The Switch in Time that Saved Nine:

The Supreme Court's Conflict and Compromise

Concerning New Deal Legislation

Matthew Ding

Senior Division

Historical Paper

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Franklin Delano Roosevelt's New Deal marked a turning point in U.S. domestic policy. The series of legislation, aimed to expedite national economic recovery in the wake of the Great Depression, ushered in an era of unprecedented "direct, vigorous"[1] federal government involvement in the lives of Americans. The new and expansive laws set wages and working conditions,[2] regulated agricultural output levels,[3] and established federally funded programs.[4]

These New Deal legislations also led to one of the most controversial and pivotal periods in Supreme Court history. The years 1935 – 1937 marked an escalation of conflict between the Roosevelt administration and the Supreme Court. The administration took what they viewed as necessary measures to address an unprecedented economic depression – even if it meant an unprecedented expansion of executive power. With every addition of a new agency, the Court grew increasingly worried about the expanding executive hegemony. Exercising its power of judicial review, the Court struck down legislation after New Deal legislation to preserve the constitutionally-mandated balance of power – both horizontally, between the executive and legislative branches, and vertically, between the federal and state governments. This tension between the political necessities of the times and the Court's understanding of the Constitution came to a head in 1937, when Roosevelt threatened to "pack" the Court. This paper is a story about that conflict and the Court's resulting compromise – most vividly illustrated by Justice Roberts's "switch in time" – during which the Court took a step back in the contemporary conflict in order to preserve its long-run legitimacy in the eyes of the American public.

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[1] Roosevelt. Inaugural Address, 1933

[2] See the National Industrial Relations Act (1933) and Fair Labor Standards Act (1938)

[3] See the Agricultural Adjustment Act (1933)

[4] The most prominent of which is the Social Security Act of 1935, which established the Social Security Administration to administer a national system of pensions and unemployment insurance.

The concept of judicial review dates back to one of the earliest Supreme Court decisions, *Marbury v. Madison* (1803). In *Marbury*, Chief Justice John Marshall articulated the rationale for judicial review. Arguing from principles and constitutional text, Marshall declares, "It is emphatically province and duty of the judicial department to say what the law is."[5] The decision concludes, "a law repugnant to the Constitution is void,"[6] and it is up to the courts to declare unconstitutional and void the actions of the executive and legislative branches. Since *Marbury*, the Supreme Court has further expanded their power of judicial review.[7]

Implicit in the idea of judicial review lies the Court's perception of its place in our democracy. Because the judiciary is the only branch comprised of unelected individuals, the Court serves as a check to the whims of the majority, which may oppress "discrete and insular minorities."[8] The framers of the Constitution foresaw this counter-majoritarian potential. In *Federalist 78*, Alexander Hamilton envisioned that the judges' "permanent tenure" will preserve their "independent spirits."[9] Hamilton wrote in *Federalist 78*:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors… [which] have a tendency… to occasion dangerous innovations in the government, and serious oppression of the minor party in the community.[10]

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[5] *Marbury v. Madison* (1803)

[6] *Ibid*

[7] See *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821)

[8] *United States v. Carolene Prods. Co.,* 304 U.S. 144, 58 S. Ct. 778 (1938), footnote 4.

[9] Hamilton, p. 5

[10] *Ibid*

Despite the noble vision of judicial review as the protector of oppressed minorities, the judicial branch lacked a key authority – it could not enforce its decisions without the help of the other branches. While the President controlled the armed forces,[11] and the legislature controlled the purse strings,[12] the judiciary depended on the goodwill of the people to follow its decisions. Absent goodwill, it looked to either the purse of the legislature or the sword of the executive to ensure enforcement. The Court itself had little to incentivize the people bound by its decisions. It was what Alexander Hamilton called the "weakest of the three departments of power."[13]

This "weakness" is perhaps most distinctly illustrated in the de-segregation saga starting with *Brown v. Board* (1954) and ending with the passage of the Civil Rights Act of 1964. The Court declared segregation unconstitutional in its landmark 1954 ruling, a shining moment of judicial review. In response, Southern states adopted a policy of massive resistance.[14] Southern schools that complied with *Brown* experienced violent backlash. With one such school in Little Rock, Arkansas, it was not until President Eisenhower exercised his Article II Commander in Chief powers, federalized the National Guard, and deployed 1,000 paratroopers that nine African American students, known as the "Little Rock Nine," were allowed to attend school.[15] While the 1954 judicial ruling in *Brown* inspired the Civil Rights movement, de-segregation did not begin

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[11] US Const. article II, section 2

[12] US Const. article I, section 1

[13] Hamilton, p. 2

[14] Massive resistance took the form of laws passed following the *Brown* decision, which, among other things, eliminated state funding to any public school that pursued integration.

[15] Anderson, p. 137-165.

in earnest until the ratification of the Civil Rights Act ten years later, passed by the legislative branch and backed by the executive branch.

However, long before the drama of judicial review that was *Brown*, the Court was involved in a quieter, but no less riveting, conflict between its responsibility to uphold the Constitution and its constitutionally limited powers to carry out its decisions. The time was 1932. America was reeling from the worst depression in its history. Its once booming economy lay silent. Decades of *laissez-faire* policy[16] had left industrial workers with low wages, dangerous working conditions, and eroded bargaining power. Massive agricultural surpluses meant that farmers couldn't sell enough crops to make a living. Millions were laid off. The country starved. An energetic and optimistic Franklin Delano Roosevelt promised change:

> The country needs and, unless I mistake its temper, the country demands bold, persistent, experimentation. The millions who are in want will not stand by silently forever while the things to satisfy their needs are easily within reach.[17]

Americans eagerly accepted Franklin Roosevelt's vision for a brighter tomorrow. The new president in turn made swift progress, passing 16 major bills in his first 100 days in office.[18] From 1932-1940, Roosevelt's new administration created approximately 32 new agencies that

[16] This Supreme Court period in history was known as the Lochner Era. Supreme Court cases that represent the laissez-faire policy of the time include: *United States v E. C. Knight Co.* (1895), *Allgeyer v Louisiana* (1897), and *Lochner v New York* (1905).

[17] Roosevelt. "Oglethorpe University Commencement Address"

[18] Leuchtenburg. *Franklin D. Roosevelt And the New Deal*. p. 42, 51-52, 60, 123, 133.

were responsible for carrying out policies.[19] His hand-picked staff wielded vast power over broad swaths of manufacturing, agriculture, and labor.[20]

These new Acts brought pragmatic, yet radical changes to the struggling economy. Industrial regulators, namely the National Industrial Relations Board, created new national policies centered around minimum wages, maximum hours, fair-labor standards, and collective bargaining provisions.[21] While widely popular among the working class, these policies stood in stark contrast to decades of laissez-faire policy.

In addition, these new agencies expanded executive purview and shifted the balance of powers divided among the executive, legislative, and judicial branches "in order to protect liberty."[22] According to the Constitution, the legislative powers are "vested in a Congress,"[23] executive power "vested in the President,"[24] and the judicial power "in one Supreme Court."[25] The three branches are designed so that no one branch has power over the other two, and the Supreme Court is tasked with ruling on decisions where they believe the "separation of powers" has been infringed.[26] These New Deal agencies, headed by unelected officials not directly accountable to the public, threatened to encroach upon the authority of the other branches.

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[19] *Ibid*

[20] *Ibid*

[21] United States, Congress. Public Law 73-67. *National Industrial Recovery Act,* 1933.

[22] *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983)

[23] US Const. article I, section 1, clause 1

[24] US Const. article II, section 1, clause 1

[25] US Const. article III, section 1, clause 1

[26] *Marbury v Madison*, 5 U.S.137, 153 (1803)

Faced with executive agencies exercising vast amounts of authority over factions of the American economy, the Supreme Court was asked to decide the constitutionality of New Deal legislation. From 1935 to 1937, the Supreme Court struck down piece after piece of New Deal legislation, citing infringement of the "separation of powers" clause or the federal government's infringement on states' rights.[27] Because their decisions overturned recently-created protections, many working class-people began to view the Court, as well as the conservative "Four Horsemen" of the Court, as staunchly opposed to economic freedoms.[28]

For New Deal policy supporters, the staunch anti-progressiveness of the Court was cemented in public consciousness on "Black Monday," May 27, 1935, when the Court handed down three decisions striking down key provisions of Roosevelt's legislature. Included was the National Industrial Recovery Act, the paradigm of Roosevelt's New Deal legislation that he had argued for most vigorously. In *A. L. A. Schechter Poultry Corp. v. United States* (1935), the Court unanimously ruled that Congress's delegation of broad legislative power without clear guidelines in the Act violated the constitutional separation of powers. Afterwards, in a press conference, Roosevelt heatedly commented on the decision as the United States' return to "the horse-and-buggy age."[29]

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[27] The Framers of the Constitution established that states had rights that were not specifically given to the federal government and the federal government only had rights that were specifically outlined in the Constitution.
See US Const. amendment X.

[28] The press dubbed four conservative Justices as the "Four Horsemen," a reference to the Biblical harbingers of doom.
See Leuchtenburg, "The Supreme Court Reborn" p. 132-133.
Also see "The Four Horsemen of Autocracy" *New York Herald Tribune*. 18 Sep. 1940.

[29] Roosevelt. "Press Conference #209"

Then followed a string of similar rulings.[30] Subsequent cases deemed the Roosevelt administration's usage of the "Commerce Clause" in agricultural regulation unconstitutional,[31] voided the expansion of Congress's taxing and spending powers, and enforced states' rights under the 10th Amendment.[32] As ruling after ruling made their way into national headlines, Roosevelt feared that his bright dreams for America would never come to fruition. As he trailed behind in polls leading up to the 1936 election, it seemed that Roosevelt would be unsuccessful in re-election, despite massive improvements to the economy.[33]

However, as results rolled in from across the country, things began to look more optimistic. The morning after the election, headlines across the country announced Roosevelt's surprising and overwhelming success. Roosevelt had claimed 61% of the popular vote and more than 500 electoral votes, setting a national record.[34] Flushed from his astounding and unexpected victory, President Roosevelt decided to embark on bold action to rid the New Deal of the frustrating Supreme Court road block. In his 1936 State of the Union address, Roosevelt decided to make a brief remark addressing his term goals.

> It is within the right of the Congress to determine which of the many new activities shall be continued, or abandoned, increased or curtailed. On that same basis, the President

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[30] Cases include: *Adair v. United States* (1908), *Coppage v. Kansas* (1915), *Hammer v. Dagenheart* (1918), *Panama Refining v. Ryan* (1935), *Carter v. Carter Coal Co.* (1936), and *United States v. Butler* (1936).

[31] *Carter v. Carter Coal Co.* 298 US 238, 56 S. Ct. 855 (1936).
See US Const. article I, section 8, clause 3.

[32] *United States v. Butler* 297 US 1, 56 S. Court 312. (1936).
See US Const. article I, section 8, clause 1.

[33] See Appendix B

[34] Krock. "Roosevelt Sweeps the Nation; His Electoral Vote Exceeds 500"

> alone has the responsibility for their administration. I find this task of executive management to have reached the point where our administrative machine needs overhauling.[35]

A month later, on February 5th, 1937, President Roosevelt returned to the Congressional floor. There he laid out his plan to reform the Court, outlined in the Judicial Procedures Reform Bill, prepared not by Congressmen, but the Attorney General.[36] Roosevelt's plan would add one new Justice to the Supreme Court for each of the six existing members over the age of 70, for a new total of 15 Justices on the bench. Not only would this greatly expand the size of the Court, it would also allow Roosevelt to "pack" the Court with judges who were sympathetic to his cause and gain favorable rulings.

As justification, Roosevelt claimed that the bill would "bring legislative and judicial action into closer harmony" and the introduction of "younger blood," would be able to "vitalize the courts."[37] The reaction was outraged and immediate. While Roosevelt's massive election victory also meant a very Democrat-skewed House and Senate, Congressmen from across the aisle viewed the proposal as one that would destroy "the judicial stability" of the Court.[38]

The passage of the bill would possibly undermine the legitimacy of the Court's decisions in the eyes of the American people. If the President of the United States were to circumvent the Court's authority, future decisions of the Court would be heavily thrown into contention. The Supreme Court, as interpreters of the Constitution, were tasked with ensuring that the laws

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[35] Roosevelt. "1936 State of the Union."

[36] Krock. "Roosevelt Asks Power to Reform Courts"

[37] *Ibid*

[38] *Ibid*

passed by the United States were constitutional, and if their decisions were delegitimized, there would no way to check the majority-elected Executive and Legislative branches. This once again reaffirms the weakness of the Judicial branch mentioned previously. With no way to enforce their decisions, the Court relied on the opinions of the American people.

As the debate concerning the future of the Court continued, the compromise began in *West Coast Hotel Co. v. Parrish* (1937), a simple case concerning the constitutionality of a minimum wage law for women. The *West Coast* case had legal precedent—just a year prior, in 1936, Justice Owen Roberts and the "Four Horsemen" had ruled a similar New York minimum wage law unconstitutional in *Morehead v. New York ex rel. Tipaldo* and before that, in *Adkins v. Children's Hospital* (1923). Following the *Tipaldo* decision, Roosevelt famously and angrily stated that the Court had made minimum wage legislation "the 'no-man's-land' where no government can function."[39] Justice Owen Roberts had held the deciding vote in those two previous decisions.

Yet Justice Roberts had felt conflicted on the New Deal legislation for some time leading up to the *West Coast* decision. Justice Roberts was not creative nor philosophical in his decisions; he did not skirt around problems with abstract readings of previous cases. Rather, he preferred to maintain an analytical and methodical approach to his rulings.[40] When Justice Roberts heard the *Tipaldo* arguments in 1936, he based his decision not on the merits of the minimum wage law, but rather the lawyer's arguments distinguishing *Tipaldo* from predecessors.[41] Believing the differences were unclear and the argument flawed, Roberts sided

[39] Roosevelt. "Press Conference #300"

[40] Griswold. p. 333.

[41] Carter, Edward. p. 380, 382.

with the "Four Horsemen."[42] In *West* Coast, Roberts felt as if there was a "clear cut challenge to *Adkins*."[43]

Later on in 1936, Roosevelt's landslide victory brought the tremendous amount of public support for Roosevelt's policies to the Court's attention. Additional and unrelenting press coverage over the Judicial Reform Bill described unwavering support from multiple powerful political figures.[44] To Roberts, the passage of the Bill seemed likely, if not imminent, and the Court's legitimacy, threatened.

When the issue of minimum wage returned to the Supreme Court chambers under the *West Coast* case, Justice Roberts chose to side in favor of the law. The 5 to 4 decision and Justice Robert's "switch in time that saved nine"[45] proved to be a turning point in the Court's stance on New Deal legislation.[46] As the Roosevelt administration fiercely lobbied for support of their Bill, subsequent cases continued the trend set by the *West Coast* case. Roosevelt supporters celebrated their political victory after *NLRB v. Jones & Laughlin* (1937), which upheld the National Labor Relations Act.[47] A few months later, *Helvering v. Davis* (1937) ruled that the Social Security Act

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[42] *Ibid* p. 382.
Also see Griswold p. 341.

[43] *Ibid*

[44] See "Cabinet Members Press Court Plan,"

[45] Historians later dubbed this turning point in Justice Roberts's voting patterns the "switch in time that saved nine," a play on the phrase "a stitch in time saves nine."

[46] See Appendix A

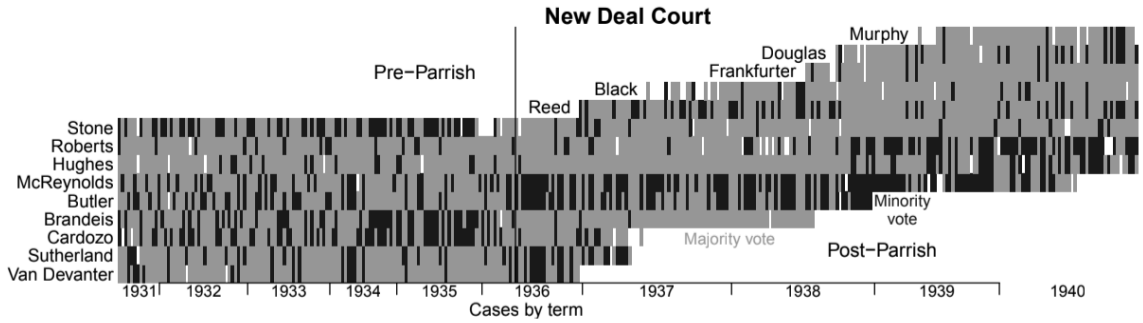
[47] Gross. p. 229.
Also see: "Supreme Court Findings Hailed by Wagner as Most Significant since Marshall." and "Four 5-4 One 9-0."

of 1935 was constitutional. Many of the laws the Court would affirm in the upcoming years still remain as remnants of the New Deal.

Justice Robert's "switch in time" compromised the Court's strict reading of the Constitution, which it had adopted in pre-"switch" decisions, in order to preserve the legitimacy of the court in the eyes of the American public. While there is no way to know for sure, it is arguable that, had Roosevelt carried out his threat to pack the Court, the Court would be shown to truly be the weakest branch, a branch that could issue paper verdicts, but unable to truly defy the executive. In turn, Roosevelt himself may have been viewed unfavorably by history for such an "abuse" of power that nakedly defied the judiciary. The Court's "switch," thus was a compromise that avoided such a show-down. It preserved both the legitimacy of the Court and the legitimacy of the Presidency.

This compromise, as history has shown, allowed the Court, in subsequent decades, to issue decisions that would contribute to the dismantling of Jim Crow and the advancement of Civil Rights. Many of the important Supreme Court decisions of the last half-century may not have existed if the conflicts and compromises during the New Deal era had not occurred, and the world would be drastically different today if that were the case. Today, as conflicts and compromises continue to coexist within the highest echelons of the American government, the Supreme Court continues to serve Americans as a protector of minorities, a champion of justice, and the defender of the Constitution.

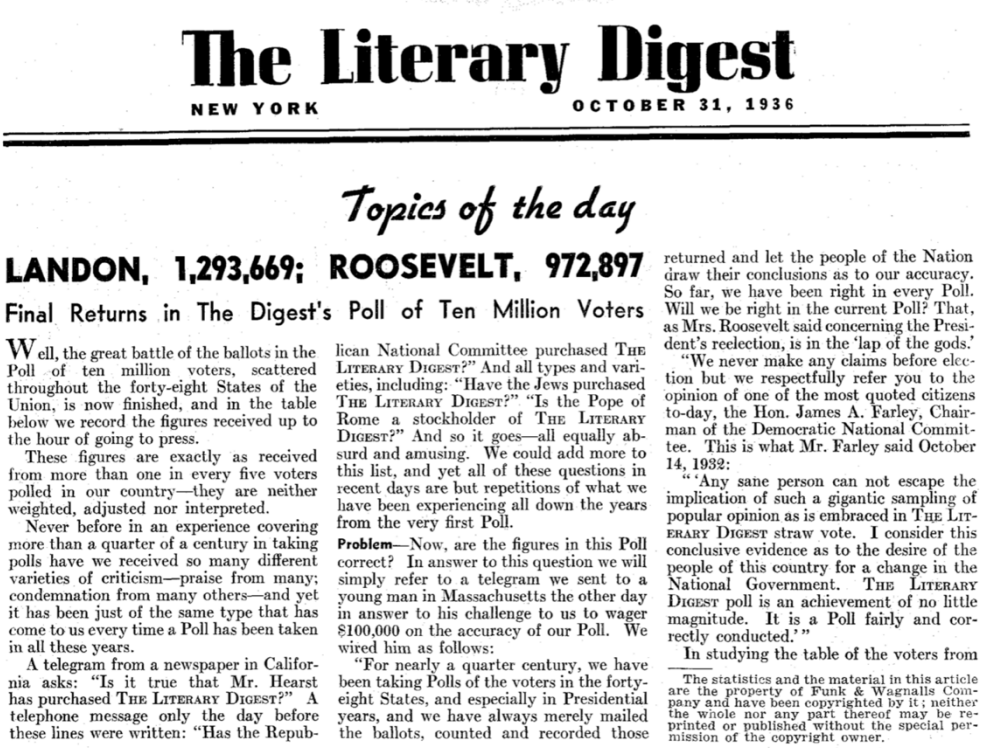
Appendix A:



This is a chart that visualizes Justice votes for the 1931-1940 Supreme Court term. Gray cells indicate a majority vote and black cells indicate a minority vote. The *West Coast Hotel v. Parrish* decision proved to be an abrupt change in minority/majority voting patterns for Justices Stone, McReynolds, Butler, Brandeis, and Cardozo, while Justices Roberts and Hughes, who had long been swing votes, remained relatively consistent in siding with the majority.

Source: Daniel E. Ho, "Did a Switch in Time Save Nine" 2 J. Legal Analysis 69, 29 October 2009. https://scholarship.law.berkeley.edu/facpubs/697/.

Appendix B:



The Literary Digest
NEW YORK OCTOBER 31, 1936

Topics of the day

LANDON, 1,293,669; ROOSEVELT, 972,897

Final Returns in The Digest's Poll of Ten Million Voters

Well, the great battle of the ballots in the Poll of ten million voters, scattered throughout the forty-eight States of the Union, is now finished, and in the table below we record the figures received up to the hour of going to press.

These figures are exactly as received from more than one in every five voters polled in our country—they are neither weighted, adjusted nor interpreted.

Never before in an experience covering more than a quarter of a century in taking polls have we received so many different varieties of criticism—praise from many; condemnation from many others—and yet it has been just of the same type that has come to us every time a Poll has been taken in all these years.

A telegram from a newspaper in California asks: "Is it true that Mr. Hearst has purchased THE LITERARY DIGEST?" A telephone message only the day before these lines were written: "Has the Republican National Committee purchased THE LITERARY DIGEST?" And all types and varieties, including: "Have the Jews purchased THE LITERARY DIGEST?" "Is the Pope of Rome a stockholder of THE LITERARY DIGEST?" And so it goes—all equally absurd and amusing. We could add more to this list, and yet all of these questions in recent days are but repetitions of what we have been experiencing all down the years from the very first Poll.

Problem—Now, are the figures in this Poll correct? In answer to this question we will simply refer to a telegram we sent to a young man in Massachusetts the other day in answer to his challenge to us to wager $100,000 on the accuracy of our Poll. We wired him as follows:

"For nearly a quarter century, we have been taking Polls of the voters in the forty-eight States, and especially in Presidential years, and we have always merely mailed the ballots, counted and recorded those returned and let the people of the Nation draw their conclusions as to our accuracy. So far, we have been right in every Poll. Will we be right in the current Poll? That, as Mrs. Roosevelt said concerning the President's reelection, is in the 'lap of the gods.'

"We never make any claims before election but we respectfully refer you to the opinion of one of the most quoted citizens to-day, the Hon. James A. Farley, Chairman of the Democratic National Committee. This is what Mr. Farley said October 14, 1932:

"'Any sane person can not escape the implication of such a gigantic sampling of popular opinion as is embraced in THE LITERARY DIGEST straw vote. I consider this conclusive evidence as to the desire of the people of this country for a change in the National Government. THE LITERARY DIGEST poll is an achievement of no little magnitude. It is a Poll fairly and correctly conducted.'"

In studying the table of the voters from

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The Literary Digest poll leading up to the 1936 election is often used as an example of statistical bias and error. The poll of ten million people incorrectly predicted that Roosevelt's opponent, Alf Landon, would win by a wide margin. Widely-publicized polls similar to this one led to a popular belief that Roosevelt would not win reelection in the 1936-1940 term.

Source: "Final Returns in the Digest's Poll of Ten Million Voters." *The Literary Digest*, 31 Oct. 1936, p. 5–10, www.unz.com/print/LiteraryDigest-1936oct31-00005/.

Annotated Bibliography

Primary Sources:

Books:

"Federalist 78." *The Federalist Papers*, by Alexander Hamilton, 1788, avalon.law.yale.edu/18th century/fed78.asp.

The Yale Law School digitized the Federalist Papers online. I used their archives to read Alexander Hamilton's *Federalist 78*, in which he discusses the role of the judiciary. In the paper, Hamilton first discusses the necessity of a judiciary-- to serve as a check to the majority opinion and discusses how the powers of the judiciary compare to the other branches of government. This document specifically refers to the judiciary as the weakest of the three branches, and I use these ideas by Hamilton to establish what the original thoughts about the role of the judiciary was.

Hughes, Charles Evans. *The Supreme Court of the United States, Its Foundations, Methods and Achievements: An Interpretation*. Columbia University Press, 1936.

Supreme Court Justice Charles Hughes, who along with Justice Roberts was one of the swing voters that decided on New Deal legislation wrote this book about his ideologies. This book and excerpts from this book specifically were referenced several times by Franklin Roosevelt in his speeches and personal writings. Reading this book gave me a bit of insight on Hughes's beliefs about the purpose of the Supreme Court in our democracy. The book also helped me understand more about the "switch in time" period, in which Hughes's vote was extremely volatile.

Cartoons:

Carlisle, Harold. "Reorganization Vexed Congress." Cartoon. *Des Moines Register,* 11 Apr. 1937. Microfilm.

This political cartoon featured President Roosevelt as a mechanic fixing a very broken-down car. Inside the car is a disheveled and nonchalant Uncle Sam, labeled and representing the United States Congress. The cartoon is captioned, "What's the matter with the old bus? It runs!" This cartoon implies that Roosevelt has control over Congress and that Congress is allowing him to exercise that control. This cartoon also criticized both Roosevelt and the Congress for allowing Roosevelt to ignore obvious flaws and problems with the legislative branch. Since this cartoon accompanied a piece about Roosevelt's court packing plan, I interpreted these problems as Roosevelt's overexertion of presidential authority and his influence pushing his court packing bill. This source was another example of criticism of Roosevelt and his Democrat-majority Congress allowing him to demonstrate executive authority over the United States government and I used this source to add to my knowledge of the early criticism.

Homan, Henry E. “In a Neutral Corner.” Cartoon. *Wilmington Morning News,* 11 Apr. 1937. Microfilm.

This cartoon shows a donkey and an elephant fighting in a boxing court. The elephant is dressed very expensively and laughing at the donkey, which is hitting itself. The donkey is also labeled differently on each half: one labeled “pro” and the other, “anti.” This cartoon is referring to the Jeffersonian Democrats, who were strongly against Roosevelt’s reelection in 1936 and his court packing plan. This cartoon is saying that the internal conflict in the Democratic party was ineffective for their goals, while the GOP was free to work on theirs. This cartoon was an example of criticism of the Democratic party’s organization, which I hadn’t seen before in any other source. While the cartoon doesn’t specifically mention the court packing plan, it was accompanying an article about the court packing debate, leading me to associate its message with the split reception on the court packing bill.

Russell, Bruce. “And the Court Plan Made It Balk.” Cartoon. *Los Angeles Times*, 11 Apr. 1937. Microfilm.

Bruce Russel was a prominent cartoonist for the *Los Angeles Times* throughout the Roosevelt administration. This political cartoon ran in the LA Times and criticized President Roosevelt’s court packing plan. The cartoon shows the president attempting to pull a camel labeled as the “Roosevelt Court Plan” through the Senate building, labeled as “Senate Needle.” This cartoon demonstrates President Roosevelt’s attempt to force his court packing plan through the small “needle” of Congress; his attempt to bypass the Senate’s authority. This cartoon was a critical statement made on Roosevelt’s political authority within the legislation. I use this cartoon as an example of the criticism against Roosevelt’s overexertion of presidential authority through his court packing plan.

Law Reviews and Analyses:

Griswold, Erwin N. “Owen J. Roberts as a Judge.” University of Pennsylvania Law Review, vol. 104, Nov. 1955, pp. 332–349, scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7461&context=penn_law_review.

Shortly after Justice Owen Roberts death in 1955, a Harvard Law Professor who knew Roberts well talked about Robert’s career and his legal mind in this obituary piece. The professor describes about Roberts’s early career and how he was nominated to the Supreme Court. The professor also talks about several difficult cases that challenged Justice Robert’s thinking about issues, including *West Coast Hotel v. Parrish*, where the switch in time that saved nine occurred. This source was very helpful for helping me understand more about Justice Roberts as a person and I learned a lot more about his prior history on the Supreme Court.

Legal Documents:

United States, Congress. Public Law 73-10. *Agricultural Adjustment Act,* 1933. The National Agricultural Law Center. http://nationalaglawcenter.org/wp-content/uploads/assets/farmbills/1933.pdf.

The Agricultural Adjustment Act (abbreviated AAA) was a major piece of legislature passed during President Roosevelt's first 100 days in office. The Act gives the Agricultural Adjustment Administration vast control over the commerce of certain important crops, such as corn, wheat, and cotton. The AAA is later struck down in *US v. Butler* as not falling under the Commerce Clause of the Constitution. Reading the legislation was useful for me to understand the power the AAA granted and why the Supreme Court ruled that it was unconstitutional.

United States, Congress. Public Law 73-67. *National Industrial Recovery Act,* 1933. Our Documents. https://www.ourdocuments.gov/doc.php?doc=66&page=transcript.

The National Industrial Recovery Act (abbreviated NIRA or NRA) was a piece of New Deal legislation sponsored by FDR. The NIRA established the Public Works Administration (PWA) and the National Recovery Administration, which regulated market wages. The NIRA was revoked by the case *Schechter Poultry Corp. v. USA*, and was one of the first pieces of New Deal legislation to be revoked. I read the NIRA to learn more about its contents and to understand the justices' decision in Schechter better, as well as to understand the powers delegated to organizations by the law. This source was very useful in adding to my understanding of the Lochner court's stance on New Deal legislation.

United States, Congress. Public Law 74-198. *National Labor Relations Act,* 1935. National Archives Catalogs. https://catalog.archives.gov/id/299843.

The National Labor Relations Act, more commonly known as the Wagner Act after its primary author, Robert Wagner, was a piece of New Deal legislation that established the National Labor Relations Board to guarantee better bargaining power for workers and their right to form unions. This law was the primary thing in dispute in the case *NLRB v. Jones and Laughlin*, which ruled that the law was constitutional following the switch in time. I applied my knowledge of this case to my overall understanding of the New Deal legislation that was being called into question and the ideas behind the labor tension at the time of New Deal policies.

United States, Congress. Public Law 75-718. *Fair Labor Standards Act,* 1938. United States Department of Labor. https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf.

The Fair Labor Standards Act was an act passed after the "switch in time." It still is one of the shining legacies of New Deal legislation. The law set the 8-hour workday and 40-hour workweek, as well as limiting child labor. Legal predecessors, such as NIRA, had failed at the Supreme Court and this law likely would not have passed without the

"switch in time." Understanding this law was very important in order to understand the conflict over regulated wages and hours. Even though there have been many amendments since the law was passed, the conflict over government regulation was very important during this time period.

U.S. Constitution.

In my investigation of the role of judicial review in the Supreme Court, I had to refer to several passages in the United States Constitution and several amendments that guaranteed rights for states and individuals. I also had to refer to article 1 of the Constitution several times in my explanation of Judicial review in my paper. Article 1 describes the formation of the United States government with its checks and balances and referencing the original source material for these statues was very important in my research. While reading summaries and analyses of the various principles laid down in the Constitution did help me get a general idea of judicial review and the separation of powers, reading and understanding the passages in the Constitution that addressed these ideas was very useful in my research.

Magazine Articles:

"Final Returns in the Digest's Poll of Ten Million Voters." *The Literary Digest*, 31 Oct. 1936, p. 5–10, www.unz.com/print/LiteraryDigest-1936oct31-00005/.

The Literary Digest, one of the most popular and well-respected magazines at the time, ran a poll of 2.4 million US voters in hopes to predict the results of the 1936 presidential election. The poll predicted that FDR's opponent, Alf Landon would win, but in actuality, Roosevelt won with 61% of the popular vote. The poll even prefaced its results by defending its credibility -- the poll had accurately predicted the results of presidential elections for the last 20 years. I used this source to demonstrate the public opinions of the 1936 presidential election. This poll was also useful for understanding more about President Roosevelt's troubles during the election and any possible issues that he would have had to deal with while in office prior to the election.

"Four 5-4 One 9-0." *TIME*, 19 Apr. 1937.

This article ran in TIME magazine the week after the *NLRB v. Jones* decision at the Supreme Court. The article talked about the recent decisions in support of New Deal legislation, including this case, *West Coast Hotel v. Parrish*, and *Schechter Poultry v. United States*. The article focused on the NLRB decision and spoke of it as a victory for New Deal legislators, including Roosevelt. Reading this article was very helpful in my knowledge of the immediate reaction to the switch in the Supreme Court and the "switch in time." I used this knowledge to add to my understanding of the issue and my understanding of the media's role in publicizing the decisions.

Newspaper Articles:

"All NRA Enforcement is Ended by President as Supreme Court Rules Act and Codes Void; Whole of New Deal Program in Confusion." *The New York Times*, 28 May 1938. Microfilm.

This article describes the disarray of New Deal lawmakers after "Black Monday" and the Court's decision in *Schechter*. All three cases and the consequences of the Court's decision are given, and key figures in the debate are described and sometimes quoted. The section also describes reactions from several groups that are continued on to later pages and has several statements on the issue from several leaders that were arguing for the legislation. This article does not contain any statements from the Justices or their opinions. This source was useful in understanding the reaction of several important groups after the decision.

"A Surprise Move by President." *Foster's Daily Democrat*, 5 Feb. 1937, p. 1.

This newspaper article was written the day after Franklin Roosevelt announced his court packing plan to the nation. The article remains primarily factual in nature, although the author does seem surprised and apprehensive of the decision. The article also didn't seem to question the validity or effectiveness of the decision, likely because of national trust in FDR's policies. I used this source to analyze public opinion in the wake of FDR's policies to learn more about people's' reactions to the court packing plan.

"Cabinet Members Press Court Plan." *The New York Times*, 15 Apr. 1937, p. 5. Microfilm.

This was one article out of the Times's coverage of the Judiciary Bill debate. In this column, the reporters talked about the message of Attorney General Homer Cummings and Secretary of State Henry Wallace, who represented the President when they said they would go ahead with the judiciary reformation. Cummings and Wallace's message asserting their executive authority over the legislative branch was very useful for me to understand how the executive branches and those in power, not just the president, were united against the courts. I used the messages reported by Cummings and Wallace as evidence of the executive branch's authority during this period.

Catledge, Turner. "The President and Congress-- First Rifts Appear." *The New York Times*, 11 Apr. 1937. p. 3. Microfilm.

This article talked about the growing tensions between President Roosevelt's supporters and his critics. It had several quotations from prominent critics of the President's plan in Congress and these quotations described the reasons those Congressmen gave for their opposition the plan. I used this source to learn more about the opposition to Roosevelt's court packing plan and to understand more about the process the bill went through as it went before the Senate Judiciary Committee.

"Congress Divided over Relief Issue." *The New York Times*, 11 Apr.1937, p. 7. Microfilm.

This article talked about the Public Works Administration and the Work Progress Administration, two separate agencies that helped oversee New Deal relief projects. The Public Works Administration was created by the National Recovery Act sponsored by FDR in 1933 and the article talked about the ineffectiveness of the Public Works Administration. Discussions of national unemployment had reached the floor of Congress and this article talked about the issues being discussed at this time. This source was helpful for giving me an understanding of the state of the National Industrial Recovery Act during this time period following the "switch in time" and what the public opinion was of the National Industrial Recovery Act.

"Congress' Power Widened by Court's Wagner Decision." *The New York Times*, 13 Apr. 1937, p. 15. Microfilm.

This headline ran on the front page of the *New York Times* the day after the decision in *NLRB v, Jones and Laughlin* and had a story that spanned several pages. The article talked about the implications of the Court's decision and what the decision meant in context with the other decisions in the Lochner-era court. This article also touched on the majority, minority, and dissenting opinions of the judges and summarized those. This article helped me learn more what was viewed as the outcome of the case immediately following the case and helped me understand how that knowledge might have influenced the judges.

Dorris, Henry N. "Congress Evades Labor Club: Hopes Wagner Act Ruling Will Point Way for Law Dealing with Sit-Downs." *The New York Times,* 11 Apr. 1937, p. 8. Microfilm.

The *Times's* coverage of *NLRB v. Jones and Laughlin* mentioned profusely the strikes and conflicts between unions and large corporations. The Wagner Act (National Labor Relations Act) helped guarantee union rights for workers and the Supreme Court's upholding of the Wagner Act was planned to help out the union workers in the debate. This article was helpful for me to understand the relationships between unions and the weight of that on the United States government. The reporter made it seemed like this issue was a very pressing issue that was weighing on the minds of Congress and this article helped my understanding of the issues that were pressing on the government at the time.

"Fight Over Court Grows Intensity; Hearings Near End." *The New York Times*, 12 Apr.1937, p. 1, 4. Microfilm.

This article talked about the Senate Judiciary Committee hearings on Roosevelt's court packing plan and also includes several interviews from prominent senators. The article specifically cites Republican Senator Arthur Vandenberg on his plan to create a filibuster, and his interview with journalists takes up a lot of the focus in the article. Despite the criticism, there are several Congressmen praising Roosevelt's decision and the article ends by claiming that the bill will likely pass with a clean majority. What I learned from

the article was that the hotly-debated issue of Roosevelt's court packing bill was still gaining support from Congressmen during this time, even if the final result wasn't the same.

"Johnson Calls on the Public to Fight to Maintain the Principles of the NRA." *New York Times*, 28 May 1935. Microfilm.

This article included a statement from head of the National Recovery Administration, Hugh Johnson. The statement was written in response to *Schechter Poultry v. United States*, which had just declared the NRA unconstitutional. In his statement, Johnson defended the constitutionality of the NRA and called for the people to defend the law. Johnson's statement also discussed his worries for the Agricultural Adjustment Act and Federal Advisory Committee Act, two similar New Deal legislations. This article was a very helpful statement that described the Roosevelt administration's reaction to *Schechter*.

Krock, Arthur. "Roosevelt Asks Power to Reform Courts, Increasing the Supreme Bench to 15 Judges; Congress Startled, But Expected to Approve." *New York Times*, 5 Feb. 1937, archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0205.html.

This was the article published in the *New York Times* in response of Roosevelt's announcement of his court packing plan to Congress. The article talks about some of the legislators' responses to the President's proposal, with some members trusting in the president's plan, while conservative democrats and Republicans were outraged. The article also briefly summarized Roosevelt's address to Congress. This source was a very informative account of the evening and provided some useful information about how Congress felt about the issue after the announcement. I used this source to learn more specific details about the night in question and to understand the President's role in his party and how much support he had from his fellow lawmakers.

Krock, Arthur. "Roosevelt Sweeps the Nation; His Electoral Vote Exceeds 500; Lehman Wins; Charter Adopted." *The New York Times*, 4 Nov. 1936, events.nytimes.com/learning/general/onthisday/big/1103.html.

This was the newspaper article that ran in the *New York Times* that announced that Roosevelt won the presidential race of 1936. The article talked about the Republicans congratulations and the "Jeffersonian Democrats" who had not managed to stir up enough votes to disrupt Roosevelt's popularity in the Southern United States. This article also talked about the population's general feelings towards the New Deal and the economic challenges that Roosevelt mentioned in his victory speech. This source was a very useful account of the presidential race and Roosevelt's challengers.

Lawrence, David. "President Held Clining to Court Plan." *The Washington Star*, 26 July 1937, p. 9. https://chroniclingamerica.loc.gov/lccn/sn83045462/1937-07-26/ed-1/seq-9/

Months after the "switch in time" and the Court's new policies toward New Deal legislation, President Roosevelt still lobbied and pressed for support of his Judicial Reform Bill. This article focused on the President's lobbying after the Act was rejected by Congress. This source was very useful to help me learn of the President's continued attempts to pass the Act after the "switch" and President Roosevelt's view of his own policy, which he described in the article as "an obligation to… the courts."

"President Renews Battle Over Court." *The New York Times*, 2 Apr. 1937. Microfilm.

This article was published shortly after *West Coast v. Parrish*. The article discusses President Roosevelt's reaction to the decision, focusing on a letter he sent to the chairman of the Interstate Commerce Commission. The letter discussed criticism over his court packing and reassured the chairman. This source helped me understand Roosevelt's position following the "switch in time" and how much the "switch" impacted his court packing plans.

"President Will Appeal to Nation with a Formula to Salvage NRA; Industries Act to Retain Codes." *The New York Times*, 29 May 1935. Microfilm.

This article gave the President Roosevelt's response to the *Schechter* decision. The article talked about the President's plan to continue his New Deal policies and described the President's surprise to the *Schechter* decision. This source was a useful account of President's Roosevelt reaction to the unconstitutionality of his New Deal legislation and his plans after the decision.

"Roosevelt Asks that Nation Trust Him in Court Move; Resents 'Packing' Charges." *The New York Times*, 10 Mar. 1937.

This article appeared in the *New York Times* with several quotes from Roosevelt defending his Judicial Reform Bill. The bill had been a hotly debated issue and this article is Roosevelt' response to the accusations and criticism against him. This source was very useful in helping me understand Roosevelt's response to the criticism to the bill, as well as Roosevelt's support for the bill in the weeks after its announcement.

Stark, Louis. "Organized Labor, Dazed by NRA Decision." *The New York Times*, 28 May 1935. Microfilm.

This article described the reactions of several government organizations after the *Schechter Poultry v. United States* decision. The organizations viewed the decision as a step back and the article quotes several leaders at the federal and state levels. This source was useful to learn more about the reaction of the organizations created by New Deal legislation. The threat of New Deal repeal was very evident in their statements and the ideas helped me understand more about the situation.

"Supreme Court Findings Hailed by Wagner as Most Significant since Marshall." *The New York Times,* 13 Apr. 1937. p. 20. Microfilm.

This was a very long article that described Wagner's statements following the decision in *NLRB v. Jones*. Wagner made several statements on his political victory and described what the decision meant for workers. While Wagner did not mention the court packing bill nor the change in the Court, he did talk about the decision in depth. I used this source to learn about Wagner's personal reaction to the decision, given that he had been its primary author and one of its most vocal supporters.

"The Four Horsemen of Autocracy," *New York Herald Tribune*. 18 Sep. 1940, p. 28.

This newspaper article discusses a speech given by a Mr. Raymond Moley, in which he criticizes the Roosevelt Administration and the executive power that Roosevelt has. Mr. Moley also refers to Roosevelt's court packing scheme and how the courts have allowed his legislature to stand in the years following the scheme. This newspaper was an early criticism of Roosevelt's expansion of executive power and I used this source to understand how early criticisms of Roosevelt's power stand in comparison to modern interpretations.

Wood, Lewis, "Court Debate Grows Hotter: From Justices to Bootblacks. Washington is Divided into Two Hostile Camps." *The New York Times,* 11 Apr. 1937, p. 7. Microfilm.

This article talked about the criticism and the debate about President Roosevelt's court packing plan. This article specifically talked about Justice McReynolds and Attorney General Cummings, both of whom had come under fire from opposing sides for their statements on the matter. Hearing from Justice McReynolds about the issue was very helpful me to learn more about the Supreme Court's standing on the issue and what logical faults they found with the court packing plan.

Speeches:

Roosevelt, Franklin D. "1936 State of the Union." *FDR Presidential Library and Museum*, catalog.archives.gov/id/197384.

In his 1936 State of the Union, President Roosevelt mostly focused on his New Deal policies and domestic issues. FDR announced support for his recently revoked NIRA law and hinted at new and upcoming changes in administration, likely referring to his plans to pack the Supreme Court that he would announce a month later. His address was very helpful to know about FDR's plans during this time period and to learn more about the issues that were troubling him during this time period.

Roosevelt, Franklin Delano. “Fireside Chat on the Reorganization of the Judiciary.” *FDR's Fireside Chats*, 9 Mar. 1936. http://www.fdrlibrary.marist.edu/archives/collections/utterancesfdr.html.

This was one out of several “Fireside Chats” that Franklin D. Roosevelt broadcasted over radio to the United States. I was able to listen to the original audio of this Fireside Chat because of the digital archives of the FDR Library and Museum, which contained audio recordings. In this chat, FDR explained his new Judiciary Reform Bill to the American public. In addition, FDR claims that the Supreme Court’s interpretation of the Constitution is incorrect and that this bill would remedy that. This source was very useful in my understanding of FDR’s point of view of the Court and his conflict with the Court.

Roosevelt, Franklin D. “First Inaugural Address.” The American Presidency Project. 4 Feb. 1933, www.presidency.ucsb.edu/ws/index.php?pid=14473.

In his first inaugural address, President Roosevelt talked about how federal government involvement was necessary to repair the economy. I used this source and its call to action of the American people, “you have nothing to fear but fear itself” as well as its references to the future expansion of executive power that Roosevelt had planned, as evidence of Roosevelt’s plan. This source was useful to help me understand Roosevelt’s plans and goals entering into office.

Roosevelt, Franklin D. “Message to Congress - Judicial Reform.” 5 Feb. 1937, www.fdrlibrary.marist.edu/resources/images/msf/msf01062.

The FDR library had many of Franklin Roosevelt’s personal speech notes on file and this was the speech he wrote for his announcement of his court packing plan. Unlike other online sources, I was able to see Roosevelt’s personal annotations and it was very enlightening to read his edits. In this speech, Roosevelt also gave several reasons and statistics for his plan, citing benefits for all, instead of revealing true intentions about his New Deal policies. I found this source to be extremely helpful for learning more about what Roosevelt communicated to Congress and what Roosevelt might have viewed his court packing plan as.

Roosevelt, Franklin D. “Oglethorpe University Commencement Address” 22 May 1932, http://www.fdrlibrary.marist.edu/resources/images/msf/msf00486.

This message was on the campaign trail in Roosevelt’s first presidential race in 1932. In this address, Roosevelt talked about the needs of the people and gave reasons for people to elect him president. This source gave me several of Roosevelt’s campaign promises, which were helpful for me to understand his goals for the 1932-36 presidential term and what he viewed were the most critical pieces that needed revision. In addition, his speech addressed the concerns of the public, so it gave me a good idea of Roosevelt’s relationship and understanding of the public’s needs and wants.

Roosevelt, Franklin D. "Press Conference #209" 31 May 1935, http://www.fdrlibrary.marist.edu/resources/images/pc/pc0022.pdf.

Following the *Schechter* case, President Roosevelt gave this press conference to discuss his reaction to the decision and his subsequent plans. The knowledge in the press conference wasn't extremely important to my research, but the delivery was an important and rare look into the emotional ties of President Roosevelt to this decision. Roosevelt is famously quoted for his "horse-and-buggy age" comment he made, and he expresses outrage at the Court's decision throughout the speech in his language and broken delivery. This source was an extremely interesting look into the motivations of Roosevelt during this pivotal time period.

Roosevelt, Franklin D. "Press Conference #300" 2 June 1936, http://www.fdrlibrary.marist.edu/resources/images/pc/pc0036.pdf.

These brief remarks were made by President Roosevelt shortly after the *Morehead v. Tipaldo* decision. Similar to his remarks following *Schechter*, Roosevelt's statement displayed his frustration very well. In his statement, Roosevelt declared the topic of minimum wage legislation a "no-man's land" and angrily discussed the political situation with a reporter. I found this source to be very helpful in understanding Roosevelt's reactions to the decisions that struck down New Deal legislation.

Supreme Court Cases:

United States, Supreme Court. *Adkins v. Children's Hospital*. 9 April 1923. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/261/525.

Adkins v. Children's Hospital was a case concerning a law passed in the District of Columbia that set a minimum wage for women and children in DC. Children's Hospital sued the official responsible for the law. The Supreme Court decided in a 5-3 decision that minimum wage for women was unconstitutional, referring to the due process clause of the 5th amendment. This decision was later overturned by *West Coast Hotel v. Parrish*. This case demonstrates the Lochner era's limit of economic freedoms and is one of the key cases that defined the Lochner era of the Supreme Court. I used this case to aid my understanding of the Supreme Court's conflict with the New Deal economic policies.

United States, Supreme Court. *Brown v. Board of Education*. 17 May 1954. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/347/483.

Brown v. Board was one of the shining moments of judicial review, in which the Supreme Court ruled that segregation in schools was unconstitutional. Even with the unanimous decision, the Court was unable to enforce their decision among the public. As demonstrated by publications such as *The Southern Manifesto*, the public resisted the decision and it was after the Executive and Legislative branches enforced their powers that the decision was carried out. Understanding this case was crucial in understanding the topics of judicial review and the judiciary that I touched upon in my paper.

United States, Supreme Court. *Cohens v. Virginia.* 3 Mar. 1821. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/supremecourt/text/19/264.

Cohens v. Virginia was the case that established that the Supreme Court could expand their powers of judicial review to include states' civil cases. I used this source in my investigation of judicial review to understand more about the expansion of judicial review powers and the extent of judicial review prior to the Roosevelt-era.

United States, Supreme Court. *Helvering v. Davis*. 24 May 1937. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/301/619.

Helvering v. Davis, along with *NLRB v. Jones & Laughlin*, was one of the first Supreme Court victories upholding the New Deal following the "switch in time." In *Helvering v. Davis*, the Supreme Court ruled 7-2 that the Social Security Act of 1935 was constitutional as long as government spending was for the general welfare of American citizens. This case was helpful for me to understand more about the timing of Supreme Court cases during this time period.

United States, Supreme Court. *Immigration and Naturalization Service v. Chadha.* 23 June 1983. *Legal Information Institute,* Cornell U Law School, *https://www.law.cornell.edu/supremecourt/text/462/919*

INS v. Chadha was a Supreme Court case that dealt with the constitutionality of a one-house legislative veto. In the case, the United States House of Representatives vetoed the suspension of the defendant's deportation by the INS, representing the Legislative branch exerting their power over the executive branch. This case was very important for the ideas of separation of powers within the three branches of the government and I researched this case to learn more about the Supreme Court's rulings on the separation of powers idea.

United States, Supreme Court. *Lochner v. New York*. 17 Apr. 1905. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/198/45.

Lochner v. New York was the most defining case of this era in Supreme Court history from 1897 to 1937, often called the Lochner era. This era first began with *Allgeyer v. Louisiana* in 1897 and ended with *West Coast Hotel v. Parrish* in 1937. This era is defined by the removal of individual states' economic policies and regulations and is often considered to be a period of limited economic liberties. In *Lochner v. New York*, the Supreme Court overrode a law that forbade workers from working over ten hours a day in a 5-4 decision. This case was very significant later because of its legal precedent of governmental authority over states and this period of the Supreme court upholding a conservative agenda that would persist into Roosevelt's terms. In addition, this era was very important to understanding the conflict within the United States government and the importance of the "switch in time."

United States, Supreme Court. *Marbury v. Madison*. 24 Feb. 1803. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/5/137.

Marbury v Madison was the original Supreme Court case that set up the process of judicial review. In the case, suit was brought against the executive administration of Thomas Jefferson, who had ignored and destroyed laws created by his predecessor intended to limit his power. Because Jefferson refused to honor judges appointed by John Adams, this case was a very early example of executive authority limiting the power of the judiciary. This case was very important in my study of the history of the court, because of its importance in its establishment of judicial review, as well as its example of battles with executive authority by Framers of the United States Constitution.

United States, Supreme Court. *Martin v. Hunter's Lessee.* 20 Mar. 1816. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/supremecourt/text/14/304.

Martin v. Hunter's Lessee was the case that established that the Supreme Court could expand their powers of judicial review to include states' civil cases. I used this source to understand more about the expansion of judicial review powers and the extent of judicial review prior to the Roosevelt-era.

United States, Supreme Court. *Morehead v. New York ex rel. Tipaldo*. 5 March 1934. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/291/502.

Preceded by *Adkins* and succeeded by *West Coast*, the *Tipaldo* case debated a minimum wage law in the state of New York. In a 5-4 decision, Justice Roberts sided with the "Four Horsemen" and held up the Court's unconstitutional ruling in Adkins. The case was one of the larger ones before the "switch" that likely contributed to the growing conflict between Roosevelt and the Court. I found Tipaldo to be very interesting and significant because it holds up the sudden "switch" narrative – that is Justice Roberts suddenly changed his opinion. Researching more into the ideas of the case were also very helpful in understanding the timeline leading up to the "switch."

United States, Supreme Court. *Nebbia v. New York*. 5 March 1934. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/291/502.

Nebbia v. New York was about the constitutionality of a law enacted by the state of New York to help out dairy farmers who had disproportionately been affected by the Great Depression. The law set up an administrative board that set the price of milk in order to prevent cost-cutting and to increase profits. The court decided in a 5-4 decision to uphold the constitutionality of the law, with the four conservative "Horsemen" dissenting and Justice Roberts siding with the majority. This case still held a majority opinion in favor of New Deal legislation despite that it occurred three years before the actual "switch in time." This case also occurred during a time period where the court was striking down New Deal legislation, making its timing even more significant and represents a possible

gradual change in Justice Roberts, rather than a sudden switch. Their swing votes proved to be a very important part of this Supreme Court era.

United States, Supreme Court. *NLRB v. Jones & Laughlin Steel Corp*. 12 Apr. 1937. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/301/1

This Supreme Court case was surrounding the constitutionality of the National Labor Relations Act of 1935 and the commerce clause of the US Constitution. The National Labor Relations Board (NLRB) charged the Jones and Laughlin corporation of discriminating against union members and therefore violating the commerce clause. The court ruled 5-4 that the National Labor Relations Act was constitutional. This case was one of the first after the "switch in time" to hold up New Deal legislation and it was very helpful to understand the compromise that occurred with other examples of controversial New Deal legislation. I cited this and several other cases in my paper when I talk about New Deal legislation as a whole.

United States, Supreme Court. *Schechter Poultry Corp. v. United States*. 27 May 1935. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/295/495.

Schechter Poultry v. United States was a unanimous decision to invalidate the National Recovery Act of 1933, a piece of New Deal legislation that placed regulations on the poultry industry. The Supreme Court ruled that the NIRA violated the Commerce Clause of the United States Constitution. Originally, Schechter Poultry Corp was charged with several violations of the NIRA, including selling sick poultry. Hence, the "Sick Chicken" case, as it became to be known and referred to, was one of several that rolled back New Deal regulations during this time period. Understanding this case was very important to understanding the conflict between the Supreme Court and FDR and how the "switch in time" unfolded.

United States, Supreme Court. *United States v. Carolene Products Co.* 25 Apr. 1938. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/supremecourt/text/304/144.

In *US v. Carolene*, the Supreme Court upheld the Constitutionality of a law that Carolene Products claimed violated the Due Process Clause of the United States Constitution. The important thing about this case was its footnote 4, in which it is established that the Supreme Court exists to protect "small and insular minorities" from the whims of the majority. This later becomes important in the period of *Brown v. Board*. I used this case for its footnote 4 to talk about the duties of the court in my paper.

United States, Supreme Court. *West Coast Hotel Co. v. Parrish*. 29 March 1937. *Legal Information Institute*, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/300/379.

West Coast Hotel v. Parrish is the case where the "switch in time" occurred. The case was about the constitutionality of minimum wage for women, after an employee filed a suit claiming that she had been paid less than minimum wage. This case ruled that minimum wage for women was constitutional 5-4 after Justice Roberts gave his support to the liberal Justices. It was important to understand what occurred in this case for my research about the switch and to identify how the court was New Deal legislation during this period.

Secondary Sources:

Books:

Clinton, Robert Lowry. *Marbury v. Madison and Judicial Review*. University Press of Kansas, 1989.

This book focused on the history and creation of judicial review in America, all the way from its roots in *Marbury v. Madison* to more present-day cases. The book talked about the creation of the three branches of government and the writings of Hamilton in setting up the judiciary. In addition, the book gave a lot of information about the *Marbury v. Madison* case and the dissenting opinions among the parties. This book was a very useful source for my understanding of *Marbury v. Madison*.

Gross, James A. *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947*. State University of New York Press, 1981.

James Gross, a professor of industrial labor relations at Cornell University, wrote this book talking about the National Labor Relations Act and its foundations during the Roosevelt presidency. His book provides several accounts of the *NLRB v. Jones* case as well and the reactions to the outcome of that case. I used this source to learn more about the people involved with the case as well as to understand the National Labor Relations Act better.

Kens, Paul. *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York.* University Press of Kansas, 1990.

Paul Kens, the professor of political science at Texas State University, wrote this analysis of the *Lochner v. New York* case. The information provided was very credible and had documentation to support it. The book mostly focused on the development of the actual case but had a couple chapters about the Lochner-era court in general. This source gave me a very helpful account of the *Lochner* case and the ideology of the Lochner Court.

Leuchtenburg, William E. *Franklin D. Roosevelt And the New Deal*. Harper & Row Publishers, 1963.

William Leuchtenburg is the leading scholar on Franklin D. Roosevelt. This book was one of his earlier works, in which he tells the narrative of the New Deal programs only a few years after the end of World War II. This story provides an accurate and well-cited narrative of FDR's new deal programs and this source was very helpful in providing accurate information about the New Deal.

Leuchtenburg, William E. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. Oxford University Press, 1995.

This book by a professor of history and leading scholar of Franklin D. Roosevelt touches on the conflict between the President and the Supreme Court and also talks about the

"switch in time" and the adoption of the President's New Deal legislation. This book provided a very useful narrative of the court packing drama that was unfolding in the legislation and also placed a lot of emphasis on "the switch in time." Both of these sections were especially helpful in my investigation of the conflicts between the Judicial and Executive branches and I used a lot of information from this book in my research.

Manweller, Matthew. *The People vs. the Courts: Judicial Review and Direct Democracy in the American Legal System*. Academica Press, 2005.

This book looked at the coexisting values of judicial review and direct democracy, which contradict each other. Judicial review is a counter-majoritarian function, while direct democracy focuses on decisions made by the people. This book talked about both sides and gave evidence for both. It was a very useful source in my investigation of the role of the judiciary as a counter-majoritarian function and the purpose of judicial review in our democracy.

Snowiss, Sylvia. *Judicial Review and the Law of the Constitution*. Yale University Press, 1990.

This book was about the shaping of judicial review through different eras in Supreme Court history, starting from its creation. Important figures from each period in time were highlighted and their ideology discussed. This source was a very useful overview of the development of judicial review and the information helped guide my investigation into judicial review during the New Deal era.

"The Judge as Legislator for Social Welfare." *The Rise of Modern Judicial Review* by Christopher Wolfe, Rowman & Littlefield Publishers, 1994.

This book talked about the establishment and transformation of judicial review. The section that I found most interesting was the section on Justice Holmes, who was one of the swing votes during the New Deal era. The section examined Holmes's interpretation of judicial review as an elastic one, and included several quotes discussing his interpretation of judicial review. The information about Justice Holmes was very helpful in my understanding of judicial review in this iteration of the Supreme Court.

Anderson, Karen. *Little Rock: Race and Resistance at Central High School*. Princeton University Press, 2010, https://www.jstor.org/stable/j.ctt7scz5.

This book gave a very detailed narrative of the policies of massive resistance implemented following the *Brown v. Board* decision. The book described the steps Southern lawmakers took to keep segregation in place, including limiting state funding for schools. In order to best understand the concept of judicial review, researching the *Brown* case and the lack of enforcement power by the Supreme Court was very important and this book was very helpful in that sense.

Thurmond, Strom et al. *The Declaration of Constitutional Principles.* 1956.

The *Southern Manifesto* was several Southern Congressmen's response to the Court's ruling in *Brown v. Board*. The legislators fought against the ruling and called for the limiting of the Supreme Court's powers. This shining moment of judicial review was important in my research to understand the historical premise of judicial review and its purpose to protect minorities. I used this book in my paper when I talked about the counter-majoritarian premise of the Supreme Court.

Interviews:

Barry Cushman. Personal Interview. 9 Apr. 2018.

Dr. Barry Cushman at the University of Notre Dame is regarded as one of the best Franklin Roosevelt scholars. He has researched the life of FDR in depth and has written several works on the issue. I first encountered his work arguing against the importance of the "switch in time." In my interview, I asked Dr. Cushman about his knowledge on the different relations within the branches of government while the court packing debate was ongoing, especially the relationships between the executive and legislative branches. Dr. Cushman's insight was very useful in understanding more about the political situation during this very tense moment in history.

David Fontana. Personal Interview. 12 May 2018

Professor David Fontana is a professor of constitutional law at George Washington University in Washington DC. I got into contact with Professor Fontana because of his current work on the "separation of powers" and the implications of the clause in our current political climate. I talked with Mr. Fontana about many aspects of the Constitution relating to my research, but specifically focused on the "separation of powers" idea. Dr. Fontana was very useful in helping me learn more about constitutional theory surrounding this idea and the relevance of the "separation of powers" in the modern age.

Erwin Chemerinsky. Personal Interview. 5 May 2018.

Erwin Chemerinsky is the current Dean of Berkley Law School. He had previously been the Dean and Distinguished Professor of Law at the University of California Irvine. Dr. Chemerinsky has written many publications about constitutional law and the American government. I contacted Dr. Chemerinsky after I read one of his comments talking about judicial authority during the current administration. I asked Dr. Chemerinsky about his opinions of the state of the judiciary, focusing on the idea that the judicial branch is the "weakest" of the three. Dr. Chemerinsky argued in part that the checks the judiciary placed on the executive meant that the judiciary wasn't weak. Dr. Chemerinsky's answers and comments to my questions were very useful in helping me understand more about the ideas of judicial weakness and the judiciary's role in the "separation of powers."

Patrick Fahy and Jeffrey Urbin. Personal Interview. 10 May 2018.

Patrick Fahy is the Archives Technician and Jeffery Urbin is the Education Director at the Franklin Delano Roosevelt Presidential Museum and Library in New York. I spoke with both of them about President Roosevelt, and while they emphasized several times throughout the interview that they were not historians, they were able to talk about their knowledge of the Roosevelt administration and its policies. We spoke primarily about the different political factors at play during this period in the Roosevelt administration. My research up to this point had included a lot of anti-Roosevelt sources, and they provided several differing views on the issues I had come to see as examples of executive overreach. Mr. Fahy was also very useful in providing me with several primary and secondary sources that described the Roosevelt administration in detail during this period. This interview was very useful in helping me learn more about what President Roosevelt was possibly thinking of and how he justified his actions that hindsight has looked so negatively upon.

Steven Horowitz. Personal Interview. 7 Mar. 2018.

Dr. Steven Horwitz is the professor of Economics at Ball State University. Dr. Horwitz has long been a leading expert in the field of macroeconomics and microeconomics from an Austrian school perspective and has written several books on the topic. Dr. Horwitz also has extensive knowledge over New Deal economics and economic recovery and has written several articles about the questionable necessity of the New Deal in the recovering American economy. I interviewed Dr. Horwitz about his critical view on the New Deal and the evidence that supports his reasoning. In our interview, he discussed how the natural recovery of economic markets in times of recession would have made any contribution by the New Deal unnecessary. We also talked about how the New Deal used deficit-based methods and other economic practices to improve the national economy and how those methods work. Dr. Horwitz helped me understand the finer economic points that surrounded the New Deal and was also very helpful in giving me insight on the New Deal from the point of view of a critic.

William Novak. Personal Interview. 13 Mar. 2018.

Dr. William Novak is the distinguished professor at law at the University of Michigan. I first read his work, “The Myth of the Weak American State” which covered FDR’s New Deal and the “switch in time.” Dr. Novak is a legal historian and has studied this topic in depth prior to our interview. I talked with him about the patterns and views of the Lochner court from a historian point of view and he discussed the different patterns that emerged of what the Lochner court was and was not opposed to. I also talked to Dr. Novak about the role of protests and public opinion at the time of the” switch in time” and he said that he believed that the “switch in time” was not directly influenced by anything and that it was simply a gradual shifting of opinion, referring to the work of Dr. Cushman. My interview with Dr. Novak was very helpful in understanding more about

the motives and patterns of the Lochner court and learning more about the different motives behind the "switch in time."

Law Reviews and Analyses:

Adkins, Jason A., "Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade," Minnesota Law Review, vol. 90, 22 Dec. 2005, pp. 500-535. https://www.ncbi.nlm.nih.gov/pubmed/18429485.

In this paper, the author talks about a conflict with *Roe v. Wade* and compares the discussion of whether or not to reopen *Roe v. Wade* with a similar one addressed in *Lochner v. New York*. This source discussed the Lochner case in depth and the conflicts that were involved in Lochner at the Supreme Court. I used this source to learn more about the Lochner case and several other cases that the Lochner court dealt with.

Carson, Jamie L. and Benjamin A. Kleinerman, "A switch in time saves nine: Institutions, strategic actors, and FDR's court-packing plan" Kluwer Academic Publishers, 2002. http://spia.uga.edu/faculty_pages/carson/pc02ck.pdf.

In this academic paper, authors Carson and Kleinerman claim that most people treat Franklin Roosevelt's court packing plan as an overextension of presidential authority and an attempt to undermine the courts and offer an explanation for the plan. The paper analyzes Roosevelt's behavior and discusses outside factors that influenced his decision making. This paper was a very interesting in-depth analysis of FDR that helped me understand the outside pressures on him and how he came to his court packing plan.

Carter, Edward L. and Edward E. Adams, "Justice Owen Roberts on 1937," 15 Green Bag 2D, 2012, pp. 375-388. http://www.greenbag.org/v15n4/v15n4articlescarteradams.pdf

Two professors at Brigham Young University reexamined old interviews between Justice Owen Roberts and Merlo Pusey. The authors used the interviews, in which Roberts discusses his thought processes in the "switch"-era cases, to talk about more general traits that Justice Roberts displays throughout his career. I found their research to be a very interesting look into the mind of Justice Roberts, a highly secretive a mysterious place post-*West Coast*. There have been many different theories to the "switch" and Justice Roberts does not clarify on his motivations to vote the way he did. Nonetheless, this source was very useful to help me learn more about Roberts and his traits.

Cushman, Barry, "Inside the Constitutional Revolution of 1937," Supreme Court Review, vol. 367, 2017. http://ssrn.com/abstract=3036658.

Professor Barry Cushman at the University of Notre Dame argues in this review of Roosevelt's court packing and the "switch in time" that Roosevelt's plan did little to influence the "switch in time." Cushman draws on evidence that shows change within the Supreme Court prior to Roosevelt's plan and argues that cases such as *Nebbia v New York* show a more liberal leaning court during the Lochner era. This source was very

helpful in giving me an alternate point of view on the issue. There are two major opinions on the "switch in time" and this paper was one of the most prominent and well-documented arguments for its opinion. I used this source to understand about shifting political ties leading up to the switch and to learn more about modern-day interpretations of the switch.

Daniel E. Ho, "Did a Switch in Time Save Nine" 2 J. Legal Analysis 69, 29 October 2009. https://scholarship.law.berkeley.edu/facpubs/697/.

In this analysis, Daniel Ho examines the question of whether or not the change in Justice Roberts was an abrupt change or a gradual one. Ho utilizes new statistical data and modern data analysis to examine the voting patterns of all nine justices and concludes that the shift was indeed an abrupt change in Justice Roberts. This paper was very useful for me to understand the statistical data of the voting histories of different justices. I used one of the author's charts in my appendices and I also drew on my knowledge of the data several times as I researched more about the voting patterns and read more legal papers on the issue.

Fettig, Shawn C. and Sara C. Benesh, "Be Careful with my Court: Legitimacy, Public Opinion, and the Chief Justices," The University of Michigan Press, 2016, pp. 374-394. https://www.press.umich.edu/pdf/9780472119912-toc.pdf.

This paper, written by two political science professors, examines the role of the Chief Justice of the Supreme Court and cites several examples from history. There is also a lengthy section about Justice Hughes and Justice Owen Roberts and their position during the cycle of 1936. This source talked about their opinion swaying because of outside pressures and discusses other examples from history where court opinion swayed. This source was very useful for learning about the patterns and tendencies of the Supreme Court and for discussing how the switch in time came to be. I used this source in my research to learn more about the Supreme Court and I utilized the facts in this paper to help guide my research into the Supreme Court's history.

Goldstein, Tom and Amy Howe, "But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making" Michigan Law Review, vol. 109, 2011, pp. 963-978. http://repository.law.umich.edu/mlr/vol109/iss6/7

This review focuses mainly on the points brought up by a new book, *The Will of the People* by Tom Goldstein. Specifically, this paper talks about the purpose of the Courts. One side argues that the Court is specifically supposed to pass judgement on the laws, not to make them. Another says that the Supreme Court is tasked with interpreting the laws and their interpretations are supposed to be in line with the Constitution. This source was very useful to me in talking about the purpose of the Court, which relates back to the issues of judicial review and the weakness of the Judicial branch.

Magliocca, Gerald N, "Court-packing and the Child Labor Movement," Constitutional Commentary, vol. 27, 2011, pp. 455-486. https://conservancy.umn.edu/bitstream/handle/11299/163448/13-Magliocca-272-ChildLaborAmendment3.pdf

While many of President Roosevelt's policies were later implemented into law, there was an instance where FDR lent his support to a child labor law that was not passed in state legislatures. The child labor law talked about in the paper had failed to be accepted by several states, yet FDR had given it his full support. The paper attributes FDR's supports to his hopes that the bill would fail so that his court packing bill would have more support for a need of "judicial reorganization." This source was useful in helping me understand how FDR was trying to manipulate Congress to pass the bill.

McCubbins, Mathew, Roger Noll, and Barry Weingast. "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law," Southern California Law Review, vol. 68, 1995, pp. 1631-1683. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5958&context=faculty_scholarship

McCubbins, Noll, and Weingast, three political science professors in California collectively known as McNollgast, talk in this article about different Supreme Courts in history, specifically devoting a large section to the Lochner court era and the switch in time. McNollgast presents their "new views" on individual issues, such as the *Nebbia v. New York* case and discuss how they interpreted the Court's actions and decisions on issues with regard to different political doctrines at the time. The authors discuss the overarching beliefs held by the Lochner court and interpret those beliefs in context with the broader scope of American political theory. This source was helpful to me because of its interpretations of the individual cases that defined the Lochner era and allowed me to understand the context of American political theory that persisted through this era.

Purcell, Edward A. "Rethinking Constitutional Change," Virginia Law Review, vol. 80, number 1, February 1994, pp. 277-290. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616268

Edward Purcell, an American historian, responds to professor Barry Cushman's article about Roosevelt's court packing in this article, where he discusses how the switch in time was actually set in motion prior to Roosevelt's announcement of his court packing plan. Purcell seems to mostly agree with Cushman's conclusion on the issue, and elaborates on Cushman's claims by talking about changes in doctrine in political doctrine over time and elaborates more about the finer issues in American political doctrine that Cushman did not elaborate on. This source was very helpful to me for much of the same reasons that Cushman's original review was -- it provided the alternate view on the switch in time and was helpful for understanding political views prior the switch. This source was additionally helpful for helping me understand the nature of political shifts in American politics and understanding more about the different issues that surrounded New Deal legislation prior to the switch in time.

Ross, William G. “When did the ‘Switch in Time’ Actually Occur?: Re-Discovering the Supreme Court’s “Forgotten” Decisions of 1936-37,” 25 Feb. 2005. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=673983.

William Ross, a professor of law at Stanford University, examines different cases that occurred under the Lochner court prior to the switch in time and argues that the switch in time was actually not as sudden as it was reported to be. The paper cites different decisions throughout 1935 and 1936 that support Roosevelt’s economic policy and New Deal legislation. These decisions were often the result of swing voting by Justices Roberts and Hughes and the author uses these examples to discuss the changes in the Lochner era court during this time period. I found this source to be useful because of its opinion that the switch in time was more gradual, which was shared by several other prominent historians. This source allowed me to also find out more about several key Supreme Court decisions that led up to the switch in time and I used these different cases in my research when understanding the shifting political tensions that preceded the switch in time.

White, G. Edward. “West Coast Hotel’s Place in American Constitutional History,” The Yale Law Journal Online, vol. 122, 1 October 2012, pp. 69-83.https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155160

G. Edward White, author and Professor of Law at the University of Virginia, discusses the narrative behind FDR’s court packing plan and the switch in time that saved nine. White also agrees with the idea that the switch in time was actually more of a gradual change. The author references several sources that don’t agree with the traditional narrative of a “switch” in time and talks about how FDR’s court packing was not similar to other historical court packings. This source was useful to me because of its comparison of FDR court packing plan. It helped me understand more about FDR planned to manipulate and undermine the court’s authority in his plan. In addition, this source expanded on the belief that the switch in time was gradual, that is shared among several other historians. I used both of these ideas in my research to understand more about the details surrounding FDR’s court packing threat.

Magazine Articles:

Berns, Walter. “The New Deal vs Nine Old Men.” *The Wall Street Journal*, 16 Mar. 1995.

This article was written by a scholar at the American Enterprise Institute, Walter Berns, who talked about Roosevelt’s push for New Deal legislation and the election cycle beforehand. This article cites several books that had recently been published and tells about the author’s opinion on the issue. I used this source to learn about the details about Roosevelt’s reelection term and to understand more about the nature of the “switch in time.”

Pulliam, Mark. "The Quandary of Judicial Review." *National Review*, National Review, 17 Aug. 2015, www.nationalreview.com/2015/04/quandary-judicial-review/.

Mark Pulliam, a frequent contributor to legal blogs, wrote this article for the *National Review* that discussed the role of judicial review and the Supreme Court throughout history. Pulliam specifically talked about the role of the Supreme Court in restricting economic freedoms during the Lochner era and makes several arguments about the role of the Supreme Court when deciding what was best for American citizens. This source was helpful for me to understand more about the role of the United States Supreme Court throughout history and to help me learn more about the history of judicial review in the United States.

Shesol, Jeff. "Would Trump Consider a Court-Packing Scheme?" *The New Yorker*, The New Yorker, 5 Dec. 2017, www.newyorker.com/news/news-desk/would-trump-consider-a-court-packing-scheme.

In this article, the writer talks about how political manipulation allowed President Donald Trump massive control over American court vacancies, far more control than his predecessor, Barack Obama. The author compares Trump's attempts to shape the judicial system to FDR's court packing plan that led to the switch in time. This source provided a valuable comparison of FDR's plan to modern-day political happenings and I used this source to understand more about how persisting issues about court packing and executive authority have large influences today.