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Laura A. Cisneros

Golden Gate University School of Law, lcisneros@ggu.edu

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TRANSFORMATIVE PROPERTIES OF FDR'S COURT-PACKING PLAN AND THE SIGNIFICANCE OF SYMBOL

Laura A. Cisneros*

INTRODUCTION

From the moment it was made public on February 5, 1937,¹ Franklin D. Roosevelt's judicial reorganization, or "Court-Packing Plan," has captured the interest and imagination of journalists, historians, political scientists, the legal academy, and the public at large, not to mention the President, members of Congress, and the Supreme Court.² Whether one subscribes to the conventional narrative which

* Associate Professor of Law, Golden Gate University School of Law. This Article was drafted for a symposium on "FDR and Obama: Are there Constitutional Law Lessons from the New Deal for the Obama Administration?" hosted by the University of Pennsylvania Law School on January 20, 2012. I thank the symposium organizers for the opportunity to share my scholarship. For their comments and criticisms in the course of our symposium, I am pleased to thank my fellow panelists and the engaged audience in attendance. Finally, I am grateful to my family, friends, and colleagues for their continued encouragement and support.

¹ LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 3–9 (1967) (discussing President Roosevelt's special message read to Congress by Attorney General Homer Cummings on February 5, 1937, which proposed legislation granting the President power to appoint additional judges to all federal courts, including the Supreme Court, whenever there were sitting judges age seventy or older who refused to retire).

² See, e.g., JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* (2009); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (2009); Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010); Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863 (1999); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267 (1988); William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-discovering the Supreme Court's "Forgotten" Decisions of 1936–1937*, 37 ARIZ. ST. L.J. 1153 (2005).

identifies the Court-Packing Plan as the impetus for the Court's shift on politically-charged constitutional questions,³ or the counter-narrative which argues that the Court's internal dynamics of doctrinal development, not the Court-Packing Plan,⁴ caused the Court to change its position on New Deal legislation,⁴ there is no doubt that the Court-Packing Plan represents an important episode in American history.

The Plan well deserves this status, not just for the role it played in the 1930s, but for the role it continues to play in contemporary constitutional politics. In the 1930s, the Court-Packing Plan forced Congress to develop an institutional response to the President, which, among other things, realigned the balance of power among the political branches. The Plan operated to de-personalize the office of the President by separating the charisma and character of the man from the powers and limitations of the office.⁵ It allowed Congress to reassert its power vis-à-vis the President,⁶ but it also created factions within the Democratic Party.⁷ Finally, the Plan's failure created a de facto bar on future attempts to reorganize the Supreme Court, arguably al-

³ See, e.g., ALSOP & CATLEDGE, *supra* note 2 at 140–41; BAKER, *supra* note 1, at 174 (“The Administration naturally believed the shift in the Court’s philosophy was a riposte to Roosevelt’s original thrust on February 5.”).

⁴ See, e.g., CUSHMAN, *supra* note 2, at 4–5; MCKENNA, *supra* note 2, at xxii, xxiii (acknowledging that “[t]he older versions [of interpretations of the Court-packing fight] tried to establish a direct link between the 1936 election, the court bill, the ‘switch in time’ theory, and ‘constitutional revolution’ of 1937,” but arguing that these events “had no bearing on the decisions reached by the justices in subsequent cases coming before them for review”); *id.* at xxv–xxvi (discussing how conventional accounts of constitutional history began to attach political labels to individual Justices in the 1930s, whether or not they were appropriate, causing the “whole of judicial decision making in the 1930s [to have become] distorted to fit [a] modernist [political label]” (citing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 300 (2000))); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 205–08 (1994).

⁵ See, e.g., MERLO J. PUSEY, *THE SUPREME COURT CRISIS 22–26 (1937)* (noting Roosevelt’s vigorous attack upon the Supreme Court in his March 4th address at the Democratic Victory Dinner. Pusey contrasts this with reaction to Roosevelt’s speech: “No doubt this line of approach produced many emotional reactions in favor of the discipline which the President wishe[d] to administer to our highest tribunal.”).

⁶ See, e.g., SHESOL, *supra* note 2, at 457–58 (“Roosevelt’s relationship with Congress was worse than it had ever been What had begun as a struggle between the president and the Court was now a struggle between the president and Congress. . . . [One Senator commented,] ‘We have retreated from one battle to the other during the last four years But this is Gettysburg.’”); SOLOMON, *supra* note 2, at 4 (“[T]he opposition sprung up immediately and mounted a sustained attack on the Court bill that left it little chance of succeeding.”); Michael E. Parrish, *The Great Depression, The New Deal, and The American Legal Order*, 59 WASH. L. REV. 723, 737 (1984).

⁷ See, e.g., BAKER, *supra* note 1, at 97–99; SHESOL, *supra* note 2, at 525.

lowing the Court the security necessary to transform itself into a powerful force for social change.

However, it is the Court-Packing Plan's role as a rhetorical device—its symbolism—that is of greatest interest to me and is the subject of this Article.

When we think of rhetoric, we immediately think of Aristotle, who extended the study of rhetoric beyond Plato's criticism of it as "immoral, dangerous, and unworthy of serious study."⁸ Aristotle taught that rhetoric was a valuable tool for rational inquiry about experience, which could then lead to knowledge.⁹ He viewed rhetoric as a system of persuasion based on knowledge, not as a cynical exercise of factual manipulation,¹⁰ and he believed it could be useful in resolving practical problems.¹¹

Unfortunately, the word "rhetoric" has suffered a serious decline in popular perception. To some, rhetoric has come to describe language that is empty, willfully deceitful, and just plain dishonest. But this popular perception is incomplete, as there is value in a rhetorical orientation, especially when applied to judicial opinions.¹² To make use of all that a rhetorical orientation toward judicial opinions can offer, one must look at rhetoric as something other than a way of dressing up lies and making poor decisions sound respectable; and one must approach judges not just as legal decisionmakers, but as writers. In this context, rhetoric describes the way a judge uses or arranges language to persuade a particular audience. How a judge uses and arranges language often reveals the underlying assumptions in his or her arguments; and understanding these assumptions is critical to forming an intelligent response to the legal opinion in question. A rhetorical analysis of a judicial opinion is important because what a

8 PLATO, *LYSIS*, SYMPOSIUM, *GORGIAS* 319 (Jeffrey Henderson ed., W.R.M. Lamb trans., Harvard Univ. Press (1925)) (1967).

9 ARISTOTLE, *THE ART OF RHETORIC* 1355b (H.C. Lawson-Tancred trans., 1991).

10 ARISTOTLE, *THE ART OF RHETORIC* 1354a (H.C. Lawson-Tancred trans., 1991) ("For speakers ought not to distract the judge by driving him to anger, envy or compassion—that would be rather as if one were deliberately to make crooked a ruler that one was intending to use.")

11 Cf. GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 77–78 (1980) (outlining several components of Aristotle's theory of rhetoric and their intended effects and applications).

12 In this, I am not alone. See Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008 (2002) ("Increasingly, though, I have begun to think that this functional approach [to dealing with Supreme Court opinions] is overlooking a crucial aspect of Supreme Court decisions: their rhetoric. . . . I believe that we can gain new insights about the Court and constitutional law by looking at the opinions from a rhetorical perspective.")

judge decides as a legal reality is shaped by the words he or she uses.¹³ *What* judges say is inescapably a product of *how* they say it.

To understand the rhetorical significance of the Court-Packing Plan, I asked, “What do we talk about when we talk about the Court-Packing Plan?” The answer I discovered is: it depends.

I reviewed Supreme Court and lower federal court cases that cited to the episode. Tracing the rhetorical journey of the Court-Packing Plan, I learned that federal courts do employ it as a symbol, though not always in the same way. Scholars refer to the controversy surrounding the Court-Packing Plan using various phrases, including, “Court-packing fight,”¹⁴ “constitutional crisis of 1937,”¹⁵ and “constitutional revolution of 1937.”¹⁶ The two predominant phrases used by federal courts, however, are “Court-Packing Plan” and “switch in time that saved nine.”¹⁷ In judicial opinions, the event functions as a linguistic trope—a rhetorical figure of speech—to further an underlying institutional argument. Generally speaking, courts tend to use the term “Court-packing” to signify external threats to the Court’s legitimacy and the term “switch in time” to signify internal threats to the Court’s legitimacy. The “Court-Packing Plan” language is used to make broader arguments about judicial independence and the need to protect the judiciary as an institution. The “switch in time” lan-

¹³ *Id.* at 2010 (“[T]he opinions written by the Justices and issued by the Court are a central, not an incidental, aspect of American constitutional law and that focusing on the opinions as rhetoric can help us to understand and appraise the Supreme Court’s work.”).

¹⁴ See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 256 (2002); Gerard N. Magliocca, *Court-Packing and the Child Labor Amendment*, 27 CONST. COMMENT. 455, 460 (2011); L.A. Powe, Jr., *The Court’s Constitution*, 12 U. PA. J. CONST. L. 529, 536 (2010).

¹⁵ See, e.g., James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115, 137 (2006); Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J. L. & SOC. POL’Y 87, 88 (2010); George Steven Swan, *The Political Economy of the O’Connor Court: Professor Thomas M. Keck Vindicated*, 33 OKLA. CITY U. L. REV. 151, 210 (2008).

¹⁶ See, e.g., Cushman, *supra* note 4, at 204; Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 855 (2010); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 771 (2009); G. Edward White, Response, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145, 1148 (2010).

¹⁷ For examples of use of the phrases “Court-Packing Plan” and “switch in time saves nine,” see e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL* (1998); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); David E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. Legal Analysis 69 (2010).

guage is used to make broader arguments about proper restraints on the Court's interpretive methodology.

In this Article, I begin by laying a basic theoretical foundation for understanding how language choice provides contextual cues to direct interpretation. Next, I analyze cases that use the "Court-Packing Plan" language. I argue that these references are intended to trigger a response in the reader that is sympathetic to judicial independence and, in some instances, to judicial incursions into policymaking. I then analyze references to the "switch in time" language, extracting the arguments about constitutional methodology and judicial activism embedded in that phrase. Here, I argue that the phrase "switch in time" is deployed to remind the reader of what happens when the Court overreaches and finds it necessary to radically change course or risk permanent institutional damage. Finally, I consider the implications of using both of these phrases in the same opinion. I contend that attention to language choice uncovers how the judiciary uses the institutional clash of the 1930s as a rhetorical tool and reveals how this episode in America's political and legal history entered our culture of argument about our system of government and the role of the judiciary as a constitutional decision-making body within that system.

I. THEORETICAL GROUNDING: AGENDA-SETTING, AGENDA-EXTENSION, AND FRAMING ANALYSIS

"Judicial opinions are rhetorical performances."¹⁸ Federal jurists often use rhetoric in judicial opinions "as a tool to stay within the constraints placed upon them by law" while giving them "some room to develop the law in certain ways."¹⁹ As an actor in a rhetorical performance, the judicial opinion writer is concerned with, among other things, "persuading the audience and demonstrating a certain authority over it."²⁰ In this regard, understanding approaches to rhetorical analysis—in particular, rhetorical analysis of the media—is instructive.

A common approach used by communication researchers to study the press and other media is called framing analysis. This approach allows communication researchers to study how the press's publication choices may effectively set an agenda by presenting the general

18 Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 187 (Peter Brooks & Paul Gewirtz eds., 1996).

19 Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 J. LEGAL WRITING INST. 197, 226 (2011).

20 Levinson, *supra* note 18, at 187.

public with a confined number of topics to think about. The informal beginning of this approach is traced to a statement made by Bernard C. Cohen in 1963. Cohen remarked, “[the press] may not be successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think *about*.”²¹ “[T]he world looks different to different people,” Cohen continued, “depending . . . on the map that is drawn for them by the writers, editors, and publishers of the papers they read.”²² This idea formally developed into a theory of agenda-setting by Dr. Maxwell E. McCombs and Dr. Donald L. Shaw in their study of the 1968 presidential election. In their studies, Maxwell and Shaw found that voters learn about an issue in direct proportion to the attention given that issue by the press.²³ Broadly speaking, the agenda-setting theory posits that the media exerts a tremendous influence in telling the general public what to think and in so doing obtains the ability to direct and affect political decisionmaking.²⁴

This initial understanding of agenda-setting—telling the public *what* to think about—developed into a secondary understanding of agenda-extending—telling the public *how* to think about it.²⁵ Specifically, agenda-extending focuses beyond the subjects of the news stories the media provides to the general public and concentrates on the “contextual cues or frames in which to evaluate those subjects.”²⁶ Framing analysis provides one approach for investigating and understanding how the process moves from agenda-setting to agenda-extending.²⁷ According to William Gamson, a frame provides contextual cues through which the reader, listener, or audience may interpret the particular facts of a subject: “[facts] take on their meaning by being embedded in a frame or story line that organizes them and gives them coherence, selecting certain ones to emphasize while ig-

21 BERNARD C. COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963).

22 *Id.*

23 Maxwell E. McCombs & Donald L. Shaw, *Agenda-Setting and the Political Process*, in DONALD L. SHAW & MAXWELL E. MCCOMBS, *THE EMERGENCE OF AMERICAN POLITICAL ISSUES: THE AGENDA-SETTING FUNCTION OF THE PRESS* 149, 153 (1977).

24 Jim A. Kuypers, *Framing Analysis*, in RHETORICAL CRITICISM: PERSPECTIVES IN ACTION 181, 182 (Jim A. Kuypers ed., 2009).

25 See, e.g., Anne Johnston, *Trends in Political Communication: A Selective Review of Research in the 1980s*, in NEW DIRECTIONS IN POLITICAL COMMUNICATION: A RESOURCE BOOK 329, 337 (David L. Swanson & Dan Nimmo eds., 1990).

26 *Id.* (citing Shanto Iyengar et al., *Experimental Demonstrations of the “Not-So-Minimal” Consequences of Television News Programs*, 76 AM. POL. SCI. REV. 848, 848–58 (1982)).

27 Kuypers, *supra* note 24, at 185.

noring others.”²⁸ This emphasis and de-emphasis makes some information more accessible to the audience, privileging some information or viewpoints over others, thereby creating a hierarchy of salient information that in turn constructs a particular reality.²⁹ The remainder of this Article analyzes the judiciary’s use of the “Court-packing” and “switch in time” language and considers the implications of choosing one frame over the other to describe the 1937 institutional clash initiated by Franklin D. Roosevelt’s judicial reorganization proposal.

II. REFERENCE TO THE COURT-PACKING PLAN TO ADVANCE AN ARGUMENT FOR JUDICIAL INDEPENDENCE

The 1937 institutional clash quietly entered judicial discourse. It began its rhetorical journey as an implicit reference in a concurring opinion. However, it has since developed into a valuable rhetorical tool. This section traces that development and discusses how judicial writers have appropriated the historical moment to advance an argument about judicial independence. In particular, this section considers how the choice to frame the 1937 clash as a “Court-Packing Plan” acts as a defense of judicial independence against external attack.

A. *Justice Frankfurter’s Concurrence in Youngstown Sheet Tube Co. v. Sawyer: The Power of the Implicit Historical Reference*

In 1939, Franklin Roosevelt nominated Harvard Law professor Felix Frankfurter to the Supreme Court.³⁰ It has often been said that Frankfurter filled the vacancy known as the scholar’s seat, given that Justices Oliver Wendell Holmes, Jr. and Benjamin Cardozo were its two former occupants.³¹ Although breaking with tradition and re-

28 William A. Gamson, *News As Framing: Comments On Graber*, 33 AM. BEHAV. SCIENTIST 157, 157 (1989).

29 Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM., Dec. 1993, at 51, 53.

30 LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 214 (2009); PETER CHARLES HOFFER ET AL., *THE SUPREME COURT: AN ESSENTIAL HISTORY* 267 (2007).

31 HELEN SHIRLEY THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* vii–viii (1960); Melvin I. Urofsky, *Essay, William O. Douglas As A Common Law Judge*, 41 DUKE L.J. 133, 150 n.118 (1992) (“The scholar’s seat was the common appellation used in the 1930s and 1940s to refer to the seat held by Frankfurter and his predecessors. Horace Gray, who taught at the Harvard Law School, held the seat from 1881 to 1902; he was succeeded by Oliver Wendell Holmes, Jr., who served until 1932. The scholarly Benjamin Nathan

quiring the nominee to testify before the Senate Judiciary Committee—the first time since 1925³²—the Senate confirmed Frankfurter without dissent.³³ In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Frankfurter made the first, albeit oblique, reference to the Court-Packing Plan found in any federal court opinion.³⁴ Although Frankfurter's concurrence was largely immaterial to the outcome of the litigation,³⁵ the case presented him with a rare opportunity to discuss the analytical framework of separation of powers issues in general and executive action in particular. Thus, Frankfurter felt compelled to write.³⁶

Youngstown Sheet is perhaps the best known of the Court's presidential power cases.³⁷ In 1952, in the midst of the Korean War, President Truman ordered Secretary of Commerce Charles Sawyer to seize and operate most of the nation's steel mills as a means of mitigating the effects of a potential strike by the United Steelworkers of America.³⁸ In a 6-3 decision, the Court held that the President did not have authority to issue such an order.³⁹ Writing for the majority, Justice Black said that "[t]he President's power, if any, to issue the order

Cardozo replaced Holmes, and Cardozo was replaced by Professor Felix Frankfurter in 1939.").

- 32 Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1158 & n.54 (1988) (noting that with the exception of Justice Stone in 1925, questioning of a Supreme Court nominee began with Felix Frankfurter in 1939: "There was one exception to the old practice [of not questioning nominees]. In 1925, the Committee allowed Harlan F. Stone to appear in order to explain his conduct as Attorney General in declining to dismiss an indictment, believed to have been politically inspired, brought by his predecessor against Senator Burton Wheeler of Montana. The questioning was limited to that issue, and Stone evidently emerged with his position strengthened."); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 426 (2010) (commenting that "Frankfurter was the first Justice ever 'invited' by the [Senate Judiciary] Committee" to give testimony and answer questions).
- 33 FELDMAN, *supra* note 2, at 163; PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 328 (2000).
- 34 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).
- 35 *Id.* at 589 ("Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case.").
- 36 *Id.* at 589 ("Even though such differences in attitude toward this principle may be merely differences in emphasis and nuance, they can hardly be reflected by a single opinion for the Court. Individual expression of views in reaching a common result is therefore important.").
- 37 Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES* 233, 233 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).
- 38 *Youngstown Sheet*, 343 U.S. at 582-83.
- 39 *Id.* at 585.

must stem either from an act of Congress or from the Constitution itself."⁴⁰ The Court found that no statute authorized the President's seizure, and the power to seize the mills was not implicit in the executive's Article II powers granted by the Constitution.⁴¹

Although Frankfurter joined the majority, he wrote separately to explain the independent basis for his agreement with the overall result. Rather than recount the facts of the case, Frankfurter used the first eight paragraphs of his concurrence to set the tone and frame the topic for the rest of his opinion. In the first sentence of the second paragraph, Frankfurter wrote:

[The Founders of this Nation] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy.⁴²

The first thing to note about this passage is the implicit nature of the allusion to the Court-Packing Plan. Nowhere in this passage does Frankfurter expressly cite to the Court-packing episode by name. Rather, the reader must rely on the linguistic cues Frankfurter uses to draw the connection.

The first such cue is the placement of the phrase "not so long ago" in the same sentence as the word "obstructive." Beginning in 1935, during Roosevelt's first term, the Supreme Court repeatedly struck down New Deal legislative measures aimed at economic recovery as being outside the scope of the federal government's power.⁴³ Throughout this period, Roosevelt voiced his frustration with these decisions. He referred to these decisions—and to the Justices who made them—as obstructionist, political, and an impediment to the government's recovery efforts.⁴⁴ The second linguistic cue is con-

40 *Id.*

41 *Id.* at 587–88.

42 *Id.* at 593 (Frankfurter, J., concurring).

43 *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding the Bituminous Coal Conservation Act of 1935 unconstitutional); *United States v. Butler*, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act unconstitutional); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (holding the Frazier-Lemke Act unconstitutional); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (holding the Railroad Retirement Act unconstitutional); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding § 9(c) of the National Industrial Recovery Act unconstitutional).

44 In one of his famous Fireside Chats, Roosevelt described the problem of the obstructionist Supreme Court that had prompted his proposal to reorganize the judiciary: "Last Thursday I described the American form of Government as a three horse team provided

tained in the passage's statement that "[i]t was easy to ridicule that system [of checks and balances] as outmoded . . ."⁴⁵ This alludes to Roosevelt's effort to denigrate the Court in the media, where he famously said that the Hughes Court's position on economics was trapped in the "horse-and-buggy" era.⁴⁶ Roosevelt's use of this term was to paint the Court's economic philosophy (and by implication their decisions striking down New Deal economic legislation) as outdated and wholly unsuited to resolve the modern-day financial crisis. By using the words "ridicule," and "outmoded," Frankfurter is able to remind his readers of Roosevelt's attempt to destabilize the Court in the name of economic necessity and to capitalize on the symbolic power associated with the triumph of the tripartite system of checks and balances in the 1937 Court battle.

Frankfurter's decision to refer to the Court-Packing Plan by implicit allusion can be understood in at least three ways. First, *Youngstown Sheet* is a separation of powers case, and the greatest separation of powers clash up to 1952 was Roosevelt's 1937 attempt to legislatively "reorganize" the federal judiciary.⁴⁷ Given this similarity and the fact that these events were separated by a mere fifteen years, it was reasonable for Frankfurter to assume his target audience—i.e., the upper-crust of legal professionals—would pick up on his reference to the earlier separation of powers clash. Second, by alluding to the Court-Packing Plan through the euphemism of separation of powers

by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. . . . In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body. When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws." Franklin D. Roosevelt, *Fireside Chat* (Mar. 9, 1937), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=15381>.

⁴⁵ *Youngstown Sheet*, 343 U.S. at 593 (Frankfurter, J., concurring).

⁴⁶ Franklin D. Roosevelt, *The Two Hundred and Ninth Press Conference. May 31, 1935*, in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE COURT DISAPPROVES, 1935, at 200, 221 (Samuel I. Rosenman ed., 1938).

⁴⁷ The text of the bill and accompanying messages from Roosevelt and Attorney General Homer S. Cummings are printed at 81 CONG. REC. 876, 876–80 (1937). The bill's most controversial provision permitted the President to appoint an additional Justice to the Supreme Court for each sitting Justice who did not retire within six months of his seventieth birthday. *Id.* at 880. If passed, the President would have been able to appoint six additional Justices immediately, as six sitting Justices on the Court fit the provision's criterion.

language, Frankfurter was able to depersonalize the Court's ruling, which was to declare President Truman's action unconstitutional.⁴⁸ Or, to put it differently, Frankfurter would have been unable to maintain his respectful tone toward President Truman had he explicitly compared the steel mill seizures to Roosevelt's Court-Packing Plan; yet he wanted to make the connection to establish the Court's right and authority to rule on the actions of the executive branch. It is interesting to note how Frankfurter accomplishes this delicate form of argumentative staging. The passage is structured to preempt criticism that the Court in *Youngstown* was simply being obstructionist by framing the issue within the broader scheme of the system of checks and balances. Finally, Frankfurter's rhetorical choice allows him to avoid having to characterize the 1937 incident in any particular way—either as the “Court-Packing Plan” or “the switch in time that saved nine.” In this way, he avoids committing to a loaded phrase or identifying with one camp or the other. By not committing to either phrase, he avoids signaling disrespect for the President and venerating the judiciary or demeaning the judiciary and exalting the Executive. The implicit allusion allows him to characterize the historical event on his own terms and thereby hover well above the cultural debate about the incident and instead use it to make his point about the larger separation of powers issue.

As Frankfurter presents the issue, it is not that the Court *wants* to interfere in the relationship between Congress and the President; rather, the system of checks and balances *requires* that the Court render a decision. Thus, defending the scope of the judiciary's power per se is incidental to protecting the larger structural scheme. Again, for Frankfurter the question is not whether the Court wants to oppose the President or wants to define the power boundary between the political branches; rather, the question is whether the Court, as an essential component of the checks and balances system, must exercise its duty to “say [sic] what the law is.”⁴⁹ In this way, the Court-Packing Plan—although never identified by name—operates as a recognizable symbol of the need to protect the Court's position within the tripartite structure of American government.

Frankfurter's language choices also argue for a long view when assessing the Court's role vis-à-vis the political branches, even when the Court's decisions appear in the short-term to be obstinate or ignorant of political realities. For example, he writes: “[n]ot so long ago it was

48 *Youngstown Sheet*, 343 U.S. at 587.

49 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

fashionable to find our system of checks and balances obstructive to effective government.”⁵⁰ The word “fashionable,” as used in this context, functions as a constitutional pejorative. It denotes things that are ephemeral and shallow, as fashion trends and tastes are constantly changing, rising and falling at the whim of a momentarily stimulated public. In addition, particular fashions become trends because they have mass appeal, which is not necessarily a bad thing, except that in the context of constitutional adjudication, it feels a bit like mob rule. Things that are “fashionable” tend to follow a well-established and cyclical pattern: (1) rapid purchase—bordering on the viral—by the masses soon after introduction into the market, (2) consumer accumulation at a rate where the incidences of purchase are exceedingly disproportionate to the length of time elapsed, (3) product saturation in the market, and (4) displacement of product A with newly introduced product B, beginning a new cycle. The mechanics of this type of cycle imply that the public has not been especially thoughtful about the reasons for buying into the trend or the long-term consequences of following it. By relating the fleeting cycle of fashion to the public’s willingness to disparage our tri-institutional system, Frankfurter is able to point out that even if the public does not like a particular decision (or set of decisions) of the Court, there is more at stake, namely the durability and stability of the American scheme of republican government.

As I will show below, however, judicial references to the Court-Packing Plan were never again as subtle as the one crafted by Frankfurter in *Youngstown Sheet*. This is probably because the authors of these later opinions could not assume, as Frankfurter did, that their target audience would pick up on the shadow reference to the Court-Packing Plan—its implied symbolism—by mere language cues alone; too much time elapsed between 1937 and the date these subsequent cases came to the Court. The judges who wrote the later opinions would need to allude to the “Court-Packing Plan” or the “switch in time” more directly, or risk that their references would hang in the ether between reader and writer, ungrasped or misunderstood. As a result, however, they lost some of the flexibility Frankfurter maintained for himself. That is, they had to choose a camp and commit openly to a position with respect to the Court’s power to review and strike down actions of the political branches. The Court-Packing Plan, as a symbol, became at once more powerful and unwieldy.

⁵⁰ *Youngstown Sheet*, 343 U.S. at 593 (Frankfurter, J., concurring).

*B. Justice Brennan's Dissent in National League of Cities v. Usery:
Using the "Court-Packing Plan" Trope as a Warning of Possible
External Threats to the Judiciary*

In 1976, in *National League of Cities v. Usery*,⁵¹ Justice William Brennan made the first explicit reference to the Court-Packing Plan in a Supreme Court opinion, and he did so to criticize the majority for interfering with the policymaking function of Congress. Contained within a dissent strongly critical of the Court's decision in *National League*, Brennan appealed to the 1937 incident as a warning to all concerned—but especially his brethren on the Court—of what happens when the judicial branch unduly impedes legislative action and thereby invites retaliation from the political branches.

In 1974, Congress amended the Fair Labor Standards Act ("FLSA") to extend coverage of the minimum wage and maximum hour provisions to nearly all public employees employed by states and their political subdivisions.⁵² In *National League*, numerous states and their political subdivisions challenged these amendments asserting a claim of intergovernmental immunity.⁵³ In a 5-4 decision, the Court held that while the general subject matter of wages and hours is within the scope of Congress's Commerce Clause power,⁵⁴ Congress may not regulate the wages and hours set by a state *as an employer*, because federal law operated to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁵⁵ The majority's decision in *National League* reinvigorated the Tenth Amendment⁵⁶ as a defense to federal action by concluding that the 1974 FLSA Amendments interfered with traditional aspects of state sovereignty. Invoking the ultimate personification of judicial integrity, Brennan's dissent begins by placing the majority's decision in direct opposition to Chief Justice John Marshall:

It must therefore be surprising that my Brethren should choose this bi-centennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary

51 426 U.S. 833 (1976).

52 *Id.* at 836.

53 *Id.* at 836-37.

54 U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

55 *Nat'l League*, 426 U.S. at 852.

56 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . .").

commerce power lie in the political process and not in the judicial process.⁵⁷

This passage frames the rest of Brennan's dissent. Framing "is the process whereby communicators act—consciously or not—to construct a particular point of view that encourages the facts of a given situation to be viewed in a particular manner"⁵⁸ Frames are "central organizing ideas within a narrative account of an issue or event; they provide the interpretive cues for otherwise neutral facts."⁵⁹ Framing allows the author to construct a narrative that will persuade readers to recognize and adopt their line of argument.⁶⁰ Frames assist both the author and the audience in "defin[ing] problems . . . diagnos[ing] causes . . . mak[ing] moral judgments . . . and sugges[ting] remedies."⁶¹ Robert Entman, Professor at The George Washington School of Media and Public Affairs, notes "text contains frames, which are manifested by the presence or absence of certain keywords, stock phrases, stereotyped images, sources of information, and sentences that provide thematically reinforcing clusters of facts or judgments."⁶² Examples of framing devices include: metaphors, exemplars, catchphrases, depictions, and visual images. Here, Justice Brennan uses the image of John Marshall—a Revolutionary War veteran and "father" of the Supreme Court—to draw a causal connection between American independence and the limited scope of judicial review.⁶³ One might argue further that judicial independence, as evoked by Marshall in his most famous opinion—*Marbury v. Madison*—is possible only where the judiciary operates within the limited

57 *Nat'l League*, 426 U.S. at 857 (Brennan, J., dissenting).

58 Kuypers, *supra* note 24, at 182.

59 *Id.*

60 For examples discussing the differential effects of framing, see PAUL M. SNIDERMAN ET AL., REASONING AND CHOICE: EXPLORATIONS IN POLITICAL PSYCHOLOGY 52 (1991) (considering the issue of mandatory testing for HIV (human immunodeficiency virus) and finding that a majority of the public supported the rights of persons with AIDS (acquired immunodeficiency syndrome) against mandatory testing when framed as a civil liberties issue, but that the majority supported mandatory testing when framed as a public health issue); Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effects on Tolerance*, 91 AM. POL. SCI. REV. 567, 577–79 (1997) (concluding that audiences expressed more tolerance for a Ku Klux Klan march when framed as a free speech issue than when framed as a disruption of public order issue).

61 Entman, *supra* note 28, at 52 (emphasis omitted).

62 *Id.*

63 For a discussion of John Marshall's service in the Revolutionary War, see generally CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996); JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES (2002); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996).

scope of its authority. The passage's structure causes the reader to make a choice: to side with John Marshall and the founding of America or to reject those principles in favor of the decision of the *National League* Court majority.

The theme of Justice Brennan's dissent is that the majority has usurped the role of the political process by claiming that judicial enforcement of the Tenth Amendment is a legitimate restraint on Congress's exercise of its Commerce Clause power.⁶⁴ He assembles a collection of materials including academic publications,⁶⁵ case law,⁶⁶ congressional debates of the Bill of Rights,⁶⁷ and legal treatises⁶⁸ as precedential authority to support his contention that the "sole design [of the Tenth Amendment] is to exclude any interpretation, by which other powers should be assumed beyond those which are granted."⁶⁹ Brennan concludes his argument by invoking the 1937 Court-Packing Plan, suggesting that the majority in *National League* is simply disguising its political preferences in constitutional garb, an effort unbefitting justices of the Supreme Court who hold their unelected positions solely by virtue of their legal integrity and institutional conscience:

Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree. The only analysis even remotely resembling that adopted today is found in a line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's. We tend to forget that the Court invalidated legislation during the Great Depression, not solely under the Due Process Clause, but also and primarily under the Commerce Clause and the Tenth Amendment. *It may have been the eventual abandonment of that overly*

64 Nat'l League of Cities v. Usery, 426 U.S. 833, 858 (1976) (Brennan, J., dissenting).

65 *Id.* at 862 (citing FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 39-40 (1937)).

66 *Id.* at 861 n.4, 862, 863 & n.5 (citing Fry v. United States, 421 U.S. 542, 547 n.7 (1975); Fry, 421 U.S. at 557 (Rehnquist, J., dissenting); United States v. Darby, 312 U.S. 100, 124 (1941); Gibbons v. Ogden, 22 U.S. 1, 196 (1824); McCulloch v. Maryland, 17 U.S. 316, 404-07 (1819); Martin v. Hunter's Lessee, 14 U.S. 304, 324-25 (1816)).

67 *Id.* at 863 n.5 (citing 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 123, 131 (Jonathan Elliot ed., 2d ed. 1836); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 450, 464, 600 (Jonathan Elliot ed., 2d ed. 1836); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 140, 148 (Jonathan Elliot ed., 2d ed. 1836); 1 ANNALS OF CONG. 432, 761, 767-68 (1789) (Joseph Gales ed., 1834)).

68 *Id.* (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 612 §§ 1907-1908 (2d ed. 1851)).

69 *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1908 (2d ed. 1851)).

*restrictive construction of the commerce power that spelled defeat for the Court-packing plan, and preserved the integrity of this institution, but my Brethren today are transparently trying to cut back on that recognition of the scope of the commerce power. My Brethren's approach to this case is not far different from the dissenting opinions in the cases that averted the crisis.*⁷⁰

The rhetorical strategies embedded in Brennan's reference to the 1937 Court-packing incident function on two levels. First, as a historical analogy, it appeals to logic or *logos*. It provides the reader with a cause-and-effect lens through which to view the *National League* Court's majority decision. By comparing the 1976 Court's decision-making to that of the 1930s Court, Brennan guides the reader to the following conclusion: if the 1930s Court's constrained interpretation of the commerce power led to a constitutional crisis averted only by its eventual abandonment of that interpretation, and if the 1976 Court's majority decision parallels that initially constrained interpretation, then the 1976 decision will lead to a similar constitutional crisis.

The second function of this passage is to evoke *pathos*, i.e., to persuade by appealing to the emotion of the audience. The key emotive word of the passage is "crisis." The passage constructs a narrative of fear and abatement around this word. First, Brennan links the two Courts through their "ill-conceived" analyses, both of which are grounded in a politically-driven interpretation of the Tenth Amendment. This interpretation "provoked a constitutional crisis for the Court in the 1930's."⁷¹ After the fear is established, the passage offers the strategy for abatement, a release from crisis: "abandonment of that overly restrictive construction . . ."⁷² This structure compliments Brennan's position, which is that the Court's sharp interpretive turn in 1937 is what preserved the institution's integrity, rather than what called it into question. Note also that the term "Court-packing" is itself pejorative, as it suggests that the President, to safeguard his New Deal agenda, must change the voting arithmetic on the Court by increasing the number of justices and filling the new positions with those who support his policies. In this way, court-packing is the judicial equivalent of ballot box stuffing. It signifies a blatant effort to bend the rules—to cheat—when one cannot win any other way.

Brennan's use of the Court-Packing Plan language reveals a fundamental assumption underlying his interpretation and articulation

⁷⁰ *Id.* at 867–68 (emphasis added) (footnotes omitted) (internal citations omitted).

⁷¹ *Id.* at 868.

⁷² *Id.*

of the 1937 Court's behavior. Specifically, Brennan needs his readers to accept a priori that the Court's survival as a legitimate government institution required that the Court abandon the "overly restrictive construction of the commerce power."⁷³ The Court's acceptance of a new construction of the commerce power preserved the integrity of the Court in terms of raw institutional power, i.e., it stopped (defeated) the Court-Packing Plan, an unprecedented and destabilizing challenge to the Court's independence. In this sense, the term "Court-Packing Plan" signifies an external threat to the Court, precipitated by Court decisions that are out of sync with political reality.

Reference to a historical event is often an effective strategy for supporting an argumentative position. It immediately establishes a connection between the writer and the reader, providing a common starting point from which to process and evaluate the writer's claims and assertions. How a writer frames the historical event, however, reveals much about how the writer understands and perceives the event itself. The 1937 Court-Packing Plan as a historical episode allows it to function as a linguistic trope. Supreme Court Justices like Frankfurter and Brennan have appropriated the episode and adopted the "Court-Packing Plan" language as part of an argument strategy that functions as protective cover for the Court. The "Court-Packing Plan" language reminds the reader of a time when the political branches attacked the institutional hegemony of the federal judiciary. It elicits both a logical and emotional response from the reader that emphasizes the importance of judicial institutional integrity both in terms of independence and constitutional decision-making authority.

III. REFERENCE TO THE SWITCH IN TIME TO ADVANCE AN ARGUMENT ABOUT JUDICIAL INTERPRETIVE METHODOLOGY

As with any narrative, there are two sides to the events surrounding Roosevelt's attempt to reorganize the Supreme Court story. So far, this Article has considered what some judicial writers mean when they refer to this event as the "Court-Packing Plan." It is now time to consider the alternate characterization of the 1937 event: "the switch in time that saved nine." This section will discuss how this alternate choice in phrasing signifies a critique of cynical or unprincipled judicial decision-making where a Justice employs whatever legal analysis will produce the policy outcome he or she prefers. By its very nature, this critique also implicates the debate over the proper scope of judi-

73 *Id.*

cial review. For those who use the “switch in time” language, the Court’s occasional lapses into policymaking masked as judicial interpretation threatens the judiciary’s legitimacy and its place within the Constitution’s tripartite system. In this way, the term “switch in time” operates as a trope to signify an *internal* threat to the Court, a corrosive force within the judicial chamber itself.

As I will show, however, the “switch in time” language is not always used in the same way or for the same ends. Sometimes a judicial writer will deploy “switch in time” to refer to a cynical shift in the Court’s position with respect to a certain issue. Those who take this position generally think that the anti-New Deal decisions of the Hughes Court were grounded in sound legal methodology, i.e., the doctrine of *stare decisis* and the text of the Constitution itself. Under this view, the “obstinacy” of the Hughes Court strengthened rather than undermined the integrity of the judicial branch. According to this perspective, it was not until Justice Owen Roberts “flipped” his vote in *West Coast Hotel Co. v. Parrish*⁷⁴ and created a pro-New Deal majority that the Court’s integrity as a judicial body came into question. Whether perceived as an act of institutional self-preservation or as judicial “flip-flopping” at its analytical worst, the “switch in time” represents to some the kind of outcome-driven decision-making that has no place in a law court.

United States v. Kitch is an example of a judicial writer’s choice to use the phrase “switch in time” that saved nine to refer to the 1937 episode.⁷⁵ In *Kitch*, a grand jury had voted to indict William J. Kitch on “two counts of being a felon in possession of a firearm” and “one count of being a violent felon in possession of body armor” in violation of federal law.⁷⁶ Kitch filed a motion to dismiss his indictment, claiming the federal law regulations were outside the scope of Congress’s Commerce Clause power.⁷⁷ Although the district court denied Kitch’s motion and upheld Congress’s action to prohibit felony possession of firearms and body armor under the Commerce Clause,⁷⁸ the judge’s opinion cited with approval two recent Supreme Court cases—*United States v. Lopez*⁷⁹ and *United States v. Morrison*⁸⁰—that

74 300 U.S. 379 (1937).

75 307 F. Supp. 2d 657, 660 (E.D. Pa. 2004).

76 *Id.* at 658.

77 *Id.*

78 *Id.* at 660–61. The statutory language required that the firearm must have traveled through interstate commerce (at least once) and the body armor must be “sold or offered for sale, in interstate or foreign commerce.” *Id.* at 661.

79 514 U.S. 549 (1995).

80 529 U.S. 598 (2000).

reigned in congressional power under the Commerce Clause.⁸¹ For our purposes, this case represents an opportunity to analyze what the choice of the “switch in time” language may reveal about the rhetorical significance attached to that particular phrase.

In *Kitsch*, the judicial writer, Judge Stewart R. Dalzell of the United States District Court for the Eastern District of Pennsylvania, elects not to refer to the 1937 episode as the “Court-Packing Plan” and instead employs the “switch in time” language. Specifically, he indicates that the holdings in *Lopez* and *Morrison* represent a long overdue return to the Commerce Clause jurisprudence of the early 1930s, when the Court routinely set aside New Deal legislation for going beyond the commerce powers articulated in the Constitution.⁸² Judge Dalzell’s text represents the idea that the Court was at its principled best during this period, bravely maintaining the delicate balance between the judiciary and the political branches. This balance was then upset by Justice Owens and his “switch in time,” which ushered in more than fifty years of federal aggrandizement under the Commerce Clause: “[t]he Court’s holdings in *Lopez* and *Morrison* . . . emphasized the limits of the commerce power in ways unseen since the famous ‘switch in time.’”⁸³

As discussed in Part II, the “Court-Packing Plan” phrase tends to be used to identify unauthorized or unwanted attacks on the judiciary from outside, i.e., from the political branches. That is, writers typically employ the “Court-Packing Plan” language when: (a) challenging an ultra vires action of the President or Congress or (b) issuing a warning that such an action may occur if the Court does not alter its current course. By contrast, writers use the “switch in time” language to critique the behavior of the *Court*. The “switch” language choice reframes the historical episode from an attack on what was done to the Court (by President Roosevelt’s reorganization proposal) to an indictment of what the 1937 Hughes Court did in response. Thus, for example, when Judge Dalzell writes approvingly of the Court’s recent decisions in *Lopez* and *Morrison*, he means to: (a) draw a sharp distinction between the then-current Court and the Courts that occupied the supreme bench between 1937 and 1995, and (b) connect

81 *Kitsch*, 307 F. Supp. 2d at 659 (“The Court continued to interpret the Commerce Clause expansively in the years after *Scarborough*, but eventually, in the seminal case of *United States v. Lopez*, it signaled a renewed interest in identifying the outer reaches of the commerce power. . . . *Morrison* again demonstrated the Court’s reinvigorated commitment to enforcing constitutional limits on legislative power . . .”) (internal citations omitted).

82 *Id.* at 659–61.

83 *Id.* at 660.

the *Lopez* and *Morrison* Courts to the Hughes Court of the early 1930s, which Dalzell considers more juridically principled. The reference to the “famous switch in time” operates as both a temporal and jurisprudential boundary: it symbolizes the precise moment the Court lost its way and became the great rationalizer for federal intrusion into the rights of the states.

Here, the purpose of referencing the 1937 event is not to remind the reader of a moment when the President tried to destroy the judiciary’s independence, thereby jeopardizing the institutional structure supported by separation of powers and the system of checks and balances. Rather, the reference signifies that the Court, when it shifted its position in 1937 in *West Coast Hotel*, deviated from the proper standards of constitutional interpretive methodology by substituting external political pressure for legal principle.

That the writer believes the Court’s interpretive misconduct has been institutionalized is revealed by Dalzell’s use of the word “unseen.”⁸⁴ Broadly construed, “unseen” may be directed at the Court en masse. In other words, the text embeds an implication that the interpretive principles underlying the Supreme Court’s 1995 and 2000 decisions in *Lopez* and *Morrison*, respectively, limiting congressional power have not been seen since the pre-1937 Hughes Court. This interpretation invites the reader to consider the nature of the Court from an ideological perspective, i.e., the 1995 and 2000 Supreme Court has appropriately returned to the constitutional principles that guided the conservative Court in 1936. The ideological overlay implies that during the intervening fifty-nine years, the Court operated in a politically-driven, legally unprincipled way, at least when confronted with Commerce Clause questions.

As I will show in the next section of this Article, however, the “switch in time” trope has also been used to argue *in favor* of overturning prior decisions that the author believes were driven by the value judgments of the Justices rather than by sound legal reasoning. In this sense, the “switch in time” represents a positive judicial response, a necessary internal corrective to the Court’s previous errors of legal judgment.

IV. COMPETING FRAME ANALYSIS: REFINING THE TROPES TO CRITIQUE EXTERNAL AND INTERNAL THREATS TO THE JUDICIARY

This section analyzes the extent to which the two previously discussed institutional arguments supported by the 1937 Court-packing episode—the judicial “independence” and the judicial “interpretive methodology” arguments—have developed. In this section, I conduct a framing analysis of the 1937 event as referenced by judicial writers in two separate opinions within the same Supreme Court case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸⁵ I first looked at how the joint opinion of Justices O’Connor, Kennedy, and Souter framed the episode. Next, I looked at how Justice Scalia framed the same episode in his concurrence/dissent. This analysis finds that while judicial writers continue to choose between the “Court-packing” and “switch in time” language, with the former focusing on the judiciary’s institutional autonomy from the political branches and the latter focusing on the judiciary’s interpretive autonomy within itself, the use of the competing frames has developed into more nuanced arguments about protecting the Court against external versus internal threats to judicial autonomy. The implication of this development is to increase the symbolic power and rhetorical significance of the 1937 episode.

A. *Case Summary: Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*,⁸⁶ abortion clinics and physicians brought a Due Process Clause challenge to five provisions of the Pennsylvania Abortion Control Act of 1982⁸⁷ (“PACA”). The amendments to PACA required, among other things, that a woman give her informed consent before the procedure and after a twenty-four-hour waiting period within which she was to receive certain contemplative information.⁸⁸ Another provision required the informed consent of one of the parents of a minor seeking the procedure, providing for a judicial bypass if the minor either wished to proceed without parental consent or could not obtain it.⁸⁹ In addition, the PACA amendments provided that, except in certain circumstances, a married woman must submit a

85 505 U.S. 833 (1992).

86 *Casey*, 505 U.S. at 844–45 (O’Connor, Kennedy & Souter, JJ., Opinion of the Court).

87 18 PA. CONS. STAT. §§ 3203–3220 (1990).

88 18 PA. CONS. STAT. § 3205 (1990).

89 18 PA. CONS. STAT. § 3206(c) (1990).

written statement that she notified her spouse of her intent to have the procedure.⁹⁰

In a 5-4 decision, the Court upheld most of the Pennsylvania provisions, striking down only that part of the PACA that required spousal notification.⁹¹ And while *Casey* reaffirmed a woman's fundamental right to decide "whether or not to terminate her pregnancy" as recognized in *Roe v. Wade*,⁹² the *Casey* plurality articulated that it was only preserving "the essential holding" of *Roe*.⁹³ Thus, the *Casey* Court rejected the *Roe* trimester framework and replaced it with a new "undue burden" standard by which to analyze the validity of all abortion restrictions.⁹⁴

The decision in *Casey* was the product of a highly fractured Court, resulting in the unusual circumstance of a joint opinion crafted and authored by Justices O'Connor, Kennedy, and Souter.⁹⁵ In *Casey*, Chief Justice Rehnquist and Justices White, Scalia, and Thomas applied a rational basis standard of review and voted to overrule *Roe* and uphold all of the challenged provisions of the Pennsylvania statute.⁹⁶ Justice Blackmun applied strict scrutiny and argued that the Court should uphold *Roe* in its entirety and strike down all of the PACA amendments.⁹⁷ Justice Stevens also applied a variation of the joint opinion's "undue burden" standard,⁹⁸ endorsed *Roe*, and voted to strike down most but not all of the PACA amendments.⁹⁹ Amid these extremes, Justices O'Connor, Kennedy, and Souter issued a joint opinion. Their opinion neither overruled nor preserved undisturbed

90 18 PA. CONS. STAT. § 3209 (1990).

91 *Casey*, 505 U.S. at 895 (O'Connor, Kennedy & Souter, JJ., Opinion of the Court).

92 410 U.S. 113, 153 (1973).

93 *Casey*, 505 U.S. at 846, 870, 871 (O'Connor, Kennedy & Souter, JJ., Opinion of the Court).

94 *Id.* at 877-78. Under this standard, the Court asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden," defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878.

95 *Id.* at 843.

96 *Id.* at 944, 966 (Rehnquist, C.J., White, Scalia & Thomas, JJ., concurring in part and dissenting in part) ("A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.")

97 *Id.* at 926 (Blackmun, J., concurring in part and dissenting in part) ("Our precedents and the joint opinion's principles require us to subject all non-*de-minimus* abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions . . . must be invalidated.")

98 *Id.* at 920 (Stevens, J., concurring in part and dissenting in part) ("In my opinion . . . [a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification.")

99 *Id.* at 912, 917 (Stevens, J., concurring in part and dissenting in part).

Roe v. Wade and established the undue burden legal standard, a midpoint between rational basis and strict scrutiny.¹⁰⁰ With this basic understanding of the facts and the different positions of the Justices, the rest of this section focuses on the competing frames of the 1937 Court episode used in the O'Connor, Kennedy, and Souter joint opinion and Justice Scalia's concurrence/dissent.

B. The Joint Opinion: Using the "Court-Packing" Frame to Critique External Threats to Judicial Independence

As indicated by the above case summary, the immediate question for the Court in *Casey* was whether various requirements added to Pennsylvania's Abortion Control Act violated a woman's constitutional right to terminate her pregnancy as announced in *Roe v. Wade*. However, the larger issue with which the Court dealt was whether it should overrule *Roe*. This larger issue required the Court to articulate its views on the importance of precedent and its understanding of the function and application of stare decisis. The reference to the 1937 event in the joint opinion by Justices O'Connor, Kennedy, and Souter occurs in that portion of the opinion that deals with stare decisis.¹⁰¹

The joint opinion discusses stare decisis in three parts. The first part acknowledges that adherence to precedent is not absolute, sets forth criteria to determine when deviation from precedent is warranted, and analyzes *Roe* based on that criteria.¹⁰² The second part compares *Roe* with "two . . . decisional lines from the past century" that are "of comparable dimension" to *Roe* wherein the Court did

¹⁰⁰ *Id.* at 874 (O'Connor, Kennedy & Souter, JJ., Opinion of the Court) ("The fact that a law which serves a valid purpose, one not designed to strike at the [abortion] right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make the decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

¹⁰¹ *Id.* at 854, 854-69 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

¹⁰² *Id.* at 855 ("So in this case we may enquire whether *Roe's* central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe's* central rule a doctrinal anachronism discounted by society; and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.").

overrule precedent.¹⁰³ In the third part, the Court justifies its decision not to overrule *Roe* in its entirety by describing the dangers inherent in: (1) frequent overruling of precedent and (2) overruling “under fire” a “watershed decision” meant to moderate “contending sides of a national controversy.”¹⁰⁴ The reference to the 1937 event occurs in the second part of this discussion. The following analysis is therefore limited to that part of the joint opinion.

The plurality identifies two instances where the Court overruled precedent and proceeds to distinguish those instances from the current case.¹⁰⁵ The two instances the plurality examined were: (1) *West Coast Hotel Co. v. Parrish*,¹⁰⁶ where in 1937, the Court overruled *Adkins v. Children’s Hospital*¹⁰⁷ and (2) *Brown v. Board of Education*,¹⁰⁸ where in 1954, the Court overruled *Plessy v. Ferguson*.¹⁰⁹ The plurality argued, “*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.”¹¹⁰ Thus, the Court operated completely within its authority when overturning cases where the original factual assumptions were false or had changed.¹¹¹ For example, the Court in *Brown* was justified in overruling *Plessy* because the socio-racial assumptions underlying that decision no longer obtained.¹¹² The same is true of *Adkins*, which was effectively overruled by *West Coast Hotel* following the 1937 Court-packing episode.¹¹³ Specifically, the plurality argues that the Court had a duty to overturn *Adkins* because the economic assumptions giving rise to that decision no longer existed in fact.¹¹⁴ The plurality pointed out, however, that

103 *Id.* at 861, 861–64.

104 *Id.* at 867.

105 *Id.* at 861.

106 300 U.S. 379 (1937).

107 261 U.S. 525 (1923).

108 347 U.S. 483 (1954).

109 163 U.S. 537 (1896).

110 *Casey*, 505 U.S. at 863 (joint opinion of O’Connor, Kennedy & Souter, JJ., Opinion of the Court).

111 *Id.* at 864 (“In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision [*Brown* and *West Coast Hotel*] to overrule a prior case as a response to the Court’s constitutional duty.”).

112 347 U.S. 483, 490–92 (1954).

113 *Id.* at 861–62 (“As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: ‘The older world of *laissez faire* was recognized everywhere outside the Supreme Court to be dead.’” (quoting JACKSON, *supra* note 2, at 85)).

114 *Id.* at 862 (“[T]he clear demonstration that the facts of economic life [by the time of *West Coast Hotel*] were different from those previously assumed [in *Adkins*] warranted the repudiation of the old law.”).

the conditions requiring this kind of reversal were not present in the current case.¹¹⁵

The main theme advanced by the plurality's discussion of stare decisis is legitimacy. Indeed, the plurality premised its analysis of acceptable deviation from stare decisis on the idea that the Court retains its legitimacy when it overturns cases that are based on false factual assumptions:

The facts upon which [*Adkins*] had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.¹¹⁶

What is noteworthy here is the subtlety with which the plurality uses the linguistic trope of the "Court-packing" language to advance its argument about protecting institutional independence. Earlier analysis of the "Court-packing" phrase in this Article argued that the phrase is typically used in situations where the judiciary perceives itself in a defensive posture vis-à-vis the political branches. Invoking the "Court-packing" language is meant to trigger a sympathetic response in the reader of wanting to secure and protect the judicial institution from encroachment by Congress or the President. The *Casey* plurality's use of the "Court-packing" phrase expands on this initial idea of protection from external threat.

There is a fine line between hegemonic and independent. As you move toward the first, you risk losing the second. Here, the ultimate goal is to defend judicial independence. However, the *Casey* plurality is presented with a situation where it must make a principled argument as to why overruling precedent in some instances secures the Court's legitimacy while in others, overruling precedent damages it. Complicating this predicament is the fact that each response—overruling and not overruling precedent—must be judicially driven and based on sound legal reasoning. The plurality navigates this difficulty by acknowledging the dichotomy between hegemony and independence. The use of the "Court-packing" phrase externally locates the source of the deviation from stare decisis outside of the

115 *Id.* at 864 ("Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed . . . the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.").

116 *Id.* at 862.

judiciary: the reason that the Court is justified in overruling precedent is because society's understanding of the facts underpinning the prior decisions has changed. Given this circumstance, the Court is presented with two options. It can either unilaterally impose a factual understanding of a reality that no longer exists or it can adapt to society's modified understanding of its reality. The former jeopardizes the Court's legitimacy by suggesting the judiciary is exercising unauthorized domination over the other branches, while the latter secures the credibility of the Court as an institution and promotes acceptance of judicial independence. The plurality's use of the "Court-packing" language works to maintain the focus on external changes outside of the Court.

C. Justice Scalia's Concurrence/Dissent: Using the "Switch in Time" Frame to Critique the Internal Behavior of the Court

Like the joint opinion, Justice Scalia's concurrence/dissent in *Casey* focuses on the Court's legitimacy. However, whereas the joint opinion deployed the term "Court-Packing Plan" to signify *external* threats to the Court as an institution, Scalia uses the term "switch in time" to signify certain behaviors *internal* to the Court that jeopardize its legitimacy as a judicial body. Scalia attacks the plurality opinion for retaining aspects of *Roe* that Scalia believes are founded on defective legal reasoning. These, he argues, should be abandoned lest they persist and damage the integrity of the Court. To make his point, Scalia calls on—and then distinguishes—two landmark cases in the Court's jurisprudential history, *Dred Scott v. Sandford*¹¹⁷ and *West Coast Hotel Co. v. Parrish*.¹¹⁸

[T]he Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal.¹¹⁹

As this passage attests, for Scalia the 1937 "switch in time" saved the Court from dishonor—dishonor caused by allowing economic philosophy to dictate judicial interpretation. Therefore, according to Scalia, the Court's shift in 1937 was prompted not by the threats posed by President Roosevelt, but by the Court's recognition of its

117 60 U.S. 393 (1856).

118 300 U.S. 379 (1937).

119 *Casey*, 505 U.S. at 998 (Scalia, Rehnquist, C.J., White, Thomas, JJ., concurring in part and dissenting in part) (internal citations omitted).

own flawed reasoning in the earlier New Deal Cases. The issue, then, as framed by Scalia, is whether the plurality opinion in *Casey* more closely resembles *Dred Scott* or *West Coast Hotel*.

Scalia is quick in his answer. He portrays the plurality opinion as a mere expression of the particular values of the three Justices who drafted it, not as a judicial position derived through the application of established legal doctrine: “the best the Court can do to explain how it is that the word ‘liberty’ *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”¹²⁰

In Scalia’s view, the plurality opinion in *Casey* perpetuates the interpretive errors first articulated in *Roe*, and because *Roe* functions as a legal mask to “a political choice,” it is unprincipled and dangerous to the judiciary. By refusing to abandon *Roe*, the plurality in *Casey* leaves a wrong-headed decision in place—an act (or omission) similar to letting *Dred Scott* stand even after it was shown to be legally indefensible. What reproductive rights law needs, according to Scalia, is not the continuation of *Roe* (however altered), but a “switch in time” that returns the Court to its proper and limited role as the interpreter of legal texts, for there is danger in yielding to unrestrained or unprincipled methods of judicial decision-making:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone. . . . [I]f, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (*ought* to be) quite different.¹²¹

For Scalia, the key to maintaining the Court’s legitimacy is proper judicial behavior. The Court damages its legitimacy when individual justices abandon legal principle to advance a policy preference.

As indicated above, Scalia uses the term “switch in time” as a linguistic trope to target judicial behavior. This is consistent with the examples previously analyzed in this Article. However, Scalia adds an additional layer of complexity to the trope. He writes that the interpretive turn created by the “switch in time” was in response to “the Court’s erroneous (and widely opposed) constitutional opposition to

120 *Id.* at 983; *see also id.* at 1000 (“[P]ermeat[ing] today’s opinion [is] a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls ‘reasoned judgment,’ which turns out to be nothing but philosophical predilection and moral intuition.” (internal citation omitted)).

121 *Id.* at 1000–01.

the social measures of the New Deal.”¹²² Ironically, however, the 1937 Court’s decision in *West Coast* ushered in an era of expanded federal power under the Commerce Clause¹²³—something Scalia has typically opposed during his tenure on the bench.¹²⁴ Given his constitutional conservatism, it seems incongruous for Scalia to cite favorably to a judicial moment that expanded the reach of the federal government. However, in this case, he is citing to *West Coast* for a limited and specific purpose—to encourage the Court to overrule what he believes was an ill-reasoned precedent: *Roe v. Wade*. Use of the “switch in time” language allows Scalia to take a core judicial moment, which is fundamental to the social welfare legislation of the New Deal, and turn it on its head to support a politically conservative position. Framed in this context, those who support the 1937 interpretive shift produced by the “switch in time” likewise must support the overturning of *Roe*.

The dominant theme of both the joint opinion and Justice Scalia’s concurrence/dissent is the legitimacy of the Court. However, the two opinions do not locate the danger to the Court’s legitimacy in the same place. The plurality focuses on *external* threats to the judiciary that arise when the Court’s factual assumptions no longer comport with social reality, thus raising the hackles of the President and/or Congress; if the Court does not direct its jurisprudence to the new factual paradigm, it risks being marginalized by the political branches

¹²² *Id.* at 998.

¹²³ *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938 against challenges under the Commerce Clause and Fifth Amendment); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935 against a Commerce Clause challenge).

¹²⁴ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., jointly dissenting) (“The striking case of *Wickard v. Filburn*, which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *me plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.” (internal citations omitted)); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that a regulation subjecting private individuals and companies to suit for gender-motivated violent torts is beyond Congress’s Commerce Clause power); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that a regulation banning possession of firearms within a public school zone is beyond Congress’s Commerce Clause power).

and/or the public. In this way, the term “Court-Packing Plan” signifies the kind of external pressure that is applied to the Court when it does not react quickly enough to the ground shifting beneath its feet.

Conversely, Scalia focuses on the fundamental *internal* threat to the Court’s legitimacy, namely judicial behavior that is driven by value choices rather than by legal doctrine. For Scalia, there is (or should be) a purity to the act of applying the law, one which must be maintained for the Court to remain legitimate. When a particular Court—or a majority of Justices—loses its way and begins to make judicial decisions based on policy preferences instead of established legal rules, the Court must self-correct to save the only claim it has to authority: its public image as a learned but apolitical body of legal experts. Therefore, the Court, at various times in its history, has made—and will continue to make—the rare “switch in time” to reset its internal balance and find the proper mode of judicial behavior.

Notwithstanding their contrary arguments, each of the two *Casey* opinions discussed above invoked the 1937 institutional clash between the President and the Supreme Court to support its position. That each was able to effectively do so is a product of the fact that two distinct linguistic tropes have developed around the 1937 episode: a “Court-packing” trope to direct at external threats to the judiciary and a “switch in time” trope to direct at the members of the bench.

CONCLUSION

The federal courts have recognized that the 1937 Court-Packing Plan event is a powerful rhetorical tool. Accordingly, they have created institutional and methodological arguments grounded in the institutional clash. Justices and judges have framed the event as the “Court-Packing Plan” to denote the institutional struggle for power and credibility between the judiciary and external threats to its legitimacy. The broader issue associated with the “Court-Packing Plan” language seems to be protecting the integrity of the judicial institution and the independence of the judiciary. This framing views judicial institutional autonomy as fundamental and essential to the success of our scheme of government.

Conversely, some Justices and judges have framed the event as “the switch in time that saved nine” to denote the institutional struggle within the judiciary for power and credibility related to the scope of its interpretive constitutional decision-making authority. This framing views the 1937 episode as a cautionary tale about the dangers to the Court’s legitimacy brought on by internal judicial behavior. The “switch in time” framing submits that the interpretive turn in

1937 changed how we understand the scope and limitations of constitutional interpretation, creating the potential, if unrestrained, to not only damage the Court, but also damage our entire system of government.

The purpose of this Article is to show how a rhetorical orientation helps us to understand how the Court-Packing Plan episode—through language choice—has entered our culture of argument about our system of government and the role of the judiciary as a constitutional decision-making body within that system. The manner in which these language tropes are used is complex and, at least on the surface, can confound one's initial assumptions about the writer who has selected them. Nevertheless, the effort is usually worth the sweat, because a deep analysis of these tropes reveals meanings we may have overlooked. We have seen that when judicial writers refer to the Court-Packing Plan or to the switch in time, they are almost always addressing the Court's legitimacy and the threats to that legitimacy. As it happens, those threats can be external or internal to the Court, and the tropes discussed in this Article—"Court-Packing Plan" and "switch in time"—help us to understand which one is being framed by the author.