

Switch in time that blew everyone's mind

By Ben Feuer

The political branches are at each other's throats. Economic calamity polarizes the Republic to a degree unseen since the Civil War. The president, a first-term Democrat, faces an uncertain reelection battle in the fall as news outlets report polls stacking up against him. The Supreme Court is populated with angry partisan justices, and recent decisions have come down 5-4 in the conservatives' pro-business favor. Key legislation transforming the relationship between individuals and government, which many argue is vital to economic recovery, advances to the court, where it is widely expected to meet its demise. But at the last minute, reliably conservative Justice Roberts dramatically switches his vote to uphold the law 5-4, infuriating his right-wing colleagues and creating precedent that fundamentally changes the course of American constitutional jurisprudence.

FIRST IN A TWO-PART SERIES

The Supreme Court's review of Obamacare in 2012? Try again.

Justice Owen Roberts' 1937 decision in *West Coast Hotel Co. v. Parrish* to vote to uphold a liberal Washington State law that established a minimum wage for working women marked the end of the court's *Lochner* era — a time when the Supreme Court considered the individual right of contract "fundamental," and, on that basis, invalidated large swaths of early New Deal legislation intended to salve the Great Depression's sting. A Republican appointee, on economic matters in the 1930s Justice Roberts had almost always joined with the court's four most conservative justices, whom newspapers termed the "Four Horsemen": Pierce Butler, George Sutherland, Willis Van Devanter and James McReynolds (the last a notorious anti-Semite who loathed both nail polish on women, which he claimed vulgar, and wristwatches on men, deemed effeminate). Across the proverbial bench sat the younger, liberal pro-New Deal "Three Musketeers": Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone, who were often but not always accompanied in economic cases by the court's swing voter, Charles Evans Hughes.

That 5-4 conservative split dominated much of the court's review of Roosevelt's first-term legislative accomplishments. In quick succession, the court invalidated (sometimes by an even bigger margin) nearly a dozen major congressional efforts to counter the nation's economic distress. Importantly, in 1936, the Four Horsemen plus Justice Roberts voted in *Morehead v. New York* to strike down a New York law that established a minimum wage.

Seeing hard-won and vital economic legislation tossed aside by an intransigent court, the White House began putting together a plan to increase the total number of Supreme Court justices, which would allow Roosevelt to secure a majority of justices to support his agenda. While the Constitution prevents the removal of sitting justices unless impeached, the total number of justices on the court and structure of the lower federal courts are largely at the discretion of Congress (the Marshall Court, for example, contained only six justices). Of course, increasing the number of justices considerably lessens the importance of each justice, and when anti-Roosevelt newspapers got wind of the nascent legislation, they pilloried Roosevelt's "court packing" plan for undermining the institutional independence of the Supreme Court.

Roosevelt won the 1936 election in an unexpected landslide, and introduced his "Judicial Procedures Reform Act" in early February 1937. Nearly two months later, at the end of March 1937, the Supreme Court released its opinion in *Parrish*, in which Justice Roberts reversed the position he took in *Morehead* and the court upheld a minimum wage law 5-4 for the first time. Soon after, Justice Van Devanter retired, allowing Roosevelt to appoint Hugo Black, and the New Dealers took firm command of the court. That ended the administration's drive to reform the court's structure, and a gutted judicial

reform bill Congress passed that July made no mention of the Supreme Court at all.

Because Justice Owen Roberts's determinative vote change in *Parrish* to uphold a minimum wage law came only a year after he voted in *Morehead* to strike one, and the only major intervening event was Roosevelt's re-election and his introduction of his plan to add to the court's ranks, newspapers and legend have labeled Roberts's *Parrish* vote "the switch in time that saved nine." Contemporary belief held little doubt that Roberts changed his position for political, not jurisprudential, reasons. By allowing the minimum wage law to stand, Roberts took the sting from the president's whip and preserved the court's independence and institutional legitimacy in the public's eyes.

The parallels between Justice Owen Roberts' vote to uphold Washington's minimum wage law ... and Chief Justice John Roberts' vote to uphold the Affordable Care Act's individual mandate ... are eerie.

Zip ahead 75 years from *Parrish*. The nation is even more bitterly partisan than in was in the 1930s. Congress polls in the single-digits as the political branches are at each other's throats. The president, a first-term Democrat, faces an uncertain reelection battle in the fall, as economic calamity and stagnant growth across global markets shoot the overall (cyclical and long-term) unemployment rate to nearly 16 percent — a number not exactly distant from the 20-25 percent overall unemployment rate at the height of the Great Depression. The Supreme Court is populated with angry partisan justices, and its biggest decisions have been coming down 5-4 in the conservatives' pro-business favor. Key legislation, the Affordable Care and Patient Protection Act, which seeks to transform the relationship between individuals and government and many argue will rein in healthcare costs in a manner vital to economic recovery, advances to the Supreme Court, where it is widely expected to meet its demise (pre-decision bets on Intrade put odds that the court would strike the individual mandate at 80 percent). But, at the last minute, reliably conservative Chief Justice Roberts dramatically switches his vote to uphold the law 5-4, infuriating his right-wing colleagues and creating precedent that, perhaps, fundamentally changes the course of American constitutional jurisprudence.

The parallels between Justice Owen Roberts' vote to uphold Washington's minimum wage law in *Parrish* and Chief Justice John Roberts' vote to uphold the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius* are eerie. But is the comparison apt? Find out in part two of this series, appearing Aug. 10.



Ben Feuer is a civil appellate attorney in San Francisco and a founding member of the California Appellate Law Group. He is the chair of the Appellate Section of the Bar Association of San Francisco's Barristers Club, and formerly served as a law clerk on the 9th U.S. Circuit Court of Appeals. More information about Ben is at www.feueresq.com.

Switch in time that blew everyone's mind: Roberts' big departure

By Ben Feuer

The parallels between Justice Owen Roberts' vote to uphold Washington's minimum wage law in *Parrish* and Chief Justice John Roberts' vote to uphold the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius* (*NFIB*) are eerie. But is the comparison apt?

It just might be. Although historians debate whether Justice Owen Roberts actually switched his vote in *Parrish* specifically on account of Roosevelt's

LAST IN A TWO PART SERIES

Part one appeared on Aug. 5. The series is collected at www.sfbayjournal.com.

court packing plan, evidence exists indicating that he changed his position on the constitutionality of intrusive economic regulations like minimum wage laws in large part due to political pressures on the court. Chief Justice Hughes wrote in his autobiography that the 1936 election (which Roosevelt won decisively) gave him enough support to persuade Roberts that the country was moving in a fundamentally different direction, and that if the justices continued to cling to political beliefs above jurisprudential reason, the court would find itself trampled. Roosevelt, for his part, maintained that Roberts would never have switched positions at all had he not introduced the court packing plan.

Likewise, we now know from a series of unprecedented leaks in the days following the court's decision in *NFIB* that Chief Justice John Roberts initially voted to overturn the individual mandate provision of the Affordable Care Act when the court held its post-argument conference in March. But he then changed his vote in late-April or May to uphold the statute based on a puzzling tax-clause rationale that required he find the mandate is *not* a tax for the purpose of the plaintiffs' standing to bring suit, but that it *is* a tax for the purpose of congressional authority to enact it — even though Congress expressly decided not to call it a tax and instead claimed its authority in the commerce clause. It's a position that no lower court adopted and few scholars anticipated, and it's hard to see on the surface why Chief Justice Roberts, a man the *New York Times's* Linda Greenhouse has called "conservative to his bones," would go to such lengths to protect a statute he had been ready and willing to toss.

But evidence suggests that Chief Justice Roberts, much like his eponymous predecessor, made his decision keenly aware of the effect it could have on the court as an institution — and as an institution, the court has been suffering. Over the course of the decade that began with the politically charged and bitterly divided 5-4 decision in *Bush v. Gore*, and saw the politically charged and bitterly divided 5-4 decisions in *Kelo v. New London* in 2005 (eminent domain), *District of Columbia v. Heller* in 2008 (right to own guns), and *Citizens United v. Federal Election Commission* in 2010 (political contributions), the court's public approval rating has come to its lowest point

in nearly 20 years and is falling fast. The 2010 retirement of Justice John Paul Stevens, considered a member of the court's liberal voting bloc even though nominated by a Republican president, marked the first time in more than a generation that the liberal justices on a court regularly divided 5-4 were all nominated by Democratic presidents, and the conservative justices were all nominated by Republican presidents.

Both Justices Roberts were surely aware that if the Supreme Court finds itself popularly regarded as a political institution, it loses the only characteristic that gives its decrees legitimacy — institutional independence from political winds. As Alexander Hamilton explained in the *Federalist Papers*, the Supreme Court is the most fundamentally weak of the three branches of American government, because it has "no influence over either the sword [the military] or the purse [the budget]," but only "judgment" to offer the people. Should that judgment lose its perception of sanctity, the court has little power of its own to fall back on — and that's not an empty threat.

In 1832, the Marshall Court held in *Worcester v. Georgia* that states could not regulate Native American tribal land, undermining any legal basis for Georgia's forced relocation of 50,000 of Native Americans across the South, of which up to a third perished, during the "Trail of Tears." President Andrew Jackson, a supporter of the relocation efforts, declared that without the backing of the political branches or the people, the court had nothing "to coerce Georgia to yield to its mandate." Jackson's response has been incorrectly but no less aptly popularized as "Marshall has made his decision, now let him enforce it!"

Similarly, during the earliest days of the Civil War, President Abraham Lincoln ignored Chief Justice Roger Taney's ruling in *Ex Parte Merryman*, in which Taney held that only Congress, not the president, could suspend the right of habeas corpus. The Army had arrested a pro-Confederate member of the Maryland militia for treason, who petitioned for a writ of habeas corpus; Taney granted the writ and ordered the Army to produce the detainee; on Lincoln's orders, the Army refused. Taney's opinion railed against Lincoln and decied an unconstitutional suspension of the Great Writ, but Lincoln ignored the ruling entirely and ordered the Army to continue detaining prisoners without submitting to habeas corpus commands from the courts. Congress authorized the suspension of habeas corpus in 1863, rendering the dispute moot.

This idea that the political branches might as well ignore the Supreme Court as long as the public regards the court poorly enough to allow it is not one consigned to history. Erstwhile Republican presidential candidate Newt Gingrich announced in January that should he ascend to the presidency, he would instruct the executive agencies to ignore several Supreme Court decisions including *Boumediene v. Bush* (which found the Constitution's habeas corpus right extends to individuals held in sovereign U.S. custody at Guantanamo Bay) and *Roe v. Wade*. This June, after the Supreme Court issued its decision in *NFIB*, Kentucky Senator and Tea Party luminary Rand Paul told

supporters that "Just because a couple people on the Supreme Court declare something to be 'constitutional' does not make it so."

Indeed, even before the court's decision in *NFIB*, a renewed effort arose behind a measure backed in part by Federalist Society co-founder Stephen Calabresi to restrict Supreme Court justices to 18-year terms. Although the Constitution forbids lowering judicial salaries without impeachment, as Roosevelt's court packing legislation made clear, the procedures and jurisdiction of the Supreme Court are largely within Congress' discretion. Calabresi's plan, trumpeted by the *Wall Street Journal*, would have two justices added by each president, with the active court limited to the nine most recent justices. Senior justices would step in for cases of recusal or vacancy among the lower nine.

Whether Chief Justice Roberts had the threat of Calabresi's plan in mind when he switched his vote in *NFIB* is anyone's guess. Anonymous leakers at the court have claimed that Roberts came under "intense pressure" from unnamed quarters to find a way to uphold the individual mandate. It's plausible he might have recognized that, given the court's sub-50 percent approval rating, a 5-4 party-line decision overturning a law that has occupied so much of the nation's political energy, in a case that has so much personally at stake for millions of Americans, would provide powerful fodder for a 2012 election campaign run on the court's back — a campaign that might threaten lasting damage to the court's public perception as a nonpartisan institution. On the other hand, allowing the law to proceed leaves the bulk of the responsibility for the result on the other two political branches which, after all, can always repeal it.

Intentionally or not, Justice Owen Roberts' vote switch in *Parrish* proved critical in insulating the Supreme Court from long-term institutional damage during the Great Depression. In the end, whether Chief Justice John Roberts' vote switch in *NFIB* will make for equally effective insulation during the Great Recession remains to be seen.



Ben Feuer is a civil appellate attorney in San Francisco and a founding member of the California Appellate Law Group. He is the chair of the Appellate Section of the Bar Association of San Francisco's Barristers Club, and formerly served as a law clerk on the 9th U.S. Circuit Court of Appeals. More information about Ben is at www.feueresq.com.