. Roosevelt, however, had narrowed his attack on removing certain conservative Justices, regard for Brandeis, the liberal spokesman, would not alter his attack. The liberal desertion of the New Deal in the Schechter case, may have convinced Roosevelt to pursue his line of attack and hope that political necessities would not bind him to the appointment of a conservative. Roosevelt definitely felt no obligation to formulate a bill that would insure the continued membership of Brandeis on the Supreme Court.

Our model, or theory, of the conservative Supreme Court Justices (born on the western frontier, living under austere living conditions as children and representing large corporate interests during their legal careers) as obstacles to Roosevelt's recovery program and, the theory of the liberal Justices (born in more established eastern-orientated areas, their childhood...
spent in a stable and more comfortable environment, and representing the "people" during their legal careers) as a responsive force to Roosevelt's New Deal program holds true for the six Justices discussed so far. The biographical data of the seventh Justice, Harlan Fiske Stone, threatens to invalidate this model.

A review of Stone's biographical data, presents many similarities with those dates of the conservatives. Starting with his childhood environment, Stone grew up in a rural setting, as did the conservatives. The conservatives faced austere living conditions, all had to work their way through college and law school, all felt unfulfilled desires of want. Stone also grew up in less than aristocratic circumstance; he also had to work his way through college and law school. Undoubtedly, there were many occasions when Stone saw his personal wants unfulfilled because of economic circumstance. Herein ends the similarities, even these similarities, upon close inspection, are tenuous and exist only through a superficial study and simple generalization. In what becomes a question of degree, Stone's biographical data present a portrait of a man much different than either his conservative or liberal counterparts.

Harlan Fiske Stone was born in the year 1872 on a farm in rural Vermont. The farm life of Stone's childhood days is remembered by Stone in a storybook fashion. Long summer days spent fishing with the town doctor, hard work doing the chores on the family's farm, and memories of close association with a loving extended family, are all examples of this storybook youth. Economically the Stones were not rich, however, in spirit, respect and familial
love, the Stones both gave and gained a king's treasure. What separates Harlan Fiske Stone's childhood from his conservative counterparts, and likens him to the Chief Justice, Charles Evans Hughes, is this familial stability with its life filled with tenderness, and emotional and physical stability. Stone's economic circumstance can also be likened to that of the Chief Justices, austere but not destitute. For both men, food was always on the table, a roof was always above head and shoes were bought each spring. Stone's formative years were not infringed upon by the real and psychologically scarring call to set forth and earn money to provide for a destitute family as was Sutherland, and to a lesser degree Butler.

The quietude and stability of the farm life also provided Stone with another asset, a rigorous early education. In the category of education, Stone can again best be likened to Hughes, although similarities to Brandeis are clearly seen. Stone was first formally educated by his mother, Anne. Like Hughes, Stone was given what his mother called, "mental exercises" before he reached the age of attending regular school. Stone's Grammar and High School years were spent in rigorous study memorizing dates, names and facts. Throughout his education process, Stone became an avid reader, pursuing both his studies and farm chores with equal vigor.

The differences between Stone and the conservatives are made clear. Although Stone was born in a rural setting, it lacked the sense of frontierism and the requisite ideology of rugged individualism that imbued his conservative counterparts. Stone's economic conditions, while perhaps austere in one respect, of not providing
enough funds to pay for higher education, were nevertheless far from those of destitution and other attributes of his farm life far outweighed the lack of funds for his college and law school education. While Stone worked to pay for college, some of his conservative colleagues had to work to gain sustenance, a difference of great magnitude.

Our model then continues to merit validity. The man that came from the Vermont farm, experienced a vastly different childhood from his conservative counterparts. Unlike the conservatives, Stone was not moulded into a firm ideological form. Stone suffered from no economic hardships, and this would lead Stone to develop a different outlook, as politically neutral as was the conservatives' philosophy reactionary and Brandeis' progressive.

Stone's juridical philosophies have been said to rest on many foundations. Stone promoted the concept of judicial self-restraint. He believed that the correction of outmoded social and/or economic processes ought to be left to the legislature to solve. His philosophy on the purpose of law was to administer justice and secure social order. His philosophy concerning the purpose of law is succinctly stated in his address to the Columbia Law School faculty while he was Dean in 1910.

Too long have we studied Law as though its problems were like the problems involving mathematical formulae. (We must) humanize law...to make the work of our school progressive and enlightened without loss of a due sense of proportion and at a time to preserve unimpaired our sense of the practical aim of
Law as an agency for administering justice and securing social order, must in this as in every case be the guiding principal in determining all questions of Law School policy.79

Throughout his legal career, Stone sought to preserve his belief in the purpose of Law. The securement of social order and the administration of justice became an operational guideline as well as a philosophical goal. In pursuit of this philosophical goal, Stone came to be regarded as a man of judicial self-restraint. Stone strove to regard solely the statutory provisions of the law. He considered only the words of the laws, and not their wisdom when he decided upon their constitutionality. It is important to understand that Stone, more than any other Justice of the New Deal Court, allied himself neither to the conservatives nor the liberals. He sought to maintain a neutral judicial stance, a stance which regarded and decided upon the validity of law not on the basis of the wisdom of the philosophical notions which supported the law.

The 1930's must have posed a serious strain upon a man like Stone who possessed such lofty and neutral legalistic philosophies. Economic decay had brought into serious question the future of the social order. As Stone said, "the fortress of our civilization developed unsuspected weakness and in consequence we are now engaged in the altogether wholesome task of critical re-examination of whatever our hands have reared."80 That re-examination was, in what Stone considered as the proper place, being undertaken in the legislative and the executive branches of government. The results, or remedies,
of that re-examination were passed through the legislature, made into law, and were now being questioned in Courts throughout the land.

The duty of the Court was to decide whether the law was permitted by the United States Constitution. As a Supreme Court Justice, Stone believed that he should strive
to make plain that his opinions upholding the Constitutionality of statutes cannot be taken as an indication that he personally thinks the legislation wise or desirable, they (his decisions) are based wholly on his conception of the principles of government which are sanctioned or permitted by the Constitution. 81

Stone would refuse to become an advocate for liberal legislation, and would dissent vigorously with the conservatives who judged New Deal laws as bad, but not necessarily unconstitutional.

Stone attacked conservative opinions which rested upon their belief that law which fostered even the slightest judicial distrust ought to be invalidated. In his famous dissent to the Agricultural Adjustment Act invalidation, Stone wrote:

We see it frequently in the common untrained mind, which is accustomed to think that legislation which it regards as bad or unwise must necessarily be unconstitutional. Where there is a choice of interpretations of a constitutional provision, such a habit of thought is very likely to make a choice of the interpretation which would lessen the possibility of enacting bad law. The difficulty with this method is that lessening the power to enact bad law likewise lessens the power to enact good ones, and the judgement of what is bad or good, which is essentially a legislative function, is likely to be affected by the passions of the moment. 82

Stone continued his condemnation of the conservatives' continued invocation of personal economic philosophies in deciding the
wisdom or propriety of law rather than deciding the constitutionality of the law. In Morehead v. New York ex rel Tipaldo
298 U.S. 587, 636(1936) Stone wrote:

The fourteenth amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted, in the name of liberty, the system of theology which we may happen to approve.\(^83\)

Representative of his neutral philosophical stance, Stone refused to support the broad ranging liberal economic treatises of Justice Brandeis. Concerning one opinion, Stone wrote to Brandeis stating that the opinion of Brandeis was a very interesting and powerful document. But...

it goes further than I am inclined to go, because I do not think it is necessary to go that far in order to deal with this case...I think you are too much an advocate of this particular legislation. I have little enthusiasm for it, although I think it constitutional.\(^84\)

This correspondence with Brandeis presents the best portrait of Stone's legal thinking. During the New Deal Stone remarked that while he did not personally approve of the New Deal program, the legislation proposed by Roosevelt sought to insure societal stability and order. Since Stone believed that it was not within his province, or the judiciary's province, to decide upon the wisdom of the statute, he steadfastly kept to his task of determining the constitutionality of the statute. If the law was statutorily permissible under the articles of the Constitution, then Stone sought to uphold the law. It is important to note that Stone, unlike the other Justices discussed above, struggled to allow no personal economic philosophies to influence his judicial decisions. Stone's socio-economic beliefs are not enunciated in
his judicial decisions. His economic philosophies were care­fully and continually separated from his methodical, philo­sophically neutral, judicial opinions.

Justice Cardozo

The last of the so-called liberal Justices needs but little discussion. Our model has now been formulated and given clarity through the personality portraits of the last seven Justices. We can concern ourselves merely with the identification of several personality traits held by Justice Cardozo and show how these traits are similar to his liberal colleagues and dissimilar to his conservative counterparts.

Justice Benjamin Cardozo's strict adherence to a judicial, not an economic or political philosophy, closely resembles the ideological stance of his closest Supreme Court colleague, Justice Harlan Stone. Cardozo, like Stone and Hughes, was born in the eastern United States. His childhood life closely resembles that of Brandeis. Specifically in an educational sense, and to a lesser degree in an economic sense. Born on May 24, 1870, Cardozo was a member of a distinguished household of Sephardic Jews. Like Hughes and Brandeis, Cardozo's childhood was devoted to academic pursuits. In the same fashion of education that Hughes and Brandeis experienced, Cardozo was a product of home education. Cardozo had the benefit of private instruction from some of the most reknown literary figures and tutors. Following the tradition of Brandeis, the child prodigy matriculated at Columbia College when he was fifteen. He graduated at the top of his class, and continued his studies at the Columbia School of
Law. He left that institution before completion of the formal educational program. Cardozo joined his older brother's law practice, and quickly established a reputation of being a legal genius. Brandeis continued to substantiate this reputation throughout his legal career.86

There are a few important aspects of Cardozo's youth that are important to our discussion of the liberal Justices. Our model has emphasized two main analytical areas in evaluating the Justices. We have considered economic and environmental circumstance. Cardozo's youth lacked the economic consternation that enveloped his conservative counterparts. This lack of economic adversity opened up and to some degree allowed the pursuit of Cardozo's academic program. The effect of moderate economic circumstance, and of an intense intellectual climate is really immeasurable. We can say that with the absence of stress in insuring the sustenance and survival of his family, Cardozo was able to participate in a rigorous academic program that helped create a highly intellectual and trained mind. Our other consideration is environmental circumstance. Cardozo was born and lived in New York, far from the western frontier with its bawdy, rugged life and the ensuing travails of frontier life. His environment was lacking in any quality of situation which would have necessitated the formulation of a theory like rugged individualism. This doctrine was formulated by the conservatives as both a shield and explanation of their youth. Cardozo was not compelled to shield or explain the circumstance of his youth. The differences between the conservatives' upbringing and Cardozo's
upbringing are vast and fundamental. Cardozo is a product of a different time and circumstance. Our question is then, what effect, or interpretative manifestation did this manufacturing process have on Justice Cardozo.

Cardozo's legalistic philosophies are easily identifiable. Cardozo, like Stone, believed that it was solely within the powers of the nation's legislature to make statutory recommendations for the solution of the society's problems. Following closely to Stone's philosophy that law was designed to secure social order and insure justice, Cardozo believed that it was beyond the constitutional sphere of the Courts to decide upon the wisdom of the actions of the legislature. Cardozo stated on many occasions that the duty of the Court was to pass upon the constitutional validity of legislative enactments, and to go no further. In *Stewart Dry Goods v. Lewis*, 294 U.S. 550, 566, 569(1935), Cardozo stated, "It is not the function of a court to make itself the arbiter between the competing economic theories professed by honest men on grounds not wholly frivolous."

Cardozo's adherence to this stance, like Stone's adherence to the same stance, separated Cardozo from Brandeis. Cardozo and Brandeis may have shared similar juristic theories, but Cardozo lacked, or refused to publically offer, a firm socio-economic doctrine which could be reflected in his legal opinions as did Brandeis. Cardozo's belief of the proper role of a Justice was succinctly similar to that of Stone's. As Cardozo stated, a Justice "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspirations from
consecrated principles." Cardozo realized that all Justices were human. He knew that "the great tides and currents which engulf the rest of men, do not turn aside in their course and pass judges by." 

Cardozo and Stone can be regarded in the same judicial view. Both men committed themselves to regard only the legal questions of the New Deal. Neither allowed a marriage to develop between private socio-economic beliefs and their juristic opinions. As Cardozo himself stated, "What am I that in these great movements onward, this rush and sweep of forces, that my petty personality should defeat them by a hairbreadth?" Cardozo's belief that the legislature should be given broad powers in solving the nation's problems, made him, in the eyes of the conservatives, a broad interpreter of the Constitution. In fact Cardozo cautioned the Court on several occasions from defining in too narrow a light the powers given to the legislative branch under the Constitution. In general, Cardozo is said to have sought a broadened interpretation of the commerce clause, and a narrower interpretation of the due process clause. Cardozo's opinions, during the pre-1937 era, were reactions against conservative opinions. He was never able to specify, or set-forth in a succinct manner what the proper limits of congressional power were in these areas. Restricting himself to speaking on the validity of specific legislative acts, Cardozo never looked ahead to theorize what the proper role of the government should be in the disputed areas. Perhaps in this respect, the politically neutral stand that Stone and Cardozo assumed held one inherent flaw: whereas the conservatives delineated a restrained governmental role,
Stone and Cardozo never allowed themselves to use their judicial opinions to describe the boundaries of governmental action, a job they viewed as a political and judicially improper one.

Justice Roberts

The last of the nine "old" men to be discussed is Justice Owen J. Roberts. Roberts presents a formidably complex and confusing judicial record. It is hard to fit Roberts into our analytical model because of the difficulty in specifically identifying his judicial stance. Two questions, of intertwined nature, need to be answered in considering Justice Roberts. Our first question, regarding Roberts' true judicial stand on questions of Congress' power to tax and to regulate commerce, necessitates a lengthy review of Roberts' representative opinions and personal statements on these issues. The second question, which arises, asks if Roberts really committed what has historically been referred to as the switch in time that saved nine, also requires extensive review of judicial decisions and personal observations of the main actors of the day.

Owen J. Roberts was born on May 2, 1875, in a suburb of Philadelphia, Pennsylvania. Young Roberts showed an early inclination to read. His academic interest was given support by his parents, who sent Roberts to a private academy to complete his childhood education. Little has been said about Roberts' homelife. However, we can say that his family was of moderate wealth, for Roberts never had to worry about his financial circumstance. In the year 1891, Roberts enrolled at the University
of Pennsylvania, from which he graduated with distinction in 1895. Immediately after the completion of his undergraduate studies, Roberts matriculated at the University of Pennsylvania School of Law. Upon completion of his legal studies, Roberts became a Law School Fellow. He continued teaching on a part-time basis until 1907. Roberts' legal career was highly successful and respected. Although he served various corporations, it is said that he never served on any one corporation for a long enough duration to earn the title of "corporate lawyer." Roberts' meteoric rise to public notice and prominence began in 1924. Roberts was appointed to prosecute the "teapot dome" oil scandals in that year, and earned himself the reputation as an avid, serious prosecutor of those who transgressed the law. A short time after, on June 2, 1930, Roberts was approved by the United States Senate to fill a vacancy on the Supreme Court. Critics claim that from this day onward, Roberts' legal career was one marked with vacillation, inconsistency, and confusion.

New Deal legislation exercised two principle congressional powers; regulation of commerce and the taxing power. For the purposes of our study, we can focus upon the legal decisions that Roberts wrote dealing with these areas. Our first task is to formulate the foundation, or portray the stance, which Roberts took on each of the issues. Our question is what was the ideological belief of Roberts on congressional powers of taxation and regulation of commerce. Our answer is hard to formulate.
Roberts remarked, in a lecture to the faculty of Yale University, that, "it was plain that substantially the entire field of taxation remains open to each of the governments, national and state." The implication being that both governmental entities enjoyed the right to tax their citizenry. The boundaries of jurisdiction for taxing power gave to the Federal government a much broader realm and a supreme authority over the boundaries and authority of the states. In this same lecture, Roberts spoke of the power and purpose of government in using the power of taxation. Roberts wrote that taxation "does not necessarily and unavoidably destroy. To carry it (the power of taxation) to the excess of destruction would be to banish that confidence which is essential to all government." Here, Roberts shows a necessary restriction upon the government's power to tax. That power must be used in a responsible and just manner. To this end, Roberts stated, "that it was the function of the Court to preserve the federal system by striking down such exercise of the taxing power by either sovereign as will hamper, impede, or destroy the other." For Roberts, the Court is the final arbiter, the guardian of the Federal system. It is the duty of the Court to remove those laws which pretend to "hamper, impede, or destroy" the Federal system. A considerable judgment of the wisdom of the legislation, and its probable effect on the Federal system, must be given to decide upon the striking of such legislation.

It is seen from the statements of Roberts that a definite
foundation of opinion concerning the propriety of legislative
tax acts has been formulated. Roberts quotes from McCary v.
U.S. 195 U.S. 27 (1904) and Veazie Bank v. Fenno 8 Wall 535,
545(186) in defense of his opinion in United States v. Butler
297 U.S. 1, which invalidated the agricultural processing tax
contained within the Agricultural Adjustment Act. The opinion
handed down in the McCary case states in part that when and if
a tax is lawful, meaning that powers to implement such a tax
are permissible under the Articles of the United States Constitu-
tion, a Court is incompetent to invalidate that tax or to limit
the effect of the tax, because the Court believes it to be unwise.
Specifically, the McCary opinion states that:

"no instance is afforded from the foundation of the
government where an act which was within a power
conferred, was declared to be repugnant to the
Constitution, because it appeared to the judicial
mind that the particular exertion of constitutional
power was either unwise or unjust."95

Even thought Roberts uses these opinions as the guidelines of
proper action for the Courts, his decision in the Butler case,
which was concurred with by the four conservative Justices, en-
voked the rage of Justice Stone. Stone condemned Roberts for
invalidating the law solely because he thought it unwise. In
the majority opinion for the Court, Roberts stated that

"If the act before us is a proper exercise of the
Federal taxing power, evidently the regulation of
all industry throughout the United States may be
accomplished by similar exercise of the same power.
This country would be converted into a central
government exercising uncontrolled police power..."96

Roberts, and the Conservatives, thought that this possibility of
the future growth of governmental power unwise, and thus considered
it an improper exercise of the Federal taxing power. Thus, as Roberts contended, the Agricultural Adjustment processing tax was not really a tax, and therefore the statute was invalid.

This opinion is, however, inconsistent with Roberts' earlier opinion in *Nebbia v. New York* 291 U.S. 502(1934). In that opinion Roberts stated:

> The Constitution does not secure to anyone the liberty to conduct his business in such a fashion as to inflict injury upon the public at large, or upon any substantial group of people.

The Agricultural Adjustment Act sought to raise the prices of a range of farm goods in order to insure the continued flow and production of food stuffs. The A.A.A. sought to achieve this end through a tax. In the *Nebbia* case, a tax was placed upon the price of milk, in order to achieve its continued flow and production. In one case the tax pre-ordained a completely centralized government, in the other the Court acted to insure that the people would not harm themselves. The explanation is still one of contention. However, we can hypothesize that the all encompassing tone of the A.A.A. may have moved Roberts into the conservative camp. Where taxation was valid for a specific farm commodity, it was not valid for a group of farm commodities. These opinions emanating from the same man who disavowed that the Court should become "a super-legislature."

Roberts was able to explain away his inconsistent behavior, stating that "new and difficult problems" now sought answers. He blamed it on the expanding "activities of state and national government which were not envisaged when the Constitution was
adopted or when early decisions of the Court in the field of... taxation were announced."98

Roberts set forth several inconsistent judicial beliefs. He believed that the Federal taxing power was supreme over the taxing power of the states. He believed that the courts could not invalidate tax legislation on the ground that it was unwise, if the legislation was constitutional. Yet, as a member of the Supreme Court, he wrote opinions which struck down Federal taxing power because it infringed upon state powers, or because the legislation was unwise. Opinions which received scathing condemnations from the progressive Justices of the Court and from legal scholars across the nation. The inconsistencies are clear. The explanation for their continued formulation is not clear.

The Commerce Power

The opinion of Roberts on the issue of the congressional power to regulate commerce, follows closely the opinion Roberts holds in respect to congressional powers of taxation. Roberts told an audience, "In short, both a state and the nation may exercise the police power, the former without restriction, save as the authority granted to the Federal government limits its actions."99 Roberts is just as specific in his definition of the term "commerce" as used in Article I Section 8, of the Constitution. Roberts states that commerce was declared by the Court to be equivalent to the phrase, "intercourse for the purpose of trade." Roberts defines commerce as the "transportation, purchase, sale and exchange of commodities between the citizens of the different states."100 Roberts derives this view from the
1914 Shreveport case, 234 U.S. 324. About this case Roberts wrote, "There can be no question of the correctness of the decision in the Shreveport case. The power (of the Federal government) to regulate interstate rates was incontestable."\textsuperscript{102} Roberts warned that if "action required by state law, within the state, were to be allowed to disrupt and destroy the efficacy of the order regarding interstate rates, the power of the national legislature under the commerce clause would be nullified."\textsuperscript{103} This viewpoint would seem to indicate the formulation of a fairly broad, fairly firm, interpretation of the powers given to Congress by the Constitution in the commerce clause.

Roberts further developed his viewpoint concerning the powers of the commerce clause in Hill v. Wallace 259 U.S. 414 (1922). Roberts stated that in this case the court held "transactions of a trader in commodities moving in interstate commerce, whose activities necessarily affected the flow of such commerce... might be controlled by a Federal system of statutory regulation."\textsuperscript{104} Congress had the power to establish such a system, the question in Roberts' mind was to what degree, how far an extent, could Congress go in its regulation.

In Carter v. Carter Coal 298 U.S. 238 (1936) commonly known as the bituminous coal case, Roberts voted with the conservative majority to limit effectively this usage of power. The decision specifically stated that the local production of coal, did not directly affect interstate commerce, and therefore could not be regulated as such. Congress was limited, then, to assert control over only those items which had a direct effect on interstate
commerce. The Supreme Court was, of course, the final determiner of degree, under an interpretation of this decision. Roberts supported an opinion which casted the Court in the role of a super-legislature, a role which Roberts condemned assuming but worked to acquire.

In the second Agricultural Adjustment Act case, Mulford v. Smith 307 U.S. 38(1939), Roberts ruled that it was constitutional to regulate foreign and interstate commerce in certain goods to provide an "orderly, adequate and balance flow of such commodities." This opinion, as pointed out by Assistant Attorney General Robert H. Jackson and others, did not logically follow the first A.A.A. decisions or other commerce decisions. As Jackson stated, "the second opinion is a broader more tolerant approach, while Carter v. Carter Coal and U.S. v. Butler follow extremely less tolerant paths of judicial thought."

Roberts later conceded that Carter v. Carter Coal was "a high-water mark of the doctrine that Congress cannot regulate local activities." Roberts' remark was of course true, after the Carter case, specifically after the Morehead case, Roberts turned to support almost any and all New Deal cases. As noted by David Burner, Roberts' biographer, from the time between Morehead and the Parrish v. West Coast Hotel case (both minimum wage cases) Roberts helped stem the tide of adverse New Deal decisions.

The climax for congressional commerce power cases came with N.L.R.B. v. Jones and Laughlin Steel Corp. In this case the Court decided to accept the definition of "affecting commerce"
that the legislation gave as a self-restraining guide. The legis-
islation defined commerce as an article or event which was in com-
merce or "burdening or obstructing commerce, or the free flow of
commerce, or having led or tending to lead to a labor dispute
burdening or obstructing commerce of the free flow of commerce."

Roberts, to the amazement of New Dealers, accepted this loose, per-
haps even all encompassing definition. This was the same man who
invalidated previous attempts at regulation of commerce because
of the indirect effect that regulated items had on interstate
commerce. Roberts later stated this decision "was in the teeth of
what the Carter opinion declared, that is, that the magnitude of
the local operation was immaterial." Apparently Roberts held
no qualms about reversing his judicial opinion from the Carter
decision to the N.L.R.B. decision. Roberts has said in his defense,
it runs pretty hard to draw a line in respect of
this type of Federal prophylatic legislation. Its
operation must be permitted to extend to the smallest
units and to activities that once were thought so
remote from interstate commerce as to have no ap-
preciable effect on it. In light of these decisions,
it is hard to think of any local business which Congress
may not regulate if it professes to believe that the
operation of that business may be detrimental, in how-
ever slight or remote a degree, to interstate commerce.

Roberts also explains his reversal as an evolutionary one.
He states that "looking back, it is difficult to see how the
Court could have resisted the popular urge for uniform standards
throughout the country, for what in effect was a unified economy." He states his belief that "the resort of Congress to the taxing
power, the general welfare power, and to the commerce power as
a means to reach a result never contemplated when the Constitution
was adopted, was a subterfuge." Roberts' legal philosophy
probably never took a concrete or consistent form. We see from his statements and representative opinions a continual state of ideological flux. Roberts' changing judicial views are hard to account for. The reason for his sudden, and timely reversal on several key issues is one still debated among historians. Several theories and observations concerning this question are given below.

A Switch in Time?

Historically, the bantered question of whether Justice Roberts did in fact change his judicial views in order to save politically the Court, is now upon us. Historians have, as a general rule, concluded that in fact "a switch in time saved nine" did occur. Historical sentiment is perhaps best likened to a quote from Fielding's Jonathan Wild, "...he...would have ravished her, if she had not, by a timely compliance, prevented him." Thus the analogy is made that President Roosevelt, if the Supreme Court had ruled adversely to any of the Wagner cases, Social Security case, or Washington Minimum Wage case, would have been able to "ravish" the Supreme Court with his Court Reorganization Plan, the Court by its timely reversal prevented him.

During a time of public debate and condemnation of the Court, a time shortly preceding and during the Court Reorganization Plan's public unveiling, the Court did change its ideological stand. As Roosevelt outlined in a memo to his files in late May or June of 1937, a reversal in the Court's trend of invalidating New Deal legislation took place. From October of 1935 to the introduction of the Court Plan, Roosevelt states that five
important New Deal programs were invalidated.

A. The A.A.A. - the decision limited the Federal taxing power.

B. The Guffey Coal Act - limited the Federal commerce power.

C. New York Minimum Wage - in Morehead ex rel Tipaldo, limited state action through the due process clause.

D. N.L.R.B. case - crippled the administrative powers of the executive.

E. Washington Utility Case - limited utility regulation by states under the due process clause.

Roosevelt then noted that (in his eyes) after the announcement of the Court Reorganization Plan, the Court upheld three important pieces of New Deal legislation.

A. Washington Minimum Wage case - in West Coast Hotel v. Parrish the Court overruled the New York minimum wage decision, and reversed 1923 precedent of the Adkins v. Children's Hospital. The Court gave a new interpretation of the due process clause to the states.

B. Wagner Act cases - reversed their ruling on Guffey Coal Act case and created a new boundary of Federal commerce power.

C. Social Security Act - the Court overruled the Agricultural Adjustment Act decision in giving the Federal government new spending and taxing powers.

Obviously delighted in the effect that his proposal had on the Court, it still had not been considered by the Senate, Roosevelt stated that, while he had "attained the most difficult of his objectives, i.e., the liberalization of the interpretation of the Court," he still had to accomplish two goals:
(a) insurance of the continuity of liberalism and, 
(b) a more perfect judicial mechanism for giving maximum justice in a minimum of time. These goals could only be achieved through the enactment of his plan. The President was, however, pleased with the path he had forced the Court to take. As he stated, "fortunately, after the transmission by me of my message to the Congress for a rejuvenation of the judiciary on February 7, 1937, the Supreme Court reversed itself, and declared the minimum wage law by the states constitutional (in West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937)."

March 29, 1937, was the day in which a shift in the Supreme Court interpretation of the Constitution was first noticed, and can be cited as the famous day of reversal. Our analysis will tie together the Court's reversal and the downfall of the Court Reorganization Plan. On March 29, the Court upheld three strategic "New Deal" pieces of legislation. All votes were a close five to four, the liberal side of the Court prevailing because of newly found support from Justice Roberts. The Railway Labor Act, the Frazier-Lenke Farm Mortgage Moratorium Bill and the Washington Minimum Wage legislation decisions were all handed down. As historian Merlo Pusey wrote in observing the decisions of March 29th, "The Court achieved self-salvation through self-reversal, and the destruction of the President by giving him what he wanted" - a liberal Court. Whether the latter part of the statement is true or false, will be discussed in the next chapter. Our purpose here is to decide what caused this reversal.

In the month preceding the March 29th decisions, the Court decided upon the validity of the Wagner Act, and the Social
Merlo Pusey speculates that the Court, after receiving copies of the Court Plan, began to ask themselves if they were willing to continue their conservative invalidation of the New Deal. A continued invalidation would surely have adverse political consequences. The final verdict, the one who would decide if the Court was to remain sacrosanct, was Justice Roberts. The conservative reactionaries would not sway their stance; the liberals beckoned; Roberts followed.

There is no historical doubt that Roberts did change his voting pattern in the period after 1936. He did change from voting with the conservative faction of the Court to voting with the liberal elements of the Court. Our question is why did this change in his voting behavior occur. Is Roosevelt's explanation valid that, "now, with the shift of Roberts, even a blind man ought to see that the Court is in politics, and understand how the Constitution is "judicially" construed." In order to answer the question of why Roberts made his shift, we will examine the cases of Morehead and Parrish. From a comparison of the Court opinions in each case we should be able to determine with what ideology Roberts was aligning himself with. We can then discuss the consistency of his alignments, and speculate on why he changed alignments.

In the Morehead case, four Justices concurred with Justice Butler in the five to four decision which invalidated New York minimum wage laws. The decision in Morehead denied to both the State and the Federal government the power to deal with problems of long hours and low wages. Morehead is based heavily upon the
The 1923 ruling of *Adkins v. Childrens Hospital*. Justice Butler shows the close relationship between the two cases when he stated in *Morehead*, "The state court rightly held that the *Adkins* case controls this one..." The Court then offered questions it deemed necessary to answer in the decision of the *Morehead* case. The same questions, the Court notes, are answered in *Adkins*. Justice Butler states, "the question rises whether the state may impose upon the employers state-made minimum wage rates for all competent experienced women workers..." The Justice poses the next question of "whether the state has power similarly to subject to state-made wages all adult women involved in trade." These questions, writes Butler, were decided upon in *Adkins* when the Court ruled that, "the right to make contracts about one's affairs is a part of the liberty protected by the due process clause," in the fourteenth amendment. The Court ruled that the state possessed no power to enforce state-made minimum wages upon employers or adult women. The Court clung to nineteenth century laissez-faire ideology when it stated, "Freedom of contract is the general rule, restraint the exception." The Court was not willing to give statutory effect to the exception is either the Adkins or Morehead cases.

Roberts voted with the conservatives in Morehead, and by so doing, he gave his support to the notions promoted in the Adkins decision. The strict 19th century laissez-faire ideology fits well with the ideological tone Roberts presents in his Butler opinion. In this opinion, Roberts shows his concern with the possibility of growing power in the central government. The
agricultural processing tax made it evident, for Roberts, that "the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. This country would be converted into a central government exercising uncontrolled police power." Roberts supports nineteenth century notions of a firm dichotomy between states and the Federal government. That, according to the Butler decision, the central government must be restrained in its use of taxing powers in order to keep states and Federal government on an equal basis. This is consistent with the views Roberts made known to the law faculty at Yale University. There he said, "it is plain that substantially the entire field of taxation remains open to each of the governments, national and state," and again when he said "it is the Court's function to preserve the federal system by striking down such exercise of the taxing power by either sovereign as will hamper, impede, or destroy the other." Roberts, however, does not completely remain within the realm of nineteenth century classical liberalism. During the same lecture, Roberts stated, "The Constitution does not secure to anyone the liberty to conduct his business in such a fashion as to inflict injury upon the public at large, or upon any substantial group of people." There exists an inconsistency in these views. Classical liberalism does not allow for the protection, by the government, of the masses against the actions of individuals in private business in all aspects. The statement by Roberts opens the door to governmental regulation of all units and aspects of business, the same door Roberts sought to close in other opinions.
This inconsistency is taken one step further in **West Coast Hotel Co. v. Parrish.** In this opinion, written by Chief Justice Hughes, a re-examination of Adkins was undertaken. The question of due process in the fourteenth amendment was considered, and a sense of restraint was cast upon the laissez-faire concept of freedom of contract. The Court defined, in a new light, due process. "Liberty", the Court said, "under the Constitution is thus necessarily subject to the restraints of due process, and regulation to its subject and is adopted in the interests of the community is due process." In further destruction of laissez-faire ideology, the Court stated that, "freedom of contract is a qualified and not an absolute right." As applied to minimum wage legislation this meant that an employer-employee relationship, was no longer considered as a private contract between two individuals. This contract of labor, or employment, was conditioned, or under the jurisdiction of, the state and its regulatory guidelines. The Court struck down the traditional concept of individual liberty when it stated that, "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Regardless of the nature of business, be it of local or interstate nature, the Court ruled that the "State still retains an interest in his (the employee's or citizen's) welfare, however reckless he may be. The Court professed it as the state's duty to interfere when "the individual health, safety, and welfare are sacrificed or neglected..." The concepts that had led to the formulation of Adkins were
rejected. In reference to Adkins, the Court stated that:

The validity of the distinction made by the Court between a minimum wage and a maximum hours in limiting liberty of contract was especially challenged. That challenge persists and is without satisfactory answer.

The Court repudiated the Adkins decision and went on to extinguish any doubt as to the case's correctness. The Court said, "that the decision in Adkins was a departure from the true application of principles governing the regulation of the state and of the relation of the employer and employed." In a concluding statement the Court announced:

"Time without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the Court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In an especial slap at the conservative Justices the Court closed its opinion with, "the community may direct its law making power to correct abuse which springs from their selfish disregard of the public interest."

Justice Roberts joined in this opinion, to the amazement of Justice Stone, to the delight of Hughes and the political forces which joined to oppose the Court Reorganization Plan. Could it be as Merlo Pusey said that Roberts made a timely switch to save the Court and undermine Roosevelt, or was the vote for the Parrish opinion a product of an evolutionary trend of Roberts' judicial thinking. As Roberts stated, "looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout...what was in effect a
unified economy." We can only speculate that Roberts' resistance was lessened by both his political awareness of the danger that continued conservative opinions would place the Court. Roberts may have also held a growing awareness, and, or, a gradual change of ideological stance from nineteenth century laissez-faireism to twentieth century liberalism.

The question as to whether Roberts purposely altered his voting behavior to save the Court politically, can be given no definite answer. The views espoused by Roberts, both in lectures and in legal opinions, fail to provide a firm ideological foundation on which we can judge his actions. He established a legal career where only his vacillation was consistent. Credence is given to the contention that Roberts acted in a political fashion. Credence is also given to the argument that Roberts' change of view was a result of a gradual transformation of ideological beliefs.

Roberts once claimed that he voted in Morehead only because of existing precedent, and that without review of that precedent he could not vote against it. His other opinions do not follow this concern. We can conclude that the judicial voting record of Roberts was changed at a convenient time, and that no firm ideological foundation supports this alteration, and therefore the credibility of the change in his judicial ideology remains questioned.

Conclusion

The differences between Roosevelt and the Supreme Court Justices were differences of ideology. The four "reactionary conservatives" answered to the concepts of nineteenth century
liberalism. The concepts of this ideology called for a strict adherence to a laissez-faire relationship between the government and the governed. The proper role for the Federal government, in the eyes of the conservative Justices, was one of restraint. The government was not to be a powerful regulatory agency, it was not to be powerful at all, according to the "conservatives."

As seen in Document One in the appendix, the "conservative" Justices were consistent in their invalidation of the New Deal. The document also shows the consistency of the support that the liberals gave the New Deal. The liberals, who answered to the twentieth-century ideology of modern liberalism, saw the need for governmental action to correct a malfunctioning economic system. The deciding vote of Justice Roberts was sought after by both ideological sights of the Court, and his alliance swayed back and forth between the two like a willow in the wind. The inconsistency of Roberts is clearly noticeable, and is perhaps the only consistent action of his legal career.

This analysis of the development of the socio-economic theories of the Justices, serves only to prove the existence of differing opinions over the proper role of the government. The conservative Justices, through their development, were imbued with the concepts of nineteenth century liberalism. Concepts which best explained and best guided the worlds that they lived in. The liberal Justices came from different circumstances and therefore sought new and different doctrines to guide and form their world. The conservatives were, however, of the majority opinion on the Court and insisted upon invalidating governmental programs which did not conform to their personal ideologies.

Roosevelt responded to the invalidation of his New Deal program
by four principle representatives of an earlier economic order and their one follower. These four men refused to allow an interpretation of the Constitution that would give to the Federal government the power to correct the failures of the old economic system. In this respect, Van Devanter, McReynolds, Butler and Sutherland, sought to arrest the forces of evolutionary legal interpretation. They sought to affix their ideological interpretation of law upon all legislation and governmental action for all future time. The cries of desperation brought forth by the failure of the old economic system, as described in Chapter Two above, were answered by New Deal programs, described in that same chapter, and were then invalidated by the unmoving, unbending followers of classical economic dogma.

The 1930's marked the beginning of the creation of a new American society. The financial collapse of the thirties showed the necessity of governmental action in and partial control over aspects of the nation's economy. Responsibility for the health, welfare and safety of the nation's citizens was shifted from the proven incompetent hands of private society to the domain of Federal authority and public concern. The New Deal was formed as a corrective action, taken to reverse the nation's devastating descent to economic ruin. The corrective measures were proposed through the executive and were judged as necessary in the wisdom of the legislature which enacted the measures. The Supreme Court, through the decisions of the four principle conservatives, judged the wisdom of legislation again, seeking
to evaluate the legislation against the concepts of their old
economic order.

Roosevelt responded to the situation by trying to remove
the specific Justices who obstructed his legislative path to
national recovery. He formulated a plan which was designed to
remove, or negate the influence of the old order. The President's
personality is seen within the plan in his attempt to vent his
frustrations through the humiliation of the "conservative"
Justices. The President launched his attack as a last resort,
after four years of continued invalidation of strategic pieces
of recovery legislation. The Court was not an innocent victim
which suffered the attempted violation of its judicial sanctity
by Roosevelt. The Court challenged the President in a very
real and political sense. The continued support of a governing,
political ideology by the conservative Justices invoked the full
wrath of the President (wrath, which as we shall see, was less
potent than the Justices judicial decisions). The battle was
between two separate and equal branches of government, first the
judiciary trying to limit, restrain, and suppress the power of
the executive, and then the executive trying to gain popular
support for an overt suppression of the judiciary. The next
chapter will deal with the results of the contest, this chapter
having explained the reasons for the battle.
Chapter Five
Congress and the Court Plan; reaction and rebellion

The creation of the New Deal was facilitated by the overwhelming support Roosevelt received from Congress. The new order had been born and implemented in less time than the old order had taken to collapse. When the continuation of the new order was thwarted by the Supreme Court, Congress and Roosevelt alike protested, and joined in denunciation of the Court. With the formulation of the Court Reorganization Plan, Roosevelt foresaw the enlistment of Congress in the battle to force change within the membership of the Court. From the day of the Plan's announcement, however, it became readily apparent that Congress, spirited by adverse public reaction to the Plan, and emboldened by what they believed to be Roosevelt's last term in office, would enlist the support of the Supreme Court to defeat the Plan and to castigate Roosevelt.

In his bid for the enactment of the Court Plan, Roosevelt asked the Congress to give virtually unquestioned support, in effect creating a vote of personal confidence by the members of Congress for the President. This chapter will present and assess the adverse reaction by the Congress to the Plan, in an attempt to explain the reasons why Roosevelt lost Congressional and popular support. The Court Plan proposal created some long-term negative consequences for Roosevelt and his ability to govern. Through our analysis and review of the events which followed the Court Plan proposal, we hope to conclude with a portrayal of Roosevelt's
political position after the cessation of the Court battle. We have as guides, two common interpretations of Roosevelt's political circumstance after the defeat of the Court Plan. New Deal historian Merlo Pusey has described Roosevelt as the "tragic hero" of the Court crisis. Pusey contends that before the announcement of the Court Plan, Roosevelt held more power than any other President has held either before or after his time. Pusey notes that Roosevelt's command over Congress, his success in formulating a complete legislative program and the enactment of the entire program, are unprecedented accomplishments for any American President. After the defeat of the Court Plan, with the resulting loss of prestige and influence for Roosevelt, Pusey describes Roosevelt as "humiliated and powerless to get his way." ¹

Roosevelt's Assistant Attorney General, Robert H. Jackson, has portrayed Roosevelt in a somewhat different light. Jackson surmises the outcome of the Court issue as both a win and a loss for the President. Jackson stated, "in politics, the black-robed reactionary Justices had won over the master liberal politician of our day," however, Jackson further states that Roosevelt scored a victory in the field of law by "defeating the recalcitrant Justices in their own Court." ² The notion of a combined defeat and victory is shared and further expounded upon by Erwin C. Hargrove. Hargrove states that, "although he failed with Congress, (Roosevelt)did indirectly convince the Court to support New Deal legislation, so he achieved a victory of sorts." ³

The areas for analytical concern in this chapter are clearly
delineated. Our goal is to ascertain why, and to what extent, Roosevelt lost his Congressional, popular, and political support. We must conclude with a statement on the effects this loss of support had on Roosevelt's ability to govern. Through our investigation, we hope to show that Roosevelt's loss of Congressional control and authority was accelerated, but not solely brought about, by the Court Plan. The Court Plan served to rally the already existing conservative forces in the Senate. The Plan worked as an adhesive, binding the here-to-fore warring factions of Republicans and Democrats of Congress together. We will find, after the Court Plan, that Roosevelt was a President who lacked much, but no all, of the political power needed to continue the legislative program that the Supreme Court now found Constitutional.

A Brief History of Roosevelt's Relationship with Congress

When Roosevelt first acquired the reins of government, Congress was emerging from a period of time where it was best described as, "an angry, turbulent, and ineffective body during the evenly divided lame-duck session of 1932 through 1933." Roosevelt's election signaled the transformation of this unproductive body into an efficient legislative machine. The election returns signaled to many members of Congress that, as Senator Burke from Nebraska stated, "a clear mandate was given to the President to go forward with the programs he conceives as necessary to take care of the needy, and to correct the glaring evils in our social and economic system." The members of Congress responded to this perceived mandate by enacting voluminous amounts of social legislation, and did so willingly, losing
their angry, turbulent personality and becoming "psychologically encouraging, especially in contrast to what many had expected." The cautioned forecasts of continued Congressional ineffectiveness, were never realized. The warning of Senator Key Pittmen that:

(F.D.R.'s) leadership (would) be exceedingly difficult for awhile. Democrats have grown out of that habit of being led, during the long Republican regime they have grown individualistic, they have lost the habit of cooperation, they have grown unaccustomed to discipline,

was proven invalid. The Congress proved to be accommodating to the New Deal and to Roosevelt. The combination of Roosevelt's political skills and the existence of grave social and economic ills, resulted in the passage of an unprecedented number of key pieces of social legislation. Eleven of the New Deal's most important social and economic reforms consumed only forty hours of debate in the House, a feat still unrepeated by Congress.

Roosevelt's task of gaining the cooperation of, and authority over, the Congress was facilitated by the paucity of, and deep splits between, the remaining Republican lawmakers. After the overwhelming defeat in 1932, the remaining Republicans (thirty-five in the Senate and one-hundred and sixteen in the House) were characterized by James T. Patterson as "unhappy, disorganized, and acutely aware of Roosevelt's tremendous popularity." Their very distinct minority caused many Republicans to become quiet acquirers to the New Deal. For the first years of his administration, Roosevelt was unhindered by an opposition party. The lack of a viable opposition enabled Roosevelt to consolidate and direct his efforts at organizing and controlling the Democratic party.
Roosevelt possessed some personality traits which helped in the creation of a good relationship with Congress. Roosevelt had a very keen sense about the use of power. He also had an instinctive knowledge of when to compromise, and, how to use patronage with cautioned dexterity. At least this is what can be inferred from a study of Roosevelt's handling of early legislation, and remarks made by Senators like Senator Key Pittmen who stated at the beginning of Roosevelt's term, "the President will not interfere with any of the Departments until after his program has been put into effect." Pittmen's remark shows Roosevelt's astuteness at keeping his relationship with Congress "tinged with a shade of expectancy" until he received what he wanted. Roosevelt's possession and use of these political skills resulted, to a large degree, in the control and seeming domination over the Congress. Roosevelt's political finesse, along with other factors, did work to create an atmosphere which facilitated the enactment of an entire social program in an extremely short period of time.

The combination of the crisis of the day, the overwhelming Democratic electoral victory, and the inherent political astuteness of Roosevelt, worked to secure a legislature which became efficient, and seemingly devoted to the principles on which the New Deal was based. For the first four years of his administration, Roosevelt experienced little Congressional dissent. He became the master of a tightly run ship, heading the nation out of the troubled waters of depression, into the calm waters of recovery. Once in calm waters, Roosevelt found that the crew became restless and his navigatory skills weakened.
Underneath the triumphant electoral and legislative success could be found the beginning of a faction that would penetrate and infect the New Deal coalition. The faction became increasingly evident as the economic crisis subsided. As Patterson, author of Congressional Conservatism and the New Deal, wrote that:

From the very beginning of the New Deal, however, a cluster of Congressmen regarded the New Deal, in the words of Virginia's peppery Senator Glass as "an utterly dangerous effort of the Federal government to transplant Hitlerism to every corner of the nation." While this belief, and variations of the belief, was held by other legislators, the conservative elements of Congress could not consolidate to form a viable opposition to the New Deal. The reasons for the non-consolidation of the conservatives have been described above. The conservative elements could "seldom manage more than thirty-five votes in the Senate or one-hundred in the House, and more often than not they were wary of denouncing the New Deal in public." The conservatives in the Congress represented members of both Democratic and Republican parties. The conservative coalition formed in Congress was, out of necessity, a bi-partisan coalition, only then could it become a viable political force. The conservative members of Congress remained relatively quiet throughout the first three years of the New Deal. Their quietude resulted more from political necessity than from lack of dissent. An appropriate time would come when the conservatives would rally to their own convictions, and would become an acknowledged voice of opposition. The issue that rallied the conservatives
was the Court Plan proposal, and strangely enough, for
the Republican conservatives' quietude would remain a strength
and a key factor in the formation of an operational conserva-
tive coalition.

From the onset of the New Deal, several legislators did
speak out openly against the Roosevelt administration. Senator
Glass became opposed to the New Deal early-on in the first year
of Roosevelt's administration. Senator Gore of Oklahoma shared
the fundamental conservative beliefs of Glass, and revolted
against the New Deal in an enunciation of a personal demand for
the return to the concepts embodied in nineteenth century liber-
alism. These early opponents of the New Deal, along with a
handful of others, were of the same ideological era, and were
embued with the same beliefs as the Justices of the Supreme
Court who invalidated the New Deal. These Congressional op-
ponents worked to invoke a similar invalidation of the New Deal,
on the legislative level, as their ideological brethren obtained
from the Supreme Court. The Congressional conservatives failed
in their quest for legislative veto of the New Deal. The con-
servatives would become successful only through the advance of
time, when events and circumstance worked to facilitate the re-
ception of their call.

As Roosevelt's years in office progressed, two key tools
which helped enable him to secure the support of the Congress
gradually diminished. New Deal programs which were enacted to
remedy specific flaws in the nation's economic system, did have
a dramatic effect in lessening the severity of the nation's
economic crisis. The programs which were invalidated by the Supreme Court did have noticeable beneficial effects for the economy while they were operational, which usually was for a period of two years before the legislation reached the Supreme Court for final judgement. The effects of the New Deal programs were two-fold; the main effect was, of course, the progress towards recovery, the other effect was the loss of influence Roosevelt had with Congress. It seemed that with each successful step towards recovery, with the corresponding diminishment of the national crisis, Roosevelt lost the edge of authority he held over Congress during the crisis. The diminishment of the crisis lessened the sense of urgency which had helped form congressional unity, which in turn produced congressional expediency. In this sense, with each success Roosevelt lost, instead of gained, power and authority.

Through the passage of time, Roosevelt lost much of another managerial tool: the power of patronage, as Patterson states, "it (was) no longer easy for Roosevelt to entice wavering Democrats with a handful of plums." By the time that the Court Reorganization Plan was proposed, in 1937, many of the public works projects, political appointments, and other "plums" had been handed out. Roosevelt lacked sufficient tangible reserves needed to influence those who might not support him. The lack of the availability of patronage, lessened the political price that a Congressman or Senator would have to pay if he opposed the New Deal. Without the "tools" of urgency and patronage, Roosevelt found it increasingly harder
to coerce the congressional flock to follow the shepherd.

Congressional dissent also mounted against Roosevelt with the continued creation and proliferation of agencies and their bureaucratic operators. The implementation of the New Deal resulted in the advent of recovery by agency. The Federal government became inflated with alphabet agencies which subsequently increased the amount of people and paper which Congress found itself faced with. Legislators increasingly felt boxed in, their "natural desire...for independence, was frustrated by Roosevelt's strong leadership..." They were now further frustrated by the many score of new agencies and their operatives. This frustration became a subject on which to base general discontent as the New Deal moved on.

The combination of the loss of political managerial tools, and the growing awareness of Congress to the creation of a huge Federal government, resulted in growing resistance and dissent in the second and third New Deal Congresses. The first New Deal Congress, 1932-1934, had given to the President all that he had asked for. The second New Deal Congress began to balk at some of the far reaching pieces of New Deal legislation. The 1935 fight over the passage of the Utility Holding Company Bill is an example of what can be termed as the beginning of Congressional dissent to the New Deal. Roosevelt's version of the legislation, which included the famed "death sentence" clause (providing for the abolishment of almost every utility holding company) was voted down 258 - 147 by the House. Roosevelt's handling of the Works Projects Act and the poor formulation
of the 1935 Tax Bill, provided conservative and some moderate Congressmen and Senators with substantiation for their growing belief that the New Deal had gone too far in Federal regulation and involvement in the private sector.\textsuperscript{16}

The Democratic party, and the administration, increased its representative strength in both houses of Congress in 1934. The increase of majority party representation in a non-presidential election year, remains as a feat seldom accomplished in the history of American politics. The Republican party, now decimated even further, returned with little political power or support in 1935. In increased numbers, the Republicans that were able to retain or win their elective offices supported the New Deal and its ideological tenets. Out of the twenty-five Republicans who returned to the Senate, ten were western progressives "who for all intents and purposes had left the ranks of their affiliated party."\textsuperscript{17} The second New Deal Congress was comprised of an almost embarrassing overabundance of Democrats. The traditional separation of Democrats and Republicans by the center aisle in the House of Representatives, had to be disregarded as the Democrats were forced to flow over this political barrier in pursuit of seats, cramping and confining the remaining Republicans to a few forward rows of seats. The existence of the overwhelming Democratic majority, would actually become a disadvantage rather than a further facilitation for Roosevelt's control over the Congress.

The legislative session which directly preceded the 1936 national elections, effectively glossed over the few disputes.
and dissensions that had surfaced in the second New Deal Congress. The congressional session held on the eve of elections "was generally free of serious controversy mainly because Roosevelt and Congress alike were anxious to avoid altercations in an election year." The results of the 1936 election clearly constituted another tremendous electoral triumph for Roosevelt and the Democratic party. The number of known conservatives or anti-New Dealers had been reduced in both houses of Congress, with the Senate boasting a mere eighteen conservative members. With the electoral triumph behind them and the subsequent sense of security that at least two years of office gave, the members of Congress were now willing to focus upon the glossed-over controversies that were left unresolved before the election. The third New Deal Congress marked a sudden upsurge in the expression of suspicion and distrust of Roosevelt. Said one Senator, "Roosevelt is in an audacious mood and is even thinking of proposing to pack the Supreme Court by enlarging it...Roosevelt is determined to curb the Court and put it in its place, and will go ahead even if many people think it is unwise." Congress was emboldened by the electoral triumph, interpreting the results as a statement of support for them as individuals, much the same as the symbol of public support that Roosevelt viewed the elections as providing him with. Both Congress and Roosevelt felt entitled to new initiatives of power. Congress became much more willing to voice opposition to the New Deal and Roosevelt. The President became convinced that his popularity would "carry
the country with him with his Court proposal."\(^{21}\) Roosevelt would become cognizant of the increased congressional assertiveness in the days which followed the January 5, 1937 Court Plan announcement. Roosevelt’s "most energetic and courageous supporters were the first to balk"\(^{22}\) in supporting the Court Plan. Even the "people", whom Roosevelt believed had given him a mandate to press forward and clear the obstructed path of recovery, were to desert him.

Congressional reaction to the Court Plan can best be described as a gradual quickening of opposition. Burton K. Wheeler, whose opposition Roosevelt termed as "below the belt because by using only a very small excerpt from the (Court Plan message), he deliberately gave a false impression,"\(^{23}\) stated that the Court Plan issue must be used to "teach that man in the White House a lesson. We must show him that the United States Senate has to be consulted and is going to have something to say on how the Government is run."\(^{24}\) (I have underlined that man merely to illustrate that those who became opponents to Roosevelt during this time referred to F.D.R. as that man and not by name.)

Wheeler’s defection was the first of an increasing number of Senators and Representatives who revealed their true ideological colors and would disassociate themselves from the New Deal. Progressive Senators, like Norris and Borah, were deeply troubled by the Court Plan proposal. Torn between their moral instincts to object to the Plan, and their deep desire not to defy Roosevelt, the Senators would lobby in an effort to
convince the President to alter his plan of attack. Borah went so far as to offer a ready-made constitutional amendment which would redefine the due process clause. Borah's amendment would limit the Court's jurisdiction over certain types of Federal legislation. Roosevelt refused to consider such suggestions, deciding to adhere to a no compromise stance, believing that the legislature would soon quiet and enact what he wanted.

After only one month, of what would become a seven month battle, Harold Ickes confided in his diary that Roosevelt "has a first class fight on his hands." Ickes continued writing with a prognosis of the Plan's support in Congress. According to Ickes the end could be seen from the beginning, as he noted with the passage of each day the "Progressives in Congress are lining up with the reactionaries." While Ickes and other Cabinet members correctly sensed the mood of Congress, the President responded to the warnings with "insistence that the "people" were with him." Roosevelt was convinced that his Plan was the only way in which judicial correction could be carried out. Roosevelt substantiated his view that an amendment to the Constitution restructuring or redefining the Court's powers could not be secured, by referring to reports like that from Senator Meely who informed Roosevelt that a mere $25,000 would prevent the passage of an amendment or similar type of judicial reform measure from being considered in Meely's state of West Virginia. The loss of support from his own Vice-President, and from key Senators like Connally, Clark, Borah, Wheeler and Byrd, was met with a "calm carelessness" of acceptance by Roosevelt. In what Pusey
describes as "alarming symptoms", Roosevelt constantly made
"references to the election and (used it) as a text for a sermon
on optimish," he also firmly refused to listen to (or, as in
the case of Chairman of the House Judiciary Committee Summers
on December 8, 1937, to see28) his leaders in Congress.29
Roosevelt's aides did begin to take notice of the growing op­
position. While Roosevelt stated that the letters and telegrams
from people were "so sincere that you feel the country is be­
ginning to realize that something in the long run must be
done."30 Roosevelt aides were aware of the nine-to-one ration
of mail coming into the White House which was opposed to the
Court Reorganization Plan.31 For every letter of support, like
the letter from Allison Waugh on January 8, 1935 which stated;

The need for your program is so great and
criticizm regarding the permitting of "nine
old men" to wreck the wishes of the majority
of Americans is so striking, that Constitu­
tional changes or even a wholly new Constitu­
tion might win support. Surely a Constitutional
convention would be favored by many,32

Roosevelt received nine which repeated the same message as
H.C.T. Hough, when he wrote;

Thank God - for the Supreme Court - which has
again shown it may be possible to have the
American form of government prevail over the
Communist ideas of Tugwell, Ickes - Hopkins
et al. (see document eight in Appendix for
full letter)

Roosevelt's treatment by the press was as lopsided as his mail.
Raymond Clapper of the Scripps-Harold Chain provides a representative
statement of those who supported the Plan. Clapper stated that;
The hysterical attack upon President Roosevelt's Supreme Court proposal obscures its essential mildness. We are being treated to a bedlam of frantic shrieks not unlike those which split our ears in the Presidential campaign. What has Mr. Roosevelt proposed? Changing the Constitution? No. Requiring it to reach its decisions by a two-thirds or unanimous vote? No. Stripping it of appellate jurisdiction? No. Tampering in any way with the power of the Court? No.\textsuperscript{33}

The New York Tribune's Walter Lippman saw the issue as a question of great moral significance, writing:

No issue so great or deep has been raised in America since recession. No blow has been struck which, if successful, would so deeply injure the moral foundations of the Republic. There is no doubt that a great question has been raised in America. It is the question of whether the people shall be deprived of their sovereign right to give and to withhold the power their servants exercise, of whether a man, who has evaded the judgement of the people on this very question, shall by indirection become the master of all three branches of Government and the fundamental law as well.\textsuperscript{34}

All this public and private debate created an issue in which, in the opinion of Ickes, Roosevelt now had to win or should resign because, if he lost, he would not be able to carry-out his objectives. Ickes lamented that the stakes involved in the Supreme Court gamble were too high for what was such an unpopular notion.\textsuperscript{35}

With the mounting opposition, the inner group of Roosevelt's closest advisors, Cohen, Corcoran, and Assistant Attorney General Jackson, began to have success in convincing the President to change the direction of his attack. Roosevelt had occupied himself with a search for substantiation of the arguments
contained within the Court Plan proposal. In the year before the Court Plan announcement, Roosevelt sought to prove to Congress that it was well within their jurisdiction to take action against the Court. As in the January 14, 1936 memo to his Attorney General Homer Cummings, Roosevelt asked, "What was the McArdle Case (7 Wal 506 - year 1869)? I am told that the Congress withdrew some act from the jurisdiction of the Supreme Court." Roosevelt later focused his efforts on compiling remarks made by Supreme Court Justices and others, which could be used to enhance his arguments. Roosevelt wrote to Homer Cummings on May 26, 1936, asking for a meeting to discuss a letter from United States Circuit Court of Appeals Judge William Denman, the letter (see document ten in Appendix) reportedly quoted Hughes on the need for more Justices to end trial delays. As late as February 6, 1937, Roosevelt still sought to convince legislators of the tenability of his Court Plan argument. As document nine illustrates (see Appendix) Roosevelt desired to place in the hands of legislators Full copies of a part of Hughes and Taft quotations, Legislative History Act of 1869, including mention of the bill which passed the House - framed on lines similar to the McReynolds and Gregory suggestions, excerpts from Was the Supreme Court Packed by President Grant and material marked "Policy" which... (explains) why the present plan is the best.

On February 19, 1937, James Roosevelt sent his father a memo which suggested personal pressure be used on Nye and Frazier. Young Roosevelt's report went on to indicate that at best the Senate was evenly divided over the Court Plan issue. The report prompted the inner group to ask Roosevelt to
disregard what Ickes called, the "unteachable premises" of the judicial reform bill, and to state in truth why he wanted to change the membership of the Court. On March 4, 1937, at the Democratic victory dinner, Roosevelt first pursued a new direct attack. The President delivered, what Ickes called, "a fighting speech," where he lambasted opposition leader Senator Tydings and stated that "the prosperity of the country counted on the legislation that the Court had invalidated. Roosevelt in effect "laid-it-on-the-line," abandoning the false arguments created by Cummings and pushing for his true belief in the political necessity of being allowed to carry-out his programs. The pursuit of the "new direction" created further faction and dissent. Among Roosevelt's own staff, personal disputes between advisors erupted over which strategy should be followed. One group argued for compromise, another for the adherence to the charges levied in the original Court Plan proposal. Other aides, like Raymond Moley, still regarded the entire Plan as an attempt to "provide in advance for Supreme Court approval of whatever legislative reforms Roosevelt happened to espouse, a plan to enable Roosevelt to control the Court." Roosevelt's sudden switch in the direction of his attack created even more dissension within the Congress. His change in argumentation added further substantiation to the growing belief that the tenets on which the Court Plan was based, were fabricated, political lies. Supporters of the Court had
maintained from the first announcement of the Court Plan that:

Once an understanding of the Supreme Court's function and procedure is established, the deceptive nature of the President's message becomes obvious.43

Public opinion reacted negatively to the President's direct approach towards the Court issue. In what is a representative editorial, the Literary Digest commented:

Instead of going directly to the people with a request for the amendment he seeks, he first resorts to questionable methods to build up support for his plan. This is unworthy for the high office he holds.44

The Nation enunciated a similar theme nine days after the President's victory dinner speech. The magazine stated that now;

The underlying issue is clear. It is not age or pressure of business. It is the attitude of justices toward allowing the government to attempt desperately needed social and economic readjustment, partly known, in greater part unforeseen.45

Roosevelt's switch in direction damaged his reputation with Congress and the people because it not only indicated his attempt to cover-up his original arguments but it also came too late. A study done by the Washington Post in mid-February of 1937, "made clear that there was no relationship between the age of Justices and congestion in the Courts."46 The survey did much to damage Roosevelt's reputation and cast further doubt upon his sincerity and honesty in trying to improve the Court, as his Court message had stated. The Literary Digest commented:

Although the President in his recent message to Congress justified his plan for naming additional judges for those beyond seventy years by the congestion existing in the Federal Courts, the survey showed no apparent relationship between
aged judges and congested dockets. The heaviest congestion being in court districts comprising the largest areas of population.

The lie was uncovered, Roosevelt's actions were to cost him politically. Roosevelt's actions gave impetus to the spawning of the conservative coalition. As Robert J. Steamer, the author of *The Supreme Court in Crisis*, observed:

Ironically, the President's intransigence and lack of complete honesty may have been instrumental in saving the Court from an act of Congress which would have curtailed its power in some way.

The Growth of Opposition and of the Conservative Coalition

The opposition to the Court Plan in Congress headed by a nucleus of conservative Senators, grew so that by March 3, 1937, Thomas Corcoran was forced to report that over twenty-two Senators had stated their definite opposition to the Court Plan. The revolt in the House of Representatives became as widespread and threatening as the revolt in the Senate. The Court Plan's legislative history was decided when House leaders moved to block the initiation of Court Plan debate and consideration in their chamber, forcing Roosevelt to introduce the Plan in the Senate. Our study of opposition to the Court Plan will focus on the Senate deliberations.

The conservative coalition that began to form in the Senate, chiefly as a result of the Court Plan, consisted of a nucleus of seven Senators. The coalescence of this group according to the author of *Congressional Conservatism and the New Deal*, James T. Patterson, would later serve as the foundation for the bipartisan conservative coalition in Congress, which became
operational during the Court issue and would continue as a viable political force up to our present day. The leader of this group was Millard Tydings of Maryland, who at age forty-three had earned himself the title as "the outstanding spokesman for corporate wealth in Congress." Tydings and Roosevelt developed a relationship of mutual hate. Harold Ickes has recorded a rather remarkable statement made by Roosevelt about Tydings. Ickes remembers Roosevelt as stating that he wanted to peel-off Tyding's hide and then rub salt into the wounds. In any event, the two men had few kind words for each other, their opinions residing at opposite poles. North Carolina's Senator Josiah Bailey held the distinction of being able to oppose the New Deal without fear of electoral repercussions. Bailey was firmly entrenched in the Senate, and was able to express his true feelings, along with Tydings, early in the New Deal. Bailey held a genuine dislike for Federal programs which called for the expenditure of large sums of money. Bailey also loved to speak about issues in terms of great moral questions. He quickly turned the Court Plan issue into a moral debate, advocating with all his available moral indignation for the Plan's defeat. Virginia's Senator, Harry Flood Byrd, became disenchanted with the New Deal during the enactment of the National Recovery Act and the Agricultural Recovery Act. Senator Carter Glass, Byrd's Virginian colleague, supported Byrd in his opposition to New Deal programs. The opposition of Glass to the National Recovery Act was characterized by Secretary of Agriculture as the result of
a fear that the legislation would force Glass "to pay more
than ten cents an hour for his apple pickers." 53 Glass'
opposition to the New Deal like the opposition of Tydings and
Byrd, came far before the formulation of the Court Plan.

The other Senators who formed the nucleus of the con-
servative coalition, also became opposed to the New Deal shortly
after its inception. Royal S. Copeland of New York became op-
posed to Roosevelt, and thus the New Deal, because of the manner
in which he was treated by Roosevelt. Throughout the administra-
tion's recovery program, little of the Roosevelt patronage was
given to Copeland. His revenge for Roosevelt's indiscretion was
to join with the conservatives. 54 Senator Burke of Nebraska
rescinded the laudatory remarks which he made at the beginning
of the Roosevelt administration, because of Roosevelt's in-
clination to direct Nebraskan patronage to Senator Norris, an
avid Roosevelt supporter. Burke had been torn between the New
Deal and his support of business, the patronage issue helped
decide Burke's stand. Burke created a long record of negative
votes for labor laws, which, combined with his business interests,
set him apart from New Deal ideology. 55 Burke lost his bid for
renomination to the Senate in 1940. Angered and disillusioned,
Burke campaigned for Wilkie, Roosevelt's opponent in the 1940
Presidential election.

In addition to the seven men who comprised the foundation
for the conservative coalition, we can add Senator Buckley from
Ohio, Senator McCarren of Nevada and Senator Ben Clark of
Missouri. These men joined the conservative ranks after the
Utility Holding Company bill debates. As we have mentioned, the bill aroused sizeable dissent in the Senate. We must note, however, that even though the Senators listed above as conservatives became opposed to the New Deal, they could seldom join to work together. Before the Court Plan's announcement, the conservative Senators did not form a coalition, even though they and others saw the "New Deal as not only new, but revolutionary." The Court Plan became the adhesive which worked to bind together the conservative elements in the Senate to form a solid block of opposition. The process of transformation was a gradual one, dissent and union happened slowly. From January 5, 1937 to July 14, 1937, the forces of dissent enlarged with the passage of each day drawing other Senators, mainly middle-of-the-road Democrats, away from the New Deal coalition.

There are a few key elements which guided the course of the Court Plan battle in the Senate. In 1936, the Senate was comprised of seventy-five Democrats, sixteen Republicans, one Progressive, one Independent, two Farmer-Laborites and one vacant seat. When the Court bill was introduced in the Senate, spirited by a feeling that someone else would head the next national ticket, all past hatreds and slights that any Senator had incurred by the White House were now exposed and intensified. The Senators' mood and reaction to the Court Plan was best described by the Literary Digest on April 17, 1937 when the observation was made that:

The tipsheets whispered that Representatives and Senators were becoming increasingly hot
tempered about the great issue, that bitter personal rows over the subject would soon bubble to the surface and flare into black head-lines, that the Democratic Party was already split and had only an even chance of regrouping, even if the President accepted a compromise judiciary reform bill. 59

The mood was set, Congress grew restless during what they perceived to be the last Roosevelt administration. The Roosevelt myth was being shattered, the urgency and sense of despair which accented the Roosevelt administration of 1932, had dissolved and dissipated during the years which aged the New Deal and its purpose. Roosevelt's towering authority was crumbling, his power to persuade balking legislators had grown weak.

The Court Plan's Congressional History

The Court Plan was referred to the Senate Judiciary Committee where, under the leadership of Senator Ashurst, the Plan was debated for three months and thirteen days until it was finally brought out of committee, by a vote not recommending enactment, on May 18, 1937. 60 The manner in which Roosevelt acted, his inability to convince Ashurst to speed up the committee's deliberations, his assumption that Committee members would come through in the end for him, resulted in the loss of support for Roosevelt and the Plan.

The Committee's final vote was also influenced by the efforts of the influential Burton K. Wheeler to enlist the Supreme Court in his battle against the Plan. Wheeler constructed an opposition force which functioned with devastating political precision. Wheeler was able to convince Chief Justice Hughes to write a letter to the Judiciary Committee defending the
Supreme Court. Hughes responded to each of the charges which Roosevelt levied against the Court. He wrote that:

an increase in the number of Justices of the Supreme Court, apart from any questions of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more Judges to hear, more Judges to confer, more Judges to discuss, more Judges to be convinced and decide.

The letter continued: to destroy, point by point, the original argument of the Administration, an argument already repudiated by Roosevelt himself.

The letter proved to be disastrous for the Administration. Ickes wrote in his diary that the;

episode proves again the mistake in going to Court with a weak case. I refer of course, to the fact that the President's special message on the question of judicial reform was almost entirely based on the proposition that we needed more Federal judges.

The Hughes letter further demonstrated the political slickness of Roosevelt's Court Plan. His arguments were now refuted by the Supreme Court Chief Justice. The Court, in one respect, again invalidated a Roosevelt attempt at reform. Roosevelt's power over Congress diminished, his reputation tarnished, Roosevelt still refused to concede defeat believing that the "people" were still with him, and that Congress would soon turn and fulfill his desire. Roosevelt would learn the lesson offered by Bernard DeVoto author of F.D.R. and the Supreme Court Crisis. DeVoto stated, "up to a point the bleachers will applaud political slickness, but the moment that point is passed they always start throwing pop bottles." The Senate in its continued
debate over the issue was nearing that point. The only factor which obstructed the Senate from carrying out a full fledged rebellion was the continued defense mounted for the Plan by Senator Joe Robinson.

Robinson was perhaps the only supporter of the Court Plan, and his reasons for support rested upon political considerations. Tom Corcoran, Roosevelt's Presidential aide, reported to Harold Ickes on February 10, 1937 that Robinson would be demanding a lot of patronage as a price for Court bill support. In addition to any direct patronage requests, Robinson requested that in return for his loyalty he would be appointed to the Supreme Court at first opportunity. Robinson's life long goal was to gain a seat on the Court. Throughout the four and one-half years of the Roosevelt administration, Robinson was devoted to Roosevelt and the New Deal. When the President slighted the Senator, Robinson still tendered support, when Roosevelt failed to make an attempt at forming a warm acquaintanceship with Robinson, the Senator continued to steadfastly side with the President. Robinson provided his loyalty in exchange for a promise of a Supreme Court seat. To Robinson, the Supreme Court was a goal that was worth the sacrifices made during the New Deal.

On May 18, 1937, Justice Van Devanter announced his intention to retire after the close of the spring session. Van Devanter's announcement came at a politically inopportune time
for Roosevelt. The announcement offered Roosevelt a chance to appoint a new Justice, a liberal Justice, and withdraw the unpopular Court Plan before a final vote was taken. Roosevelt decided not to take advantage of the development for one main reason; Roosevelt had all but publically pledged the next Supreme Court appointment to Robinson, and Robinson was feared by the administration as being a moderate-conservative. As discussed in the Memorandum on Features of Proposed Plan (document eleven, see Appendix) the administration needed to insure the creation of a liberal Court that was liberal by clear and wide majorities. With the appointment of one new Justice, the Court would still only be balanced, the deciding vote would still be cast by Roberts. Fearing that appointment of Robinson would result in a conservative Court, one beyond the criticism of Roosevelt by virtue of his appointment of a new Justice, Roosevelt decided to continue with his attempt at Court Reorganization in order to guarantee a liberal Court by 1938.

Roosevelt made no public move to Robinson. Ickes reports in his diary on June 17, 1937, that Tom Corcoran informed him that Roosevelt had called Robinson to the White House. Roosevelt made clear to Robinson of his desires for a liberal Court, the President is reported as saying,"that if there was to be a bride there must also be bridesmaids, at least four of them."66 Roosevelt would continue to hold the carrot at the end of the stick for Robinson until a Court Plan victory had been secured.
Roosevelt's intentions about appointing Robinson to the Court have always been in question. As documents two and three (see Appendix) indicate, Roosevelt clearly used Robinson for his own advantage. Roosevelt went so far as to refuse to publically support Robinson in his 1936 re-election. Roosevelt's "agreement" to appoint Robinson to the Supreme Court after the delivery of the Court Reorganization Plan, must also be placed on tenuous grounds. Tom Corcoran, in discussing the agreement with Raymond Moley, has given substantiation to the belief that Roosevelt never intended to appoint Robinson to the Court. Corcoran is reported to have said:

I've learned a lot about politics from being down here, when a politician makes a promise he knows that he is not binding himself, and the man to whom he makes the promise knows it too.67

Further support to the contention that Roosevelt never really intended to appoint Robinson to the Court is offered by Ickes. He reported that when he made known his belief that Roosevelt could not afford to appoint a relatively conservative man like Robinson to the Court, Roosevelt is said to have "emphatically" agreed.68

After June 17, 1937 the opposition to the Court Plan and to Roosevelt grew at a steadily quickening pace. Democratic Senators became upset with the treatment of Robinson. In late June, Roosevelt authorized Robinson to attempt a compromise. On July 2, 1937, Robinson offered a substitute Court Bill (see document five in Appendix). The substitute bill varies slightly
from Roosevelt's original proposal. Under the compromise bill, Roosevelt would still be able to appoint an additional Justice for each Justice age seventy-five or older. Robinson's bill would have allowed for the appointment of only one additional Justice in each calendar year. The substitute Court Bill would not have allowed Roosevelt to attain his final goal, the creation of a solidly liberal Court by 1938. In this respect, the substitute bill was a very real compromise for Roosevelt.

The compromise bill received little support in the Senate. In an earlier day the substitute bill would probably have been accepted by the Senate. Through the prolonged Court Plan battle, however, Roosevelt lost the support needed for the enactment of any reorganization bill, no matter how mild. As author Merlo Pusey stated, "he fought too long, divided too many."69 The Senate was in rebellion against the bill and against Roosevelt.

The rebellion in the Senate was carried on by members of the Democratic party. The Republican party's contribution to the Court battle was silence. While the Court Plan divided the Democrats, it did "what no Republican stratagem could have done; it united Senate Republicans for the first time in some three decades."70 Republican leader McNary, while supportive of most New Deal programs, found himself and all of his Republican colleagues in opposition to the Plan. It was McNary who brought up the tactic that facilitated both opposition to the plan and the growth of the conservative coalition. As J.T. Patterson observed, "until the Court Plan was defeated in July, most
prominent Republican Senators maintained a discreet, and to Democrats, infuriating silence." The Republicans realized, that with their minority position, they would have no beneficial effect on the formulation of the opposition if they tried to lead it. The Republicans instead decided to quietly urge on opposition, attending bipartisan conservative meetings and working closely with conservative Democrats in the formulation of opposition to the Plan.

The Republican strategy of discreet silence worked. It allowed powerful Democrats, like Wheeler, to lead the way for an exodus from party folds. Thus it became a Democratic rebellion, a rebellion of and by the majority party. The Democrat, while desiring to maintain some control over the Court's jurisdiction, strongly condemned what M.A. Kaigle in a letter to the President on July 2, 1937, called "the dubious expedient of packing." Roosevelt was failing with his party, and also failed in gaining the support of labor and the farmers, two of the New Deal's primary supporters.

Labor leader Lewis decided on behalf of the C.I.O. not to support the bill. Merlo Pusey contends that Lewis acted in this manner "because of the callous way in which the government treated him." The A.F.L. officially supported the bill, however, because of his refusal to take in labor as a decision maker, the A.F.L. kept its lobbyists at home. One labor leader did attempt to conduct a campaign of mass rallies in support of the bill. A.F.L. and C.I.O. headquarters quickly passed out
the word that such meetings in support of the bill were "poison," the result was no mass rallies of support for Roosevelt. As with labor, the farmers, through the Farm Bureau, failed the President. The Farm Bureau officially came out against the bill, signifying the desertion of one of the President's most secure blocs of support. Support from labor and the farmers was non-existent. Both labor and the farmers might have supported a Court Bill if the President had consulted with or in some way made them part of the decision process. As Merlo Pusey surmised, "...the President was paying for the extreme secrecy of his preparations." In its own fashion, the Supreme Court also failed the President. Beginning with the May 24, 1937 decision upholding the Social Security bill, the Court began to reverse previous conservative New Deal opinions. The effect of the Court's refusal was to remove the Court from further public condemnation, and thus remove the Court from the critical public eye. Without the continuation of conservative judgments, the public, and Congress, began to forget the opinions which spawned the Court Plan and began to focus upon the Plan as separate from the invalidation of recovery programs. In this light, the Court Plan struck against the popular view of reverence for the Supreme Court as an institution. Instead of rallying to teach the Court a lesson, as Roosevelt hoped the Congress would, defense of the Court and fear of the effects of an attack upon the Court became the rallying point. Henry L. Menchan expressed the point of increasing consternation when he stated, "if the plan succeeds,
the Court will become as ductile as a gob of chewing gum, changing shape from day to day and even hour from hour as this or that wizard edges his way to the President's ear."\(^{76}\)

The battle in the Senate became heated and embittered. Joe Robinson fought frantically for the substitute bill which, upon enactment, would supposedly tender him a seat on the Supreme Court. The fight was Robinson's to carry, Roosevelt's to win. As we have stated above, Robinson was almost the sole impediment to adverse action by the Senate early on in the fight. If the bill had been Robinson's to win, without the Roosevelt stigma which was evoking much of the opposition, the outcome might have been much different. As it was, Robinson fought gallantly and arduously for an unpopular bill destined for defeat. The stress of the battle, and the strain and desire for a positive outcome, took its toll on Robinson who died of a heart attack on July 14, 1937.\(^{77}\)

After Robinson's death, Roosevelt managed to further inflame Senatorial opposition by refusing to attend Robinson's final burial in Arkansas. The result of this action was to quickly seal the fate of the Court Bill. After Robinson's death, Vice-President Garner returned from his self-imposed exile in Texas to lobby for and insure the defeat of the plan.\(^{78}\) Garner worked for an immediate vote on the bill, and was able to declare to Roosevelt on July 20, that no hope existed for a Court Bill victory. The seventy to twenty vote, which returned to committee a judicial reform proposal not including the Supreme Court, substantiated Garner's declaration.\(^{80}\)
Roosevelt's Court Reorganization attempt was dead. Opposition to the Plan, and to Roosevelt, was the majority view. The reasons for Roosevelt's defeat must be affixed to Roosevelt's own actions. Roosevelt's manner of introducing the plan was offensive, he failed to consult with others over the Plan's formulation, he failed to show moderation in pursuit of his ends. At the time of the Plan's announcement there was much public support for a measure that would in some way force the Court to become more responsive to the changing needs of the American society. Roosevelt failed to capitalize on this mood. As Patterson concludes, "practically every appraisal of the Court controversy agrees that the most important reason for Roosevelt's defeat was the plan itself and Roosevelt's handling of it."^\textsuperscript{81}

The loss of Court reorganization must be squarely placed upon Roosevelt's shoulders. The Court Reorganization Plan was his plan, he had decided upon the direction, formulation, announcement, and strategy for enactment of the Plan. Roosevelt took a highly unpopular method of Court correction and transformed it into a test of his personal power and prestige, a test which he failed miserably. By charging the entire Court with inefficiency and inadequacy in the performance of its functions, Roosevelt succeeded in alienating the Court, the Congress and the American people.\[^\textsuperscript{82}\]

The travesty of court reorganization had some long term consequences for the Roosevelt administration. Walter F. Murphy, author of Congress and the Court, states that after the
demise of the Court Plan, "the mighty New Deal coalition that had triumphantly swept forty-six states in November 1936, had been splattered like Humpty-Dumpty the next spring." Murphy points to the fact that only one piece of major social legislation passed the Congress after the Court Plan defeat. This last measure was the Fair Labor Standards Act. The legislation, introduced in early 1937, had a horrible time in passage and when it was finally enacted in June of 1938 it was, "the product of the kind of political bartering in the back-rooms of Congress that Roosevelt had not before engaged in." The first of the long term consequences was Roosevelt's loss of Congressional control. After the defeat of the Court Bill, the control that Roosevelt had over the Congress from 1932 through 1936 was to become a historical fact, not an operational reality.

The loss of Congressional control is but one aspect of the decline in Roosevelt's power and authority to govern. Paul K. Conkin, author of The New Deal, provides an insight into the extent of the repercussions of the Court battle. Conkin writes that;

the Court fight...helped destroy the Roosevelt myth of invincibility, disillusioned many of his former disciples, divided the Democratic party, gave the Republican party a new lease on life, showed his worst militant characteristics, and left Roosevelt bitter and hurt.

Roosevelt's loss of party control pervaded beyond the loss of Congressional authority. As a result of the Court re-organization attempt, writes Leonard Baker, Roosevelt lost the leadership of the entire Democratic party, and by so doing lost
the chance to "determine in which direction the party would move in the future." During the Court Plan battle in Congress, Democrats began to rebel against Roosevelt throughout the country. On February 8, 1937, Stephen Early informed Roosevelt of the introduction of a resolution in the Texas State Senate which denounced the Court Plan (see document twelve in appendix). On May 9, 1937, it was reported that "certain prominent leaders of the Democratic party in Wyoming, and some of our Democratic newspapers, have recently voiced their opposition to (the proposed) reorganization of the Supreme Court." These specific examples serve to exemplify a national loss of New Deal coalition and Roosevelt support. The occurrence was caused by the creation of the Court Plan and Roosevelt's handling of the Plan. As a party leader Roosevelt's authority had been irreparably undermined.

Roosevelt's unsuccessful attempt to regain his party authority in 1938, by trying to "purge" or campaign against disloyal party members, resulted in a further loss of Roosevelt's control over the Democratic party. The purge strengthened the conservative coalition by increasing the size of the coalition's membership, and by extending the duration of the coalition's operations in Congress.

Conclusion

In this chapter we have examined the reactions by members of Congress to the Court Plan, in an attempt to ascertain a description of the effects the Court Plan had on Roosevelt's
ability to govern. We have noted that the Court Plan was Roosevelt's first real Congressional defeat, and that this defeat served to destroy the myth of Roosevelt invincibility. The Court Plan proposal intensified faction within the previously unified Democratic party. The conservative coalition is perhaps the most important result of the faction caused by the Court Plan. The Court Plan did not create conservatives, it served to unify conservatives to create a coalition of conservatives. The opposition to the Court Plan signaled to Senators and Representatives, that it was alright to voice opposition to the New Deal. Members of Congress were increasingly unafraid to answer to their personal convictions. The result was a breakdown in the Democratic unity which had expedited the creation of the New Deal, party unity that was seldom seen before the New Deal and has not been seen since.

The Plan created opposition, durable opposition which would hamper his efforts to receive the enactment of domestic legislation in 1937. Leonard Baker evaluates Roosevelt's achievements after the defeat of the Court Plan and finds that Roosevelt did not fulfill the purpose of the New Deal, he did not bind his party together again, and he did not insure the continuance of liberalism. Paul Conkin continues stating that the fight wasted an entire Congressional session, disillusioned New Dealers, destroyed Roosevelt's reputation, factionalized the Democratic party, and provided for the recovery of the Republican party. Thus, the immediate results of the Court Plan for Roosevelt were disasterous, one can only
speculate on how Roosevelt would have fared in 1938 and 1939 if not for the increased anxiety caused by the rumbles and rumors of World War II.

Our evaluation is focused at the long term effects of the Court Plan on Roosevelt's ability to govern. We must agree with William Leuchtenburg and his analysis that:

by the end of the Roosevelt years, few questioned the right of the government to pay the farmer millions in subsidies not to grow crops, to enter plants, to conduct union elections, to regulate business enterprises from utility companies to airlines, or even to compete directly with business by generating and distributing hydroelectric power. All these powers had been ratified by the Supreme Court. 90

The Supreme Court would later ratify new broader powers of governmental authority. Roosevelt was able to appoint members to the Court who would vote to overrule thirty-two precedents. 91 As Roosevelt wrote, "the result has been that the Federal government now has the undisputed power which had always been intended for it by the framers of the Constitution." 92

Roosevelt's success must be measured through time, as Baker states;

In the sixties the American people proceeded with the philosophy of the New Deal then, that they did not turn their backs on the reforms fought for and instituted by F.D.R. - this signifies the real victory of F.D.R. 93

Roosevelt lost a great deal of his powers and ability to govern because of the adverse reactions to the Court Plan. His loss must be judged against what he had acquired, the complete control over Congress, solid and continued popular support for himself and his New Deal, and the success of his programs on
restoring and rebuilding the American society and economy. No other President had such complete authority over Congress, we must remember that eleven key, major pieces of new social legislation passed through Congress with only forty hours of debate. Roosevelt achieved and acquired what modern day Presidents have found impossible to achieve or acquire. Any detraction from this powerful and revered position would seem to be a dramatic loss. Roosevelt was removed from his pedestal and placed momentarily upon an equal footing with other Presidents in our nation's history. Roosevelt's omnipotent powers were reduced to a pedestrian level until 1940.

We can conclude then by saying that the Court Reorganization Plan caused Roosevelt to lose some power and authority, some ability to govern in 1937 and 1938. His victory, however, has been realized through the passage of time. His powers, his programs and his influence on American society still remain today. The Court defeat was a momentary defeat, an anomaly in his governing career, a lapse in his ability to govern. The immediate effects of the Court Plan were serious to Roosevelt and his record of unopposed, undefeated leadership. We use the argument of time not to gloss over the adverse effects but to place them in their proper context.
CHAPTER SIX
Conclusion

The Supreme Court Crisis of 1937 was a product of the expression of will by two branches of our national government. During the 1930's, a change in the definition of the proper role of government in American society occurred. The new role definition was promoted by Roosevelt, through the social legislation labeled as the New Deal. The judiciary, through the legal opinions of the conservative Justices who comprised a majority on the Supreme Court, expressed its will by invalidating the social legislation of the New Deal, and thereby moved to prohibit the change of the Federal government's role in American society.

For a period of four years the ideological battle ensued. On February 5, 1937, President Roosevelt moved to enlist the legislative branch of government to end the stalemate, to force change within the membership of the legal tribunal and to bring about new legal opinions which would promote and pass favorably upon the new role of government. The argumentation pursuant to the Court Reorganization Plan proposal, presents some fundamental questions regarding the powers and relationship of each branch of government to the others.

The issue of the proper relationship and the boundaries of power of the three branches of government is a fundamental issue, and one that as of yet has not been given a steadfast answer. The framers of the United States Constitution debated at length over which branch of government should represent the supreme will, and how the expression of will could be limited and checked by the other branches of government. The Founding Fathers struck
upon an agreement of government in which, as Madison states in Federalist number fifty-seven, "Ambition must be made to counteract Ambition." While at the same time the independence of each branch of government must be insured. Madison went to great lengths in Federalist number fifty-one to set-forth how important is the independence of each department of government from the other departments.

The extensive quote from the Federalist fifty-one is important in that it shows the fear that the Founding Fathers had of one branch being able to subjugate another branch, particularly the judicial branch. In Federalist number fifty-one, Madison states, in part, that:

in order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have its own will; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.... Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others....

The departments of government, according to Madison, are to be independent and counteract the ambitions of the other branches, and yet the departments of government are to form a Union which
will be strong enough to inhibit the development of factions. The Court Crisis of 1937 saw the development of factions among the three branches of government itself. How is such faction to be resolved while still insuring the independence of each branch of government, and insuring that the ambition of, or the expression will by, any one branch will not subjugate the other branches of government? The resolution of such faction, as between the President and the Supreme Court, has never been accomplished through direct or overt measures taken by the President. Two Presidents before Roosevelt, took steps to force a change in the Court's ideological stance. The two Presidents, Thomas Jefferson and Abraham Lincoln, faced Supreme Courts which answered to the ideology of an earlier order.

Jefferson tried many different tactics to force change within the judiciary. His most novel tactic was the use of impeachment of lower court justices. As a Jefferson aid explained to an opposition leader, "we want your offices for the purpose of giving them to men who will fill them better." Jefferson did succeed in having one Judge impeached, his next attempt at impeachment failed, and Jefferson ended his attack.

Jefferson held very strong opinions about the Supreme Court, which was the object of his wrath and the primary target for forced change, although, as the author of The Supreme Court and the President stated, "But for all his schemes and fulminations, Jefferson never succeeded in limiting the independence of the Supreme Court." Jefferson believed it to be "a very dangerous doctrine to consider the Judges as the ultimate arbiters of all Constitutional questions. It is one which would place us under
Jefferson was deeply worried about and fearful of the Supreme Court which he found opposed to his governmental ideology. Jefferson's correspondence is punctuated with statements which express his fear of the Court. In one letter, Jefferson writes; "there is no danger...so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court." Jefferson was repulsed by "the very idea of cooking up opinions in conclave," believing that the manner in which the Supreme Court arrived at decisions "begets suspicions that something passes which fears the public ear."

The issue of the proper role of the Federal government in our society, and the issue of which branch of government has the authority and function to formulate and express this role, arose between Jefferson and Chief Justice Marshall of the Supreme Court. Jefferson, like his executive counterpart in 1937, condemned the Supreme Court's ability to frustrate what seemed to be the will of the people as expressed by the President. Jefferson stated that the "practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the Court, is very irregular and very sensurable."

Roosevelt repeated these sentiments when the Hughes Court invalidated New Deal legislation because of the conservative majority's opinion that the legislation was unwise.

Marshall, and the Supreme Court which opposed Jefferson, saw the need for a strong central government, and the enlargement of the powers of Congress. In the Sedition Acts case, the Supreme
Court expressed its belief, or will, that these tenets should guide the operation of the Government. Marshall, and his Court, validated the Acts as an expression of will. The Court's opinion was clearly seen as such an expression, as one detractor stated, "the uncertain future of the Federalist party was more important than the upholding of the Constitution." The issue between Jefferson and Marshall is analogous to the Supreme Court Crisis of 1937. The executive and judiciary held opposing views as to the proper function and role of the government. The judiciary was able to thwart the expression of will by the executive.

When the Constitution was conceived of, the framers believed that the judiciary would be the weakest, and most vulnerable branch of government. In the Federalist number seventy-eight, Alexander Hamilton wrote that:

the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

History has proven Hamilton wrong. The judiciary has both deterred and denied the expression of will by the executive and legislative departments. The denial of the expression of will is an attack upon the powers of the other branches of government. The decisions of the Court have been far-reaching and have had fundamental effect upon the destiny of this nation. The Court has acquired and developed a degree of power so great that its decisions have had important effect upon the unity of the nation, and upon the ability of the other two branches of government to resolve national crisis according to their own ideology.
The Supreme Court's decision in the Dred Scott case served to limit the ability of President Lincoln to deal effectively with a serious national issue. The Court, through the opinion, gave legal sanction to a particular ideology which subsequently prohibited resolution of the issue through compromise. Our American system of government operates on the principle of compromise, and the Court, through the sanction of a particular viewpoint or philosophy, removed the ability formulate compromise, and the issue involved in the Dred Scott case was left to be resolved outside of our normal system of government.

President Lincoln deplored the role of the Supreme Court as the arbiter of national issues, when he stated that;

the candid citizen must confess that if the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, moving to that extent practically resigned their Government into the hands of that eminent tribunal.

President Roosevelt echoed this warning in 1937. To Roosevelt, the Supreme Court should not be allowed to become a tribunal of men who decide upon the vital questions facing the nation. When the Court became involved in issues which adversely effected national recovery in the 1930's, Roosevelt stated, "we have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. In our Courts we want a government of laws and not of men." 12

The development of the Supreme Court's power to assert itself into the decision and formulation of national policy began with
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the Judiciary Act of 1789. This act listed the type of cases that the Supreme Court could hear on appeal. Wesley McCune, author of The Nine Young Men, states that, "in the course of listing a national legislature, by its own voluntary act, deliberately made itself subordinate to and reversible by a national judiciary." From this act has sprung the notion of the Supreme Court's power of judicial review.

The Constitution has no provision whereby the Supreme Court may veto or pass upon the validity of an act of Congress. Proposals made during the Constitutional Convention to include such provisions were voted down. The Court has assumed this power, and has used this assumed power to prevent the expression of a particular governmental ideology by the Congress or President. The assumption of the power of judicial review has been seldom questioned by either executive of Congress. Roosevelt did not question the Court's assumption of the power during the Supreme Court Crisis of 1937.

What has been questioned is the Court’s use of the power of judicial review. The power of judicial review has given the Court ominous authority, which can only be tempered or controlled through the Court's own self-restraint. Mr. Justice Washington wrote in Ogden v. Sanders (1827) 12 Wheat 213,270 that it "is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proven beyond all doubt." However, not all Courts have followed this doctrine, and have, as in 1937, precipitated conflict
between the several branches of government.

Judicial review, says Charles E. Hughes, "gives assurance of a more just and reasonable balance between public and private interests in the enactment and administration of our laws." The power of review is supposed to give a stabilizing effect to our governmental institutions. The Supreme Court is elevated to the position of guardian for the interests of the state against the legislatures abuse of the great powers given them. As Chief Justice Balck of Pennsylvania stated, "there is nothing more easy to imagine than a thousand tyrannical things which the legislature may do, if its members forget their duties." The Supreme Court, however, is maintained and restrained only through the counsels of self-restraint urged by its own membership. Our paper has reviewed a period of time where the Court did not heed such counsels of self-restraint, and proceeded to insist, in an almost tyrannical fashion, upon economic doctrines that a majority of the members of the Court came to believe in.

The Supreme Court Crisis of 1937 was an event where in a time of "crisis and change, a reluctant and backward-looking Supreme Court, dominated by...a group of men who (owed) their power to a repudiated President and party" created friction and chaos in the running of this nation. The Court Reorganization Plan was a response to the Crisis of 1937. This paper has reviewed the time of crisis and has portrayed the severity of the economic decay, in an attempt to show the failure of the old economic order. In 1932, the people of this Nation chose Franklin D. Roosevelt to formulate a new economic order and to initiate change which
would revitalize and rebuild the fallen economic system. We have provided examples, i.e. the R.F.C., which have shown the differences in governmental operations of the New Deal compared to the workings of government under the auspices of the old order. We noted in exactly what direction the New Deal attempted to take the country, and how this varied from the guidance of government under nineteenth century liberal notions.

Our focus then turned to the invalidation of the New Deal. In that section we attempted to show that the Supreme Court struck at the very heart of the recovery effort. The Court refused to allow programs which provided further steps to the operationalization of modern twentieth century social and economic thought. We also sought to provide a feeling and an understanding of the effects that the invalidation of New Deal legislation had on the people of our country, and upon the recovery program. In this we wanted to make clear that, without the continued operation of the New Deal with its new governmental operations and activities, the nation would falter even more. The void left by the invalidation of New Deal programs was not filled by a return to the proper functioning of nineteenth century liberal notions.

The analysis of the backgrounds of the Justices, and the evaluation of their economic beliefs, should give substantiation to our primary contention that the decisions of the Supreme Court during the 1930's, were not based upon clear juristic principles. The decisions were founded upon the socio-economic beliefs of a small majority of the members of the Court. In this respect, the Constitution was what the five conservative members of the Court
said it was. The conservative members' interpretation of the Constitution was based solely upon their economic beliefs, and their tenacity of adhering to those beliefs, despite the powerful arguments proclaiming the legislation's necessity and validity, is what fixed the Court and President on a head-on collision course of ideological dispute.

We have spent much time analyzing the backgrounds and ideological thoughts of the members of the Court. Our reason for the length and breadth of this section is multi-fold. We had to make clear the influence of the Justices' socio-economic environments upon their ideological development. We also had to make known that the juristic opinions of the Justices were greatly influenced by, and served to restate, their socio-economic beliefs. Our primary consideration was to deflate the elevated vision commonly held by most Americans towards the Supreme Court as an institution. The Supreme Court is comprised of nine individual men, and in this respect we must emphasize that, in 1937, the Court was comprised of very politically motivated men. The conservative members of the Court gained their offices through the promotion and struggle for the success of their political party and political ideals. Their elevation did not neutralize their political beliefs or their desire for the continued success of those beliefs.

The first sections of the work, are designed to show the emergence of two totally divergent ideologies. The competition between those who held these beliefs would promote faction within the branches of government, and would lead to the expression of
two ideological opposite wills, and result in government in stalemate. The Supreme Court, which was never intended to pass upon national policy only to settle disputes between the various States and review such questions as Congress provided, acted in a legislative fashion. The Court vetoed the actions of the President and Congress by invalidating legislation which it viewed with displeasure.

The last point, of the Justices acting in a legislative fashion, is our primary object of review. In order to adequately substantiate this claim, and in order to fully portray the situation as we view it, great length and explanation was needed.

The crisis of 1937 was intensified by the chance denial to Roosevelt of the pleasure to appoint new Justices to the Supreme Court. Because of the Justices ability not to die, and their determination to remain on the bench, Roosevelt's only recourse to force change within the tribunal was by formulation of some court reorganization plan. Our last chapter reviews the formulation and failure of the Court Reorganization Plan of 1937. The plan failed to gain support, and severely damaged Roosevelt's reputation and to some extent limited his ability to effectively govern.

The failure in Congress of the Court Plan provides an excellent example of what Madison called "Ambition ... made to counteract ambition." The Court battle also provides an illustration of how wrong Hamilton was in his contention that the Court would be the weakest of the three branches of government. We have shown that it was the bill and the manner of its presentation which brought about its defeat. We have also shown that the Court bill
was an attempt by Roosevelt to repudiate and embarass his opponents on the bench. The Congress would not allow such action, especially when such action would give so great a victory for one branch of government as to threaten the subjugation of the other.

The real importance of the Supreme Court Crisis lies in this last statement. Roosevelt was denied a direct victory over the Court, yet he did not suffer total defeat. His attempt failed, the Court's interpretations changed, government then continued along its normal course. The study of the Supreme Court Crisis of 1937 is a study of the resiliency and of the true and proper functioning of our American system of government. Our system of government provides for a gradual cycle and transformation of change. The 1930's were an abnormal time calling for vast amounts of change in an extremely short amount of time. The system balked, demanding less change in more time; the necessity of the day was more change now. As is usual in our system of government, compromise was reached. After four years of balking, after four years of pressure for quick change, change occurred. In what could have brought the downfall of government in another nation, resulted in strengthening of our fundamental system of three separate but equal branches of government expressing will and independence, serving to promote unity while counteracting Ambition with Ambition.
APPENDIX

Dissent is usually not a game played in solitaire; the great majority of all Supreme Court dissents are concurred in by two, three, or four justices. The agreements and disagreements thus recorded can be examined to determine whether any regular pattern of alignments is evident in these votes. The existence of such a pattern would be evidence that disagreement in decisions is not a random process but is, as Thomas Reed Powell put it, indicative of "some underlying differences of gospel." One useful method of presenting data on judicial alignments is in the form of a table showing the relationship between the dissenting votes of every pair of justices. Such an analysis is set forth in Table II, covering the five terms from 1931 through 1935. It indicates the number of dissents cast by each justice during that period and the number of times that the other justices on the Court were also in dissent in the same cases. Dissents in which only a single justice participated are given in parentheses. The justices are arranged in the table in such a manner that, so far as interrelationships permit, each justice is placed closest to those with whom he dissented most often, and farthest from those with whom he dissented least often.
My dear Mr. President:

Sometime ago I wrote Senator Wagner with reference to the approaching arguments in the Supreme Court involving the National Labor Relations Act. I suggested that he participated in the argument and in the preparation of the brief. For your information, I enclose herewith a copy of the letter I have just received from him.

While I thought it quite likely that he might not want to take such an active part in the matter I, nevertheless, felt it was desirable to submit the suggestion to him.

Sincerely yours,

[Signature]

The President,
The White House.
United States Senate
Washington, D. C.

Hon. Homer Cummings
Attorney General
Washington, D. C.

My dear Attorney General:

Thank you for your kind letter of December 31st, with respect to the approaching arguments before the Supreme Court upon the cases involving the National Labor Relations Act.

While I deeply appreciate your offer to have me participate in the argument, I feel that as a general matter of governmental policy it is best that the cases should be handled by the lawyers of the Department of Justice and the National Labor Relations Board, acting in cooperation. My general views are reinforced in this respect by my great confidence in the Department of Justice under your wise and discriminating leadership. And of course my confidence in you extends to the preparation as well as the presentation of the cases.

With the very best wishes for unqualified success in the approaching cases involving the National Labor Relations Act, cases which I believe fraught with the gravest importance for the preservation of our democratic institutions, I remain,

Very sincerely yours,

Robert F. Wagner
July 6, 1937

MEMORANDUM FOR SENA TOR ROBINSON

Dear Joe:

That was a magnificent speech of yours today on the Court Bill.

I enclose for your eyes only, a letter to me from Harry Hopkins with a memorandum attached. Would you be good enough to read it and speak with me about it at your convenience? Incidentally, this involves, to a certain extent, the problem of the unemployment census and I want to talk with you about that also.

F. D. R.

Let. from HARRY HOPKINS, 7/1/37, with memo. re unemployment.
March 13, 1938

PERSONAL AND CONFIDENTIAL

My dear Senator:

No reply has been made to this and I doubt whether any should.

The President, however, wanted me to show it to you and talk to you about it.

The only disadvantage about just ignoring it - and that's what it rates - is the fact that he may later on make it public and say that the President refused to come out for Robinson.

My own idea about it is to find an indirect reply by the President, saying something publicly that would convey the answer.

I would like to talk with you about it Monday when we discuss the Arkansas trip.

Sincerely yours,

M. S. McINTYRE
Assistant Secretary to the President

Honorable Joseph T. Robinson, Jr.
United States Senate,
Washington, D. C.

Enclosure
Letter of 5-9-33 to the Pres. from J. Rosser Venable, Little Rock, Ark., asking the President, "Do you intend to endorse Robinson in your speech in your visit to Arkansas?" and stating that this question must be answered by Pres. personally.
Senator Robinson this noon introduced a substitute court bill. Possibly the President will be interested in the provision of the bill which refers to the Supreme Court. This provision reads as follows:

"Sec. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

'Sec. 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be increased by the appointment of an additional justice in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who at the time of the nomination has reached the age of seventy-five years, but not more than one appointment of an additional justice as herein authorized shall be made in any calendar year, provided that the authority to appoint for any calendar year shall not lapse by reason of the rejection of the nomination, delay in confirmation, inability to nominate during an adjournment of the Senate or withdrawal of the nomination in a succeeding calendar year; And when such additional justice, or justices, shall have been so appointed, no vacancy caused by the death, resignation or retirement of a justice (except the Chief Justice) who has reached the age of seventy-five years, shall be filled, unless the filling of such vacancy is necessary to maintain at not less than nine the number of justices who have not reached the age of seventy-five. The number of appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the Court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum. As used in this Section, the term 'justice' shall not include a justice who has retired from regular, active service.'"

Early.
President Franklin D. Roosevelt,  
Washington, D. C.

My dear President:

You may be interested in the following tabulation, which is based on a personal survey conducted by my research organization during the past ten days.

15,479 New Jersey voters (males, females, farmers, business men, industrialists, etc.) were asked (by personal interview) the following question:

Are you in favor of changing the Constitution of the United States in order that President Roosevelt's policies may be made effective?

<table>
<thead>
<tr>
<th>Tabulation</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of Persons interviewed</td>
<td>15479</td>
<td></td>
</tr>
<tr>
<td>No. of Persons answering &quot;Yes&quot;</td>
<td>12001</td>
<td>77.5</td>
</tr>
<tr>
<td>No. of Persons answering &quot;No&quot;</td>
<td>3478</td>
<td>22.5</td>
</tr>
<tr>
<td></td>
<td>15479</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Should you desire a further breakdown tabulation (based on various classification of voters) I shall be glad to prepare it for you.

Sincerely yours,

Karl L. Gauck
February 10, 1937.

President Franklin Delano Roosevelt,
White House,
Washington, D. C.

My dear Mr. President:

I have read with delight and profound satisfaction your communication to the Congress concerning the courts and the judiciary of the United States. With characteristic courage it grapples with a problem of long standing. In a masterly way the plan and the procedure for remedying the ill are presented. I sincerely hope that the progressive thought of the country will act speedily and effectively so that you may be assured of the overwhelming support of the Congress. It is my conviction that orderly constitutional government can not survive unless the courts and the judiciary keep abreast of economic changes. The measure of our daily bread depends upon economics. Men will not forever be patient with judicial machinery that denies to them the fruits of our economic development. Democracy in America can be perpetuated only by recognizing that "new occasions teach new duties; time makes ancient good uncouth; they must upward still, and onward, who would keep abreast of truth." Your message contains no revolutionary suggestion but it does point out the way for preserving real constitutional democracy.
My father was a Confederate soldier at sixteen years of age. I was born and reared in the South, educated in North Carolina and at Harvard University; yet these are my convictions from twenty-five years of active practice at the bar.

Please accept my commendations and admiration for this last manifestation of your greatness as a leader.

Very sincerely yours,

R. B. Ferrell

RHF:0

Copies: Senator Claude Pepper
        Senator Charles O. Andrews
        Congressman Mark Wilcox
Thank God for the Supreme Court — which has again shown it may be possible to have the American form of government prevail over the communist ideas of Trockheljcher - Stopkiss et al. The Chicago platform may be ignored - stump speeches made in place of "the State of the Country" - class warfare against class - pledges broken but these remain a silent thinking population which sooner or later will awoke itself.

H. C. T. Hough

A Democrat from 1901 to 1933.
MEMORANDUM FOR

THE ATTORNEY GENERAL

Don't you think that
most of this materials, which is
excellent, should be put into
the hands of the appropriate
Senators and Congressman for use
in the coming debate, together
with all the other things we
suggested for their use?

F. D. R.

Handwritten (ink) note from the A., 2/14/37
to the President, enclosing copies of
some material previously handed to President
for possible use at Press Conference (a),
full copies of a part of the foregoing material—
particularly the Hughes and Taft quotations (b&b),
Legislative History of Act of 1869, including
mention of the Bill that passed the House — framed
on lines similar to the McReynolds and Gregory
suggestions, (c) Excerpts from "Was the Supreme
Court Packed by President Grant" (d), and Material
marked "Policy", which President may find helpful
if he comes to the point of explaining why the pre-
sent plan is the best (e).

SEE P.P.F. 1320—for first carbon
Hon. Homer Cummings,
Attorney General,
Washington, D. C.

My dear Mr. Attorney General:

Re- Relief for justice denying delays in Federal Courts.

The suggestions of my "Review" have to do only with the civil side of courts. While I have had but little experience in criminal cases, my friends among District Attorneys advise me that the delays on the civil side are paralleled by those on the criminal side of the courts' docket.

They tell me that with every change of Administration there has to be a clean-up of cases, many of which justice requires to be prosecuted, but in which, by delay, the criminal escapes because of dispersion of witnesses, fading memories, destruction or loss of real evidence.

The Department's statistics do not show this in the same way that the arrearages of civil cases do, hence the evils should be made manifest by some other analysis.

It is of little significance that in the thousands of criminal cases, District Courts dispose of as many as are filed. The vast number of minor cases and those in which there is a plea of guilty bury the significant facts.

In the undecided cases remaining at the end of the year are those that consume the time of the courts because of their greater importance and complexity of proof. If, as I pray, your Administration intends to bring the administrative standard of the Federal courts to an approximation of that of our industrial genius, I trust someone like Mr. Holtzhofer will combine with Mr. Edgar Hoover for an analysis of the effect of delay on criminal justice.

I feel certain that such an analysis will lend still greater force to the showing of the need for a substantial increase in Federal judgeships.

Very faithfully yours,
REVISED DRAFT OF SECTION I

SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily increased by the appointment of an additional justice in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who at the time of the nomination has reached the age of seventy-five years, but not more than one appointment of an additional justice as herein provided shall be made in any one calendar year, whether or not the nomination or appointment be actually made in said calendar year and when such additional justice, or justices, shall have been so appointed no vacancy shall be filled caused by the death, resignation or retirement of a justice, except the Chief Justice, unless the filling of such vacancy is necessary to maintain the number of members at not less than nine, or, unless, immediately prior to such death, resignation or retirement, the number of justices on the court who have reached seventy-five years of age is lesser than the number of justices by which the Court then exceeds nine. The number of temporary appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the court. If the number of members of the Supreme Court is in excess of nine at least two-thirds of the membership shall constitute a quorum. As used in this section, the term "justice" shall not include a justice who has retired from regular, active service.
SEC. 1. Section 215 of the Judicial Code of the United States is
hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist
of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily
increased by the appointment of an additional justice in the manner now
provided for the appointment of justices, for each justice, including the
Chief Justice, who at the time of the nomination has reached the age
of seventy-five years, but not more than one appointment of an additional
justice as herein provided shall be made in each calendar year,
whether or not the nomination or appointment be actually made in said calendar
year, and when such additional justice, or justices, shall have been so appointed
no vacancy shall be filled caused by the death, resignation or retirement of
a justice, except the Chief Justice, unless the filling of such vacancy is
necessary to maintain the number of members at not less than nine, or, unless,
immediately prior to such death, resignation or retirement, the number of
justices on the court who have reached seventy-five years of age is larger
than the number of justices by which the Court then exceeds nine. The number
of temporary appointments so made shall not, at any time, increase the total
number of justices by more than two-thirds of the permanent membership of the
Court. If the number of members of the Supreme Court is in excess of nine
not less than two-thirds of the membership shall constitute a quorum. As used
in this section, the term "justice" shall not include a justice who has retired
from regular, active service.
EXPLANATION OF THE REVISED DRAFT OF SECTION I

Certain amendments in the proposed draft are necessary to ensure that section 1 will carry out the purposes intended. These amendments are interlined in the attached draft. These suggested amendments briefly provide:

(a) The insertion of the words "at the time of the nomination" makes it clear that there is no need for the appointment of additional justices unless justices over 75 still continue on the Court at the time the nomination is made.

(b) The expression "has reached the age of seventy-five years" is used to avoid the ambiguity in the expression "has passed the age of seventy-five years." It might possibly be argued that a justice has not passed 75 until he becomes 75 and a half years or possibly 76.

(c) The insertion of the words "for each calendar year (whether or not the nomination or appointment actually be made in said calendar year," makes it clear that an additional appointment shall not be lost because the confirmation of the appointment is delayed or because the nomination is not actually made in the calendar year in which the appointment was first authorized. The nomination of an additional justice might be unavoidably delayed beyond the calendar year because the Congress might not be in session or because a justice may only have become 75 in the last month or two of the calendar year. The President should not be under the pressure of haste in the making of appointments, nor should the Senate be in a position to make an appointment lapse by delaying its confirmation.

(d) It is necessary to make the insertion "unless immediately prior to such death, resignation or retirement from the court, the number
of justices who have reached seventy-five years of age is larger than the number of justices by which the court then exceeds nine" for the following reason. Without such qualification the advantages secured by the appointment of the additional justice may be lost. For example the additional justice may die a month after his appointment, and no successor could be appointed, although the court is composed exactly as it was before the additional justice was appointed. Or some other justice under 75 may die in the same calendar year, and no successor could be appointed, although the proportion of justices over 75 would then be as great as it was prior to the appointment of an additional justice. Or if a liberal justice over 75 like Mr. Brandeis should die, resign or retire, no successor could be appointed, and the liberal elements on the Court would be weakened.

(e) It is necessary to provide that "the term 'justice' shall not include a justice who has retired from regular, active service." Without such language it may be argued under the decisions of the Court that a retired justice is still a justice.
MEMORANDUM ON FEATURES OF PROPOSED PLAN

This plan will not add to the opportunity to liberalize the bench by filling normal vacancies through death, retirement or resignation.

The effect of its provisions for shrinking back to nine in the present condition of the Court will probably work out practically as merely substituting one appointment a year under the "age principle" for the normal expectancy of one appointment a year by filling vacancies occasioned through resignation, retirement or death.

This raises very real practical risks over the next two years in view of the following facts:

(1) The cases which will come before the Court in the next and the succeeding year will be never cases (on which the present Court chewed its teeth on the last decision day) and labor cases (Wagner Act and Black-Connery Bill) which the new statute providing for direct appeal will bring to the Court a year earlier than heretofore.

(2) After the passage of a Supreme Court statute, Hughes and Roberts will have no further incentive for shoot-gun liberalism and are far more likely to be actuated by impulses of revenge.

(3) After new judges have been appointed by this Administration, the Court will have become the Administration's "packed court" -- beyond criticism by the Administration.

Under such circumstances, the present form of the proposed provisions for shrinking the Court back to nine make them exceedingly dangerous because they may make it impossible to appoint a successor on the death, resignation or retirement of (a) "an additional justice" and/or (b) Brandeis, Cardozo,
Stone, or the successor to Van Devanter.

For real the risk is can be estimated from looking at an all too-likely hypothetical situation over the next two years.

With the appointment of Van Devanter's successor the Court will stand as follows:

<table>
<thead>
<tr>
<th>Conservative</th>
<th>Liberal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hughes</td>
<td>Brandeis</td>
</tr>
<tr>
<td>Roberts</td>
<td>Cardozo</td>
</tr>
<tr>
<td>McReynolds</td>
<td>Stone</td>
</tr>
<tr>
<td>Sutherland</td>
<td>Van Devanter's successor</td>
</tr>
<tr>
<td>Butler</td>
<td></td>
</tr>
</tbody>
</table>

That means that the addition of "additional justice number 1" before October 1st will only balance the court until January 1, 1938. With the pressure for shotgun liberalism removed from Hughes it will not give the liberals a working majority.

Now suppose that in the interval from the opening of Court on October 1st to January 1, 1938, any one of Brandeis, Stone, Cardozo, Van Devanter's successor or "additional justice number 1", dies, resigns or retires. Under the language proposed his place could not be filled prior to January 1 — and there will be a conservative majority on the Court.

Suppose no deaths, retirements or resignations happen until January 1, 1938. The Court will then stand:

<table>
<thead>
<tr>
<th>Conservative</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Hughes</td>
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<td>Sutherland</td>
<td>Van Devanter's successor</td>
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<td>Butler</td>
<td>additional justice #1</td>
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<td>additional justice #2</td>
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The Court will then have a working liberal majority of one. But if either one or two of the liberals die, resign or retire their places cannot be filled and the Court goes back either to balance or a working conservative majority because the Court shrinks back to nine without allowance for the number of members still over 75, and no further justices can be appointed until additional justice #3 is appointed on January 1, 1939.

Even if Mr. Justice Sutherland should retire during 1938 there would thus be no assurance of a liberal majority during that 1938.

It seems very important that:

(1) The Court should reach its maximum liberal strength as quickly as possible because the crucial years for decisions under the New Deal are the next two when the statutes passed this year will be under adjudication.

(2) Because of the accusations of a packed Court and the necessity for public confidence in the new decisions, the liberal majorities should be as wide as possible as soon as possible.

Under such circumstances, it would seem that the Administration's supporters in Congress intended that the idea of one new judge a year for each judge over 75 should not be in substitution for but additional to the normal filling of vacancies in the Court occasioned by the death, retirement or resignation of any justice whether or not over 75.
CONFIDENTIAL MEMORANDUM FOR THE PRESIDENT:

Regarding the resolution introduced in the Texas State Senate today, which denounces your proposal to the Congress for increased membership in the United States Supreme Court, etc., I telephoned the Vice President this afternoon. Later, with the Vice President's approval, I telephoned Governor Allred.

The Governor has just called back to say that he has given over his entire afternoon to efforts among the State Senators, but that the situation "is bad". He says the resolution was introduced and drafted by Senators Holbrook and Small.

Governor Allred says he will continue to do all in his power but he expects the resolution will pass the Senate by a substantial majority when the vote is taken tomorrow.

I have advised the Vice President. He and Senator Sheppard are working tonight, telephoning friends in Austin.

The V. P. said, confidentially, that Tom Connally would not give him or Sheppard any help.

It is interesting to note that all but three members of the Texas Senate are lawyers.

STEPHEN EARLY
THE WHITE HOUSE
WASHINGTON
February 8, 1937

CONFIDENTIAL MEMORANDUM FOR THE PRESIDENT:

You might know, before luncheon today, that Hatton Sumners held an "off the record" conference with newspapermen this morning. At this conference, he was savage in attack upon your proposal. He called it "infamous".

He refused to let himself be quoted. He insisted that the conference be "off the record".

One of the newspapermen present just telephoned me and said that Sumners gave the proposal "Hell, specifically and generally".

This, of course, will lead the press into writing more and more stories about bitter opposition by Congressional leaders, etc.

STEPHEN EARLY
Dear Felix:

Many thanks for your note and the memo.

At the annual reception to the Supreme Court, I think the Chief Justice pulled a fast one on me. After he had been talking with me himself for ten minutes he got up, said he thought some other members of the Court could have a talk with me and went across the room and brought McReynolds and plumped him down. The Chief Justice has a sense of humor though few people realize it. Thank God no photographers were present.

Love to Marian. Hope to see you both soon.

As ever yours,

Professor Felix Frankfurter,
192 Brattle Street,
Cambridge,
Massachusetts.

P. S. Alice Doer Miller can do a lot of good.
Dear George:

I have your recent letter suggesting the creation of a new court, with a limited final jurisdiction, to relieve the Supreme Court of a portion of its rapidly increasing labors.

It is impossible to make an exact comparison between the work of the Court at the present time and in 1869, when its membership was fixed at nine. There have been marked changes in the type of cases coming before it and in its control over the nature and size of its calendar. Without question, the Court's burdens have increased. During the last twenty years of the nineteenth century only about 450 cases were docketed each year, on the average. This gradually rose during the period prior to 1925 until the average was about 750 cases. In the last few years roughly 1,000 cases have been docketed each term.

The cases considered today are not only more complex than formerly, but involve a rapidly increasing number of constitutional questions. The opinions require examination into the social and economic relationships which have given rise to the legal controversies. Just as absent at that time of the last century, Congress has done much to alleviate the pressure upon the Court which would otherwise have developed. In 1890 the circuit courts of appeals were established in an effort to relieve the Supreme Court of a portion of its work. The Court was then given a discretionary power to review certain types of cases. In the Judiciary Act of 1925 the principle of discretionary selection of cases was greatly extended. As you know, it seems questionable to me whether, without further legislative aid, the necessity for keeping abreast of its docket can be satisfactorily
reconciled with proper consideration of the increasing number of important cases which call for decision by the Supreme Court.

Several considerations raise doubts as to the advisability of creating another court for final disposition of some of the federal legal issues. The state courts deal with a wide variety of federal problems, and each of the circuit courts of appeals exercises a jurisdiction more or less independent of the others. There must inevitably develop conflict in decisions, often on questions of first importance. I should think it difficult to devise a satisfactory system by which the Supreme Court could resolve the conflicts in some types of cases and a new court decide those which arise in other types of cases. Especially is this true in view of the apparent impossibility of segregating the types of litigation in which important questions are apt to develop. Serious constitutional questions, such as the recent decisions under the Social Security Act, often arise in the course of tax litigation or, for another example, in the adjudication of claims against the Government, such as the refund of processing taxes. Litigation between citizens of different States is a field almost as broad as that of the law itself. For the sake of uniformity, I feel that so far as possible final decision should be left to the Supreme Court.

It has seemed to me that the solution must be found through one of two approaches, or through a combination of both. One is to permit the Supreme Court to select cases which it will hear, taking into consideration the public importance of the case, the necessity of resolving conflicts between inferior courts, and the desirability that
the Court keep abreast of its docket. The second is to increase the number of judges on the Court, so that it will be possible for a larger number of cases to be considered on their merits, or at least for a summary statement to be made of the reasons for the refusal to review the case. I have never felt that the Supreme Court should be deprived of its right to select the cases which it would hear, except as a means of hastening decision of constitutional questions which involve governmental policies. I cannot but feel that with an increase in the size of the Court, to meet the increasing volume and complexity of its litigation, we can preserve the advantages of a single court for the determination of the more important legal questions.

For these reasons your suggestion, while attractive as a means of making the burdening on the Court as light as possible, has disadvantages which, it seems to me, outweigh the advantages which you have indicated.

Your interest in the matter is sincerely appreciated.

Very truly yours,
MEMORANDUM FOR MR. EARLY:

Mr. Suydam called — said Columbia has extended an invitation to the Solicitor General to speak on the Court issue, Sunday night — Mr. Suydam and Mr. Reid think it would be inappropriate for him to accept, inasmuch as Mr. Reid argues cases before the Court all the time. They would like to have your opinion before accepting the refusing this invitation.
Dear Harry:

That is a good letter of yours and I rather imagine that somewhere between your thought and my Friday statement the truth lies!

Once more, of course, the press reporting is not exactly adequate. They left out the beginnings of several sentences which ran thus: "If certain sentences in this decision are carried to their logical conclusion, the following would be the result, etc." That, of course, is perfectly true — just as true as your statement that the Court has in several excellent examples, such as the railroads and the anti-trust laws, built up a series of decisions which are practical and work well.

The real crux lies in the fact that too great literalness in defining industry directly engaged in interstate commerce seems to present a riddle no one has yet solved. The best legal and commercial brains I can get hold of agree that somewhere between sixty and ninety-five per cent of all commerce is so tied up with direct interstate implications that in effect it is interstate within perhaps any fairly liberal interpretation of the rule. It is the "dictum" in the Schechter case opinion that is disturbing because, again, if the "dictum" is followed in the future the Court would probably find only ten per cent of actual transactions to be directly in interstate commerce.
Anybody who can work the thing out a little faster than the five to ten years I mention will receive a gold medal at the hands of the President.

Meanwhile I can assure you that I am trying to look at several angles and that I hope something practical can be worked out. I am mighty glad you wrote me.

Always sincerely,

Honorable Henry L. Stimson,
Hightbocd,
Huntington,
Long Island, N. Y.
MEMORANDUM FOR AAA FILE

(COPY TO RAY MOLEY)

It has been well said by a prominent historian that fifty years from now the Supreme Court's AAA decision will, in all probability, be described somewhat as follows:

(1) The decision virtually prohibits the President and the Congress from the right, under modern conditions, to intervene reasonably in the regulation of nation-wide commerce and nation-wide agriculture.

(2) The Supreme Court arrived at this result by selecting from several possible techniques of constitutional interpretation a special technique. The objective of the Court's purpose was to make reasonableness in passing legislation a matter to be settled not by the views of the elected Senate and House of Representatives and not by the views of an elected President but rather by the private, social philosophy of a majority of nine appointed members of the Supreme Court itself.
THE WHITE HOUSE
WASHINGTON

October 29, 1934.

MEMO FOR MAC

Will you try to get Cardozo in to Tea with me alone on my desk?

Oct 30 F. D. R.

Tea 445
March 1, 1937

NEW DEAL CASES
DECIDED BY THE SUPREME COURT

1. "HOT OIL" STATUTE. Pan American Refining Co. v. Ryan, 293 U. S. 388. Held invalid, on the ground of delegation of power, Section 9(c) of the National Industrial Recovery Act, authorizing the President to prohibit the interstate transportation of oil produced in excess of state-fixed quotas. Opinion by the Chief Justice. Dissenting opinion by Cardozo, J.


Norma v. United States, 294 U. S. 317. Held that the orders and regulations pursuant to the Emergency Banking Act of 1933, requisitioning gold certificates in exchange for legal tender currency of equivalent face amount, were valid. Opinion by the Chief Justice. Dissent as in the Norman case, supra.

4. N. R. A. United States v. Schechter Poultry Corp., 295 U. S. 495. Held the code-making provisions of the N. R. A. invalid on the ground of delegation of power and also, as applied to the poultry dealers involved in the case, on the ground of lack of power under the commerce clause. Opinion by the Chief Justice. Separate concurring opinion by Cardozo, J., in which Stone, J., joined. No dissent.


Hickert Rice Mills v. Fontenot, 297 U. S. 110. Held, on the authority of the Butler case, supra, that A. A. A. taxes paid into court should be returned to the taxpayer and the collector enjoined from making collection. Opinion by Roberts, J. No dissent.

6. T. V. A. Ashvander v. Tennessee Valley Authority, 297 U. S. 288. Held valid the Tennessee Valley Authority Act as applied to the sale of power produced at Wilson Dam. Opinion by the Chief Justice. Separate concurring opinion by Brandeis, J., in which Stone, Roberts and Cardozo, JJ., joined, to the effect that the complaining stockholder had no standing to challenge the transaction. Dissenting opinion by McReynolds, J.

7. SECURITIES ACT OF 1933. Jones v. Securities and Exchange Commission, 298 U. S. 1. Held that the Commission had improperly refused to permit the withdrawal of the registration statement and therefore had no power to continue with a stop order proceeding. The validity of the statute was not passed upon. Opinion by Sutherland, J. Dissenting opinion by Cardozo, J., in which Brandeis and Stone, JJ., joined.

8. BITUMINOUS COAL CONSERVATION ACT OF 1935 (Guffey Act). Carter v. Carter Coal Co., 298 U. S. 238. Held that Congress is without power under the commerce clause to subject the producers of bituminous coal to the regulation of wages and hours of employees. The price provisions were not passed upon. Opinion by Sutherland, J. Dissenting opinion by the Chief Justice, to the effect that the price provisions are valid and hence adherence to a code may be required. Separate dissenting opinion by Cardozo, J., in which Brandeis and Stone, JJ., joined, agreeing with the Chief Justice and adding that the wage and hour provisions were prematurely attacked.

OTHER SUPREME COURT DECISIONS INVOLVING IMPORTANT CONGRESSIONAL AND EXECUTIVE ACTION SINCE MARCH 4, 1933.


3. MUNICIPAL BANKRUPTCY ACT. Ashton v. Cameron County Enter Improvement District, 298 U. S. 513. Held invalid, on the ground of invasion of powers reserved to the States, the municipal bankruptcy act. Opinion by McReynolds, J. Dissenting opinion by Cardozo, J., in which the Chief Justice, Brandeis and Stone, JJ., joined.


5. TRANSFER OF SHIPPING BOARD FUNCTIONS. Isbrandtsen-Koller Co. v. United States, decided February 1, 1937. Held that the transfer of the functions of the Shipping Board to the Secretary of Commerce by Executive Order was effective, in view of subsequent ratification of such transfer by the Merchant Marine Act of 1936. The Court found it unnecessary to consider the validity of the transfer under the original Order alone. Opinion by Roberts, J. No dissent.
In the Washington Minimum Wage case (West Coast Hotel Co. v. Parrish) the Supreme Court at long last has upheld state minimum wage legislation for women and has reversed the position that it had taken in the New York minimum wage case (Morehead v. Tipaldo) last June and the District of Columbia case (Adkins v. Children's Hospital) fourteen years ago. Those who have accused President Roosevelt of seeking to amend the Constitution must now admit that the Supreme Court itself has in effect amended the Constitution. And this judicial amendment of the Constitution was brought about by a shift in the vote of a single justice, because the Court in the Washington case divided 5 to 4. So it happens that the Constitution on Monday, March 29, 1937, does not mean the same thing that it meant on Monday, June 1, 1936. For on Monday, June 1, 1936, the Court stated:

"the decision (the Adkins decision in 1923) and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."

And on Monday, March 29, 1937, the Court declared that the Adkins decision is no longer the law of the land.

Of course, the Chief Justice who spoke for a majority of the Court in the Washington case might have explained that the change of heart was due to the fact that both the Democratic and Republican parties vigorously dissented from the interpretation given by the Court to the Constitution in the Morehead case on June 1 and that the election returns in November had conclusively demonstrated that the people of the United States were not prepared to accept the Court's narrow interpretation of the Constitution.
The Chief Justice, however, was somewhat disingenuous in explaining why some members of the Court had determined to yield their own personal economic predilections to a higher law of political expediency. The Chief Justice stated:

"the Court (in the Morehead case) considered that the only question before it was whether the Adkins case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: 'the petition for the writ sought review upon the ground that this case (Morehead) is distinguishable from that one (Adkins). No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted . . . Here the review granted was no broader than that sought by the petitioner . . . He is not entitled and does not ask to be heard upon the question whether the Adkins case should be overruled".

It is very strange, however, that the Chief Justice did not choose to explain why the Court had refused to entertain a petition for rehearing in the Morehead case, which was made not only by the state of New York whose statute was immediately involved but by the state of Illinois whose statute was necessarily affected by the Morehead decision. The petitions of both states begged the Court not to permit the rights of millions of working women to be jeopardized and obscured by legal technicalities. The petition for rehearing by the state of New York stated:

"On a constitutional issue of such importance, the decision of this Court should not be left obscured by possible doubts on principles essential to the legal rights and welfare of millions of citizens. In the light of the quoted excerpts from the petition from the writ of certiorari which this Court granted; in the light of the fact that four members of this Court sought to have the issues thus presented determined, it is earnestly urged on the Court that the apparently restricted basis of the Court's opinion be enlarged to cover the truly vital issues presented."
"Because of the importance of the issues herein, whatever be the ultimate determination of this Court, there should be a finality to its decision on the principles of constitutional law involved. It should be free of possible misconstruction by reason of procedural technicalities.

"The New York statute at issue was framed with a zealous regard for private rights and with a deep respect for the decisions of this Court as found in prior cases. The New York Court of Appeals certified that its decision was based upon the Adkins case. Surely, before such statute is finally struck down, a deliberate and full reconsideration should be given of the issues on the merits, and a decision reached that will leave no doubt where the way lies and where action by legislation may or may not tread.

"Wherefore, on the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the judgment, on such reconsideration, be reversed."

The petition in support of rehearing by the state of Illinois stated:

"When the immediate welfare of millions of American working women and the constitutional powers of the states of the Union are at stake, it seems imperative that there be not even the remotest ambiguity as to the scope of a decision of this Court."

"The prevailing opinion in this case was expressly based upon a supposition that the State of New York had not asked this Court to reconsider the constitutional questions decided in Adkins v. Children's Hospital, 261 U. S. 525, and that the validity of the principles upon which the Adkins decision rested were not challenged. In its petition for rehearing the State of New York has clearly indicated that it desires this Court to reconsider the Adkins case and the principles therein declared and to review all constitutional issues involved in the instant proceeding without limitation or restriction. No technical obstacle now stands in the way of such a reconsideration.

"The State of Illinois is not unmindful of the proper regard which must be given to orderly appellate procedure. But the decision of this Court in this case does not merely discharge the relator, Tipaldo, from custody. Although it does not technically affect the validity of the legislation of Illinois and other states, the decision
will unquestionably obstruct the enforcement of minimum wage legislation throughout the Union until such time as this Court authoritatively restates the principles declared in the Adkins case and determines their application to existing legislation. As a practical matter, the Timpson decision affects the interests and the welfare of millions who are not familiar with the niceties of legal procedures. Four members of this Court were of the opinion that no procedural difficulty stood in the way of a clear-cut decision on the merits. Certainly it is now within the power of this Court without violence to the requirements of orderly appellate procedure to consider the substantive constitutional issues.

"Whatever may be the ultimate decision of this Court, the issues involving the constitutional rights of the states and welfare of millions of their citizens are too significant and momentous to be decided with apparent finality without full consideration of the merits."

Thus after twenty years of unabated struggle, minimum wage legislation is for the first time sustained by the Supreme Court by a bare majority vote. Four members of the Court still insist upon putting an interpretation upon the words "due process" and "equal protection of the law", with which not one lawyer in a hundred and not one citizen in a thousand would agree. Only by the vacillating vote of a single justice was the constitutional right of the state legislatures reinstated after what seemed to be a hopeless struggle—to paraphrase Justice Holmes—to educate the Justices "in the obvious". Four out of the nine Justices have dramatically revealed that they still entertain a view of the Constitution strikingly at variance with that of Chief Justice Marshall and the Founding Fathers because the view of the four dissenting judges would obviously make it impossible for the Constitution "to endure for ages to come and to be adaptable to the various crises of human events." Unless the present personnel of the Court is enlarged, every new and debatable constitutional issue will come before the Court
with four Justices definitely hostile to any theory which would permit the Constitution to be adopted to the needs of the time.

If there should be any difference among any one of the five Justices whose minds are at all open regarding the applicability of the Constitution to new problems - the efforts of the legislatures, state or federal, to meet those problems will be nullified. It is intolerable that in this period of social and economic change the adaptability of the Constitution and the continuity of legal growth should rest upon the vacillating judgment and human frailty of a single Justice.

The history of minimum wage legislation before the Supreme Court has shown that it is perfectly futile to attempt to avoid the rigors of the decisions of the Court which are determined by the Economic views or prejudices of the Justices by improved draftsmanship. The New York Minimum Wage statute was drafted with the greatest care and competency to meet the objections specifically raised by the Court in the Adkins Case. And Chief Justice Hughes, dissenting in the Morehead case, expressly took note of "its (the New York Statutes) provisions for careful and deliberate procedure" and found that the New York statute was free of the feature so strongly denounced in the Adkins case. Yet the majority struck down the carefully drawn statute in the Morehead case with even greater alacrity than it struck down the statute in the Adkins case. And then in the Washington case it reverses itself and sustains a statute which contains the very feature which, more than any other, -- the court stated in the Adkins case-- stamped the statute as arbitrary and invalid. Economic predilections do not yield to skilled draftsmanship, although sometimes they yield to political expediency.
TO THE CONGRESS OF THE UNITED STATES:

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the Executive Branch of our Government. I now make a similar recommendation to the Congress in regard to the Judicial Branch of the Government, in order that it also may function in accord with modern necessities.

The Constitution provides that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the Judiciary whenever he deems such information or recommendation necessary.

I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal Judiciary.

The Judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to "ride circuit" and, as Circuit Justices, to hold trials throughout the length and breadth of the land -- a practice which endured over a century.
It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the federal courts.

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges — a subject of delicacy and yet one which requires frank discussion.

In the federal courts there are in all 277 life tenure permanent judge-ships. Twenty-five of these are now held by judges over seventy years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When after eighty years of our national history the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. "They seem to be benighted of the appearance of adequacy." The voluntary retirement law of 1889 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of seventy, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915 and 1916, the Attorneys General then in office recommended to the Congress that when a district or a circuit judge failed to retire at the age of seventy, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

In 1919 a law was finally passed providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over seventy "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.
In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in federal courts have been altered in one way or another. The Supreme Court was established with six members of 1789; it was reduced to five in 1801; it was increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine in 1869.

The simple fact is that today a new need for legislative action arises because the personnel of the Federal Judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States Courts.

A letter from the Attorney General, which I submit herewith, justifies by reasoning and statistics the common impression created by our overcrowded federal dockets -- and it proves the need for additional judges.

Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the Circuit Courts of Appeals will further increase.

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87% of the cases presented to it by private litigants.
The work of a judge involves more than receiving or listening to testimony or arguments. It is well to remember that the mass of details involved in the average of law cases today is vastly greater and more complicated than even twenty years ago. Records and briefs must be read; statutes, decisions, and extensive material of a technical, scientific, statistical and economic nature must be searched and studied; opinions must be formulated and written. The modern tasks of judges call for the use of full energies.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in the Army and Navy by retiring officers at the age of sixty-four. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

It is obvious, therefore, from both reason and experience, that some provision must be adopted, which will operate automatically to supplement the work of older judges and accelerate the work of the court.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.
for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a Proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

I attach a carefully considered draft of a proposed bill, which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed and also a limit on the potential size of any one of our federal courts.

These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability whose services the Government would be loath to lose. If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes to do so. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other federal judges, has my entire approval.

The further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation. Such a welter of uncorrelated differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens are denied to others. As a practical matter this means that for periods running as long as one year or two years or three years — until final determination can be made by the Supreme Court — the law loses its most indispensable element — equality.
Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring re-trials, motions before the Supreme Court and the final hearing by the highest tribunal -- during all this time labor, industry, agriculture, commerce and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice -- certainty.

Finally, we find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

In the uncertain state of the law, it is not difficult for the ingenuous to devise novel reasons for attacking the validity of new legislation or its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it and that the administrative machinery is waiting to function. Government by injunction lies a heavy hand upon normal processes; and no important statute can take effect -- against any individual or organization with the means to employ lawyers and engage in wide-flung litigation -- until it has passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of Acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized and slowly operating third house of the National Legislature.

This state of affairs has come upon the nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.
Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionality of Acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

I also earnestly recommend that in cases in which any court of first instance determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court, and that such cases take precedence over all other matters pending in that court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well, must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

This message has dealt with four present needs:

First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel; second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where federal courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving federal statutes.
If we increase the personnel of the federal courts so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire federal judiciary; and if we assure government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the constitution of our Government -- changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.

FRANKLIN D. ROOSEVELT

The White House,
February 5, 1937.

(END MESSAGE)


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6. Based upon research in the Roosevelt Presidential Library. This issue, above all others, sparked the most comment by Roosevelt (as seen in letters and addresses).


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17. Ibid, p. 5.
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2. Rosenman, ed. Vol. VI, p. LIX.
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