



# **Editor's Note**

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Dear Readers,

Welcome to the first-ever issue of the University of Maryland, Baltimore County Law Review! As this year's Editor-in-Chief, I am greatly honored to help establish a platform where students can engage in legal discourse, share original scholarship, and contribute to UMBC's growing excellence in social sciences. This inaugural issue is the result of the dedication, collaboration, and hard work of our incredible team. I want to extend my sincerest gratitude to our Managing Editor, Mehak F. Rizvi; Senior Editors Sedat Sefik & Qamrym Askew; Associate Editor Evelyn Pearce; and our website designer, Mohammed Wajahat. Last but not least, I am incredibly grateful to our writers, Anahita Abraham, Audrey Grutzik, Khizar Qazi, Juliana Blakely, Darell Jean-Louis, Priya Giri, Johann Rojas-Monroy, and Aminah Anderson for making this publication a reality.

I am deeply honored to serve as the Managing Editor-in-Chief for the first issue of the UMBC Law Review. In this edition, we are proud to showcase a variety of topics that examine law from many angles. Our writers dive into global issues like human rights, international relations, and criminal justice, as well as constitutional law and personal injury. Moving forward, we warmly welcome submissions on any legal topic, and we hope these pieces spark great conversations and inspire you to write for our future issues.

**Mehak F. Rizvi**  
Managing Editor





# Politics or Doctrine?

## Reassessing the Supreme Court's Shift during the New Deal

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### I. ABSTRACT

This article explores whether the Supreme Court's shift during the Constitutional Shift of 1937 was driven by political pressures or evolving legal doctrine. It analyzes key issues during the New Deal to illustrate the federal expansion of power. This article contrasts externalist arguments, emphasizing political influences like Franklin D. Roosevelt's policies, with internalist claims of gradual doctrinal change. It finds that neither explanation alone fully accounts for the shift and instead advances a post-revisionist perspective, arguing that both political context and legal reasoning shaped the Constitutional Revolution.

### II. INTRODUCTION

The mid 1930s, under Franklin D. Roosevelt's presidency, ushered in a plethora of cases that serve as the foundation of contemporary legal principles headed by a Supreme Court unlike any other. Divided by ideology, Justice George Sutherland, Pierce



Butler, James C. McReynolds, and Willis Van Devanter (The Four Horsemen) tended to lean conservatively, with Louis D. Brandeis, Harlan F. Stone, and Benjamin N. Cardozo typically leaning liberal.<sup>1</sup> Chief Justice Hughes and Justice Roberts tended to represent the deciding vote on cases.<sup>1</sup> Dubbed as the Constitutional Revolution of 1937, this moment is widely regarded as a pivotal shift in the Court’s approach to Commerce Clause and executive power, as the justices overrule past precedent to uphold later New Deal legislation, reshaping constitutional interpretation in the modern era.<sup>1-2</sup> The cases that exemplify this shift will be discussed as well as the compelling arguments for the reasons behind this shift. One side of the debate maintains that justices were externally influenced by politics such as FDR’s sweeping victory in the 1936 election and his Court Packing plan.<sup>2-5</sup> The other side of the debate insists that the justices remained relatively consistent in their doctrines, and that there was no sudden shift in 1937; rather what had changed was the increased legitimacy of the later New Deal policies.<sup>1,6</sup> Still, there are those that argue that the “shift in time” resulted from the justices being influenced by both political pressures and evolving legal doctrine, adapting their later New Deal decisions to reflect the demands of the modern constituency.<sup>2,6-7</sup>

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1. Barry Cushman. (1998). *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*. Oxford University Press; eBook Comprehensive Academic Collection (EBSCOhost).
  2. Kalman, L. (2005). The Constitution, the Supreme Court, and the New Deal. *The American Historical Review*, 110(4), 1052–1080.
  3. Leuchtenburg, W. (1995). *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* | National Humanities Center.
  4. Blake, William D. n.d. The Considered Judgment of the People: How Public Opinion Shaped the New Deal Constitutional Revolution. Unpublished manuscript.
  5. Rutten, A. R. (2001). Rethinking the New Deal Court (Book Review). *Independent Review*, 6(1), 144.
  6. White, G. E. (2005). Constitutional Change and the New Deal: The Internalist/Externalist Debate. *The American Historical Review*, 110(4), 1094–1115.
  7. Friedman, Richard D. Review of *The Constitution and the New Deal*, by G. E. White. *Mod. L. Rev.* 65, no. 5 (2002): 805-9.



### III. BACKGROUND

To better understand the factors behind the Constitutional Revolution of 1937, it is imperative to examine influential cases leading up to it, such as *A. L. A. Schechter Poultry Corp v. U.S* (1935) and *United States v. Butler* (1936), which have been frequently mentioned throughout this debate. These cases which involved FDR's earlier New Deal initiatives, such as the National Industry Recovery Act and the Agricultural Adjustment Act, were deemed unconstitutional.<sup>8,14</sup>

In both cases, the Court decided that Congress's powers were being overreached, through the commerce clause and the taxing and spending clause respectively.<sup>8,14</sup> The Court unanimously voted the National Industry Recovery Act as unconstitutional whereas Roberts and Hughes posed as the deciding vote on deeming the Agricultural Adjustment Act unconstitutional.<sup>8,14</sup> Many infer that the Robert-Hughes coalition on the Supreme Court may have influenced Roberts's shifting constitutional interpretation leading to the 1937 Constitutional Revolution. The details of this possible form of internal politics will be discussed later.

To further understand this shift, it is important to examine the landmark cases that signify the Constitutional Revolution, even though there is an ongoing debate about which case or group of cases really marks this transition. However, all foundational cases have one thing in common- they each significantly expand either legislative or executive power. Predictably, most accounts

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of the debate denote the *West Coast Hotel Co. V. Parrish* (1937) as one of the key cases reflecting the shift. In a 5-4 decision, the Court held that the establishment of a minimum wage for women was constitutional, effectively overruling their decision in *Adkins v. Children's Hospital* (1923).<sup>9</sup> This case made the government a party to the contract between an employer and employee, breaking the previous convention of government neutrality.<sup>9</sup> More importantly, the shift in the court's interpretation of the law was largely due to Justice Roberts, whose pivotal vote signified a break from past precedent.<sup>9</sup> Roberts's reasons for changing his vote since *Adkins v. Children's Hospital* is a key aspect of the politics/doctrine debate to understand the motivation for the 1937 Constitutional Revolution.

To emphasize the significance of the surprising decision in *West Coast Hotel Co. v. Parrish*, it is important to analyze the outcome of *Morehead v. New York ex rel. Tipaldo*, which took place a year before *West Coast Hotel Co. v. Parrish*.<sup>10</sup> This case was almost identical to *West Coast Hotel Co. v. Parrish*, where a NY minimum wage law was deemed unconstitutional.<sup>10</sup> At the time, the Supreme Court affirmed that the government must stay neutral in contracts between employers and employees, with Justice Roberts firmly aligning himself with the majority.<sup>10</sup> The issue in question was identical to the one posed in *West Coast Hotel Company v. Parrish*, which was whether the law violated liberty protected by due process of the Fourteenth Amendment.<sup>10</sup> Both cases primarily dealt with interpreting the power of the legislative branch, with differences being trivial at best.

8. Beaudreau, B. C. (2016). Why did the National Industrial Recovery Act fail? *European Review of Economic History*, 20(1), 79–101.
9. *West Coast Hotel Company v. Parrish*. (n.d.). Oyez.
10. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). (n.d.). Justia Law.

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However, the one year between the decisions made a monumental difference on the Court's interpretation of liberty of contract, further impacting later New Deal initiatives. This



“shift” was largely made possible by Roberts’s changing vote, and this poses the question of how vital his role was in the 1937 Constitutional Revolution.

Along with *West Coast Hotel Co. v. Parrish*, the Constitutional Revolution of 1937 was further defined by a few other influential cases, such as the Social Security Act Cases (1937) and *NLRB v. Jones & Laughlin Steel Corp* (1937). The cases presented in the Supreme Court dealing with FDR’s Social Security initiative are as follows: *Helvering v. Davis*, *Carmichael v. Southern Coal & Coke Co. And Gulf States*, and *Steward Machine Co. v. Davis*.<sup>11</sup> The first case challenged the old-age insurance program and the cases that followed challenged the unemployment compensation program of the Social Security Act.<sup>11</sup> All three cases were decided on the same day and deemed the cooperation between the Congress and state legislative branch to be constitutional in providing general welfare- a common public purpose to both.<sup>11</sup> The expansive power the Social Security Act provided Congress was monumental, and a power that would have little support by the Court before the Constitutional Revolution, which raises the question of whether political pressures such as FDR’s introduction of the Court Packing plan played a role in the Act’s success.

Similarly, *NLRB v. Jones & Laughlin Steel Corp* (1937) challenged FDR’s National Labor Relations Act aimed at regulating labor-management disputes.<sup>12</sup>

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11. *Social Security History*. (n.d.). Social Security.

12. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*. (n.d.). Oyez.

Characterized by the 1937 shift in constitutional interpretation, the Court deemed the Act constitutional under Congress’s Commerce Clause.<sup>12</sup> This case’s outcome was very similar to *West Coast Hotel Co. v. Parrish*, where the Court abandoned its principle of government



neutrality in labor relations. Coincidentally, Roberts served as the deciding vote, yet again (*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, n.d.).<sup>12</sup> The surprisingly progressive outcomes of the Social Security cases and *NLRB v. Jones & Laughlin Steel Corp* reflect the shift in the Court’s constitutional interpretation by expanding Congress’s powers to lengths not afforded before 1937. The next section will go into more detail on the possible reasons for this shift, presenting the decades old debate of internalism vs. externalism.

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## IV. ANALYSIS

For many years, the theory of externalism, promoted by the prominent historian William E. Leuchtenburg, was widely accepted as the most compelling explanation behind the 1937 Constitutional Revolution.<sup>3</sup> This reasoning asserts the importance of politics in the 1937 shift in constitutional interpretation, specifically FDR’s sweeping victory in the 1936 election and his Court Packing threat.<sup>2,3</sup> Leuchtenburg maintains that the Supreme Court was bombarded by constant pressure from the Roosevelt administration over a relatively narrow time (between 1935-1937), and that FDR’s popular support could also have pressured the Court to reform its constitutional ideology.<sup>2,3</sup> Friedman also somewhat agrees with this explanation, noting that the Court is not sealed off from the rest of the world.<sup>7</sup> As a matter of fact, the appointment of justices to the Court asserts the existence of some level of politics.<sup>7</sup> Therefore, the claim that justices do not indulge in politics to influence their ideology, or at least their decisions, is unfounded.



The possible influence of politics in the Constitutional Revolution of 1937 can also be argued with the timeline surrounding the *West Coast Hotel Co. v. Parrish* decision. Although Roberts initially voted before FDR formally introduced his Court Packing Plan to the Court, his second vote came a day after the bill was introduced.<sup>1-2,4</sup> President Roosevelt sent a letter to the Supreme Court detailing his intentions to pursue a “Court Reorganizing” bill.<sup>2</sup> Anti-externalist historians argue this proved Roberts’s decision was uninfluenced by political pressure.<sup>1</sup> However, reports suggest the plan had been unveiled months earlier.<sup>4</sup> For instance, journalist George Creel, after an interview with the president shortly after the 1936 election, published an article titled “Roosevelt’s Plan and Purposes.”<sup>4,13</sup> This article, leaked to newspapers before publication, strongly hinted at FDR’s intentions to reorganize the Court.<sup>4</sup> Given the justices’ connections to the outside world, it is highly likely they were notified of this development, especially Roberts.<sup>4</sup> Moreover, even if Roberts was not externally pressured by FDR’s Court Packing Plan, it is not unreasonable to presume that FDR’s sweeping victory at the polls in 1936 may have exerted some degree of pressure on the justices.

13. Nelson, M. (1988). *The President and the Court: Reinterpreting the Court-packing Episode of 1937*. *Political Science Quarterly*, 103(2), 267–293.

14. *United States v. Butler*. (n.d.). Oyez.

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Continuing the discussion of the presence of externalism in the timeline surrounding *West Coast Hotel Co. v. Parrish*, it is important to acknowledge when Chief Justice Hughes handed down the decision. He delayed the releasing of the decision almost a week after the Court Packing Plan was announced to make it seem as though the Court was not impacted by the announcement.<sup>2</sup> Strikingly, this act proves that the Court was somewhat impacted by external politics in the decisions it made. The extent to which



they were influenced remains a point of contention among modern scholars, with some asserting that external as well as internal politics were at play during the 1937 Constitutional Revolution. The presence of coalitions among the justices-Justice Sutherland, Butler, McReynolds, and Devanter forming the conservative “Four Horsemen” and Brandeis, Stone, and Cardozo forming the progressive “Three Musketeers, with Hughes and Roberts serving as the swing votes- illustrates the significance of internal politics within the Court itself.<sup>15</sup> Specifically, the Roberts-Hughes coalition provides more support for the influence of internal politics on the 1937 shift.

There is some evidence suggesting that Chief Justice Hughes may have persuaded Justice Roberts to abandon the conservative side of the Court, while summering at Roberts’s residence in Pennsylvania.<sup>15</sup> However, there is some disagreement regarding the date of this meeting (some believe it occurred in the summer of 1935 or 1936), which may weaken externalist arguments that Hughes persuaded Roberts to shift his ideology due to the pressure exerted by Court Packing or 1936 election.<sup>15</sup> Moreover, FDR’s Secretary of Labor, Frances Perkins, is quoted recalling that Hughes and Roberts did, in fact, meet, although the date she recollects is earlier than other sources.<sup>15</sup>

15. Barry Cushman. (2012). *The Hughes-Roberts Visit* (p. 14). Notre Dame Law School.

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Cushman strongly believes that they met in the summer of 1935, following the aftermath of the *A. L. A. Schechter Poultry Corp v. U.S.* decision.<sup>14</sup> If so, it would be reasonable to assume that public outcry after the *A. L. A. Schechter Poultry Corp v. U.S* decision would moderately influence Hughes to pressure Roberts into joining the liberal side of the Court. While the exact timing and nature of Roberts’s transition remains unclear, another



factor pointing to the influence of politics on the 1937 Constitutional Revolution is the clear ideological divisions within the Court itself.

The existence of labels within the Court itself suggests a second degree of internal politics, whose evolution may have played a role in the 1937 Constitutional Revolution. Some claim that the labels used to distinguish justices ideologically (conservative-Four Horsemen) and (liberal-Three Musketeers) are a characteristic of elective politics, which is another feature of externalism.<sup>6</sup> The theory of externalism claims that justices' decisions are affected by political factors very similar to publicly elected officials.<sup>6</sup> For instance, the labels created for the various coalitions within the Supreme Court are derived by associating individual justices with particular outcomes in cases, and those outcomes are consistent with their preexisting stances on the political spectrum.<sup>6</sup> Now, the difference between ideology and political stance can be argued to be of importance-as a justice must rely on their interpretation of the Constitution rather than their political stance when voting. Nevertheless, the pattern of certain judges voting conservatively/progressively may suggest a possible influence of electoral politics, further asserting the existence of externalism as a valid explanation for the Constitutional Shift of 1937. The next section will discuss the other leading explanation for the shift, which is internalism.

The theory of internalism is one of the leading schools of thought to explain the Constitutional Revolution of 1937, emphasizing the significance of law over politics.<sup>2</sup>

Internalism also subscribes to the belief that doctrinal changes to constitutional interpretation happened well before the Constitutional Revolution of 1937, and will continue to occur after 1937.<sup>2,7</sup> Taking it a step further, some believe that the



Constitutional Revolution actually started in 1934 with *Nebbia v. New York*, which is believed to begin the “doctrinal evolution” that would eventually influence the decision in *West Coast Hotel Co. v. Parrish*.<sup>1</sup> Specifically, Cushman claims that Roberts’s interpretation of substantive due process (government non-interference) shifted during *Nebbia v. NY*, suggesting an earlier transition to a more progressive approach.<sup>1</sup> Moreover, Cushman believes it is dangerous to claim that the decisions justices made in cases are purely political, as it discounts their own efforts to interpret the Constitution (constitutional jurisprudence), thereby questioning both their integrity and the legitimacy of the Court itself.<sup>1</sup> Secondly, most political evidence to support externalism is circumstantial or considered weak, such as the supposed meeting between Chief Justice Hughes and Roberts that changed Roberts’s stance.<sup>1</sup> To support the fact that the Constitutional Revolution began before 1947, Cushman lists cases that had liberal rulings, such as *Home Building Loan Association v. Blaisdell* (1934), which benefitted farmers/homeowners, and *Nebbia v. New York* (1934), which overturned precedent to aid dairy farmers, among others.<sup>1</sup>

In addition to the progressively ruled cases before 1937, Cushman claims that Roberts’s influential vote in *West Coast Hotel Co. v. Parrish*, happened before FDR unveiled his Court Packing Plan.<sup>1</sup> However, he neglected to mention the possible effect of FDR’s landslide victory in the 1936 election, as that took place before the case hearing. Notably, Roberts’s memorandum detailed that he was not swayed by politics when he decided to overrule past precedent in *West Coast Hotel Co. v. Parrish*, ushering in a new era of constitutional interpretation.<sup>2</sup> However, it should be acknowledged that Frankfurter (one of the later justices) had written Roberts’s posthumous memorandum,



and that the original document cannot be located.<sup>16</sup> The only record of such a memorandum existing is a separate document in the Library of Congress stating its existence; however, it has been widely speculated that Frankfurter had fabricated the document to make Roberts appear impartial.<sup>16</sup> Additionally, Hughes had also released a statement later saying that he too had demonstrated consistency unaffected by politics, and that his court had always “acted in full independence.”<sup>2</sup> Nevertheless, these accounts can only be taken at face value, as they do not prove that the actions taken by the justices were free from political motivation, simply because they claimed otherwise.

Another explanation within the theory of internalism is the philosophical claim that the 1937 shift occurred because of modernism.<sup>6</sup> Justices shifted their ideology to meet the modern times through an “interpretive revolution” depending more on liberalism as a mode of constitutional interpretation instead of originalism (what the founders would have done).<sup>6</sup> However, even this perspective seems to be influenced by politics. For example, the simple realization the justices accepted that the country was “modernizing” is evidence that they consider external factors, like politics. The single most important factor that marks a modern period are the current political issues advocated by the public. Therefore, this explanation also falls short of proving that externalism did not play a part in the Constitutional Revolution of 1937.

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16. Friedman, R. (1994). A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger (Justices Felix Frankfurter and Owen J. Roberts). *Articles*.

After analyzing the theories of externalism and internalism as explanations for the shift, it is possible to conclude they are not mutually exclusive, especially since the actors



behind the shift were exposed to several overlapping political pressures and legal doctrines.

The post revisionist approach, a term coined by Kalman, acknowledges that justices were exposed to political pressures and evolving ideology simultaneously.<sup>2</sup> It seems counterintuitive to claim that one theory, internalism or externalism, is the sole explanation, as doing so would require ignoring key evidence.<sup>2</sup> For example, FDR's sweeping reelection and his Court Packing Plan were legitimate concerns that threatened the very institution of the Court itself.<sup>2,7</sup> On the other hand, the new constitutional revolution preceded 1937, and the New Deal could not be the sole reason for the shift.<sup>6</sup> This transition required decades of legal groundwork, gradually built from cases before 1937.<sup>6</sup> Therefore, it is necessary to avoid simplifying the reasons behind the revolution into two distinct categories and instead synthesize both explanations to reveal a dynamic understanding.<sup>2</sup>

The post revisionist approach requires an explanation derived from both laws and politics to fully understand the nuance behind the Constitutional Revolution.<sup>6,17</sup> The one aspect that both internalism and externalism agree on is the significance of the Constitution on the revolution, as a "living, breathing document."<sup>6</sup> The Constitution grants justices the right to make final interpretations of the Constitution with little political accountability.<sup>6</sup> Now the reason behind their shifting interpretations is a point of contention between the two sides of the debate.

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17. Brinkley, A. (2005). Introduction. *The American Historical Review*, 110(4), 1046–1051.



One modification that may help reconcile these two explanations is removing the year (1937) from the Constitutional Revolution, because that seems to be the biggest source of disagreement.<sup>6</sup> To account for all the significant events that may have influenced the shift, some suggest that it should be dubbed as the “Constitutional Revolution of the 1930s-1940s.”<sup>6-7</sup> This would include case decisions before 1937, such as *Home Building Loan Association v. Blaisdell* (1934) and *Nebbia v. New York* (1934), which gradually helped cultivate the modern constitutional interpretation that came to define the shift.<sup>1,7</sup> On the other hand, the significance of political events that took place between 1936-1937, such as FDR’s reelection and the Court Packing Plan, can also be accounted for within the new framing of the Constitutional Revolution.<sup>7</sup>

Additionally, White’s conception of “modernism” as a form of internalism can be adopted to merge internalism and externalism into the post revisionist theory.<sup>6</sup> White claims that modernism functions as a “distinctive consciousness” that shapes Americans’ responses to encounters they experience with modern life.<sup>6</sup> As mentioned before, this concept portrays political tendencies, while still preserving the foundation of how constitutional interpretation can transition gradually.<sup>6</sup> However, some argue that considering political, intellectual, and doctrinal aspects of the Constitutional Revolution is not enough to understand how this transformation occurred.<sup>7</sup> Friedman emphasizes that each individual case, contributing to the expansion of constitutional interpretation, must be analyzed to understand how the combination of political, intellectual, and doctrinal elements influenced each of the nine justices toward particular interpretations of the Constitution.<sup>7</sup> This practice helps prevent the dismissal of compelling explanations in



favor of others and considers all significant events from the 1930s-1940s, to gain a holistic understanding of what caused the Constitutional Revolution.<sup>2,7</sup>

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## V. CONCLUSION

The New Deal era made for a time of new beginnings through presidential experimentation and changing constitutional interpretation. Landmark cases that altered modern interpretation of executive and legislative power ushered in a Constitutional Revolution, forever changing the government's obligations to the public. There is substantial discourse about the exact reasons behind this shift, with some asserting that the justices were influenced toward a more progressive constitutional interpretation by the political atmosphere of the 1930s- particularly FDR's sweeping reelection, and the Court Packing threat.<sup>2-5</sup> The other side of the debate maintains that the justices remained doctrinally consistent, and what had changed was the increased legitimacy of later New Deal initiatives.<sup>1,6,14</sup> There is a third side to this internalism v. externalism debate, claiming that justices were influenced by both political pressures and evolving legal doctrine to fit modern times.<sup>2,6-7</sup> This overlap is present in the individual arguments for internalism and externalism, where scholars sometimes contradicted themselves, accidentally revealing how an aspect they isolated could also be used to prove the presence of politics or legal principles in the revolution. Ultimately, a comprehensive understanding of the Constitutional Revolution requires recognizing how various explanations, like the Court packing threat and modernism, intertwine to disseminate the implications of the New Deal era on modern day government functions.



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