

## THE REMAND THAT MADE THE COURT EXPAND

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(In a large law school lecture hall, Fall 1999 term)

In today's class, we will focus on a Supreme Court decision that many of you undoubtedly studied in history or in an undergraduate course in Constitutional Law. That case is *West Coast Hotel Co. v. Parrish* (1937). *Parrish* is commonly described as "the remand that made the Court expand." While the characterization is literally correct, it fails to capture the several ways in which that decision fundamentally altered our representative democracy.

The facts are simple. The *Parrish* Court reviewed a state court decision that had distinguished precedents growing out of the famous era associated with *Lochner v. New York* (1905). During the *Lochner* era, the Court struck down a variety of state and federal regulations, often including those setting minimum wages or maximum hours in the workplace. *Lochner* itself became well known because in that decision, Justice Peckham clearly articulated what he viewed as a fundamental right to make contracts and to own property without undue regulatory interference. Against this backdrop, *Parrish* looked sufficiently run-of-the-mine that contemporaneous commentators questioned why the Court had bothered to grant certiorari. For example, in *Adkins v. Children's Hospital* (1923) and *Morehead v. Tiplado* (1936), the Court had reached nearly identical outcomes. Any differences between those cases and *Parrish* arguably had less to do with the law or the facts than with the changed political climate.

Before *Parrish*, President Franklin Delano Roosevelt, increasingly frustrated with the Supreme Court's resistance to New

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Deal initiatives, upped the ante. Presenting his 1936 reelection as a referendum on the New Deal, FDR began to work through Congress his now famous Court-packing plan. Under that plan, Congress expanded the Supreme Court's membership by one member for each Justice over the age of seventy who was unwilling to step down. Changing the size of the Supreme Court was by no means a new idea, and this was not the first time that Court size had been exploited for political purposes. Following Thomas Jefferson's election to the presidency, Congress decreased the Court's size, preventing him from appointing a successor to Justice Cushing. And the Reconstruction Congress repeated this strategy with President Andrew Johnson, preventing him from appointing successors to Justices Catron and Wayne. But not since George Washington, who appointed a newly created five-, then six-, member Court, has a single President been given as many appointments to the Supreme Court as the Court-packing plan would give FDR. Because six justices were then over the age of seventy, the Court-packing plan quickly transformed the Court from one dominated by a conservative majority of five out of nine into one that contained a liberal supermajority of ten out of fifteen.

Even in the New Deal, many viewed the plan with trepidation. If judicial opposition to New Deal policies warranted an expansion from nine to fifteen, would that provide future dissatisfied Republican leadership with a precedent for a further expansion to, say, twenty-three? And of course, this game has no end. In the pressures of the Great Depression, however, congressmen were more focused on bread lines than on abstract "what ifs?" That is not surprising. After all, two years prior to *Parrish*, on May 27, 1935, the Court had issued FDR what many viewed as a fatal blow to the New Deal. On that date, which became known as "Black Monday," the Court struck down the National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States* (1935) and the mortgage moratoria in the Frazier-Lemke Act in *Louisville Joint Stock Land Bank v. Radford* (1935). The Court also issued *Humphrey's Executor v. United States* (1935), which prevented FDR from removing a commissioner on the independent Federal Trade Commission.

Even so, it took another two years, with the intervening 1936 election and the *Parrish* remand, for the Supreme Court Expansion Act of 1937 to gain the needed political support. Two more years of the Great Depression had proved insufficient to make the Court retreat from its adamant assertion in *Schechter*

*Poultry* that “[e]xtraordinary conditions do not create or enlarge constitutional power.” Apparently, this dictum enraged President Roosevelt, who considered it the height of arrogance from a group of unelected life-tenured justices whose closest experience to hunger consisted of skipping lunch to prepare for oral argument.

While constitutional scholars may have placed excessive emphasis on *Parrish* in assessing the present Supreme Court, even the most cursory review of the floor debates surrounding the Expansion Act makes one thing clear: *Parrish* was the straw that broke bicameral backing for the nine-member Court. This is especially interesting in light of Justice Owen Roberts’s recently released papers. Roberts had considered siding with the Court’s liberals and distinguishing *Tipaldo* on procedural grounds. One can only speculate as to why he changed his mind and instead sided with the Court’s conservatives—James C. McReynolds, Pierce Butler, Willis Van Devanter, and George Sutherland—or what the effect of a contrary decision might have been.

I would now like to offer a few thoughts on how *Parrish* has affected the Supreme Court. At a minimum, FDR’s six appointments within one year of the Act’s passage fundamentally altered the Court’s political direction. One wonders, however, whether with greater patience FDR might have achieved a majority absent the plan. After the plan went into effect, none of the six elder justices was willing to step down until forced to do so by failing health. The effect was to reveal extremely sharp divisions between the Court’s suddenly dominant liberal camp and the holdover minority of conservatives. More importantly, some liberals who had previously supported Roosevelt’s policies, and even some new appointees, began to retrench support when it came to separation of powers. Yes, the new liberal majority would uphold minimum wage and maximum hours laws against due process and commerce clause challenges. But having experienced the effects of politically expedient changes to the Supreme Court, a new coalition of conservative-to-moderate justices prevented further institutional changes motivated by short-term partisan concerns. This became most notable in the area of agency delegation.

This emerging coalition paid increasing attention to the “intelligible principle” test governing congressional delegations announced in the 1928 decision, *J.W. Hampton, Jr., & Co. v. United States*. The effect was to limit most New Deal initiatives, espe-

cially schemes like that struck down in *Schechter Poultry*, involving policies set by privately managed industrial boards. Thus, in *Currin v. Wallace* (1939) and *Yakus v. United States* (1944), the Court struck down the Federal Tobacco Inspection Act and the Emergency Price Control Act, respectively, both on nondelegation grounds. The doctrinal effect proved ironic. One might have predicted that FDR's legacy would be one of governmental growth, but instead, the very institution in which Roosevelt forced an expansion viewed governmental expansion generally and agency delegation in particular with great skepticism. Because the six new justices were rapidly appointed, all within one year of the bill's enactment, FDR was unable to anticipate the emerging split within the suddenly dominant liberal camp. Had FDR's appointments been more gradual, his ability to ensure the survival of broad-based agency delegations that were essential to the New Deal might well have been greater.

*Parrish* also affected the Court in another fundamental way. With fifteen members, and the risk of an even greater expansion if the Court again blocked the political branches, the Court began to face tremendous problems in providing doctrinal guidance in most complex areas of constitutional and statutory law. This was especially true in the area of race. Even with the return of African American soldiers who had put their lives on the line on behalf of the nation in World War II, American society remained unwilling to cast aside laws premised upon the assumption that African American schoolchildren were unfit to be seated next to white schoolchildren. One might have hoped that the Supreme Court would rely upon the equal protection clause to put an end to this once and for all. The difficulty was that the Court had grown too large and fractured to create a united front. This was due in part to the increased politicization of the appointments process. As vacancies have arisen, most often the first question asked has been how the appointment would affect the Court's political composition. Even two-term Presidents have thus been unable to use appointments to control that institution. In an earlier era, such inquiries tended to lurk in the shadows of questions facially directed to issues of competence or qualification. But the Court expansion, itself prompted by Roosevelt's desire to alter the conservative makeup of the Hughes Court, removed any qualms that Senators might have had about ensuring political balance. And it is difficult for a politically fractured Court to do much without support from the elected branches. In the case of race-based segregation, that support

was sadly missing for many, many years. We can, of course, never know whether this sad chapter in American history would have ended sooner than in the Civil Rights Act of 1973, which a bare majority of the Circuit Review Court, rather than the Supreme Court, grudgingly applied to end state-mandated segregation.

Finally, I would be remiss not to mention the effect of *Parish* on the Circuit Review Act of 1970, which created the Circuit Review Court. Because the expanded Supreme Court faced grave coordination difficulties in divisive constitutional and complex statutory cases, it often issued decisions containing a dozen or more opinions, most of which were joined by no more than a single justice. With respect to matters of constitutional interpretation, that was bad enough, but the Court's simultaneous insistence upon detailed statutory language, rather than broad agency delegations, for most regulatory matters created major administrative problems.

By the late 1960s, political support had grown for the creation of another court, which would sit between the federal circuit courts and the Supreme Court to resolve questions of statutory interpretation. The concept was fairly simple. The Circuit Review Court would be obligated to take cases that produced splits among the federal circuit courts or among state courts of last resort on nonconstitutional questions of federal law. Such decisions would be binding unless the Supreme Court granted certiorari and resolved the dispute with a single decision commanding no less than simple majority support. To promote cohesion and to avoid some of the pitfalls facing the Supreme Court, the Circuit Review Court has only seven members.

The effect of the new court was not surprising. The Circuit Review Court has become extremely powerful, as you will discover when you study such courses as Administrative Law, Antitrust, Environmental Law, and Securities Law, all of which focus on particular aspects of that court's specialized jurisdiction. The Circuit Review Act has also had unintended consequences. Because that court has mandatory, rather than discretionary, jurisdiction, the Attorney General can effectively invoke that court's jurisdiction to resolve difficult statutory questions by forcing necessary circuit splits. Some commentators have noted rather cynically that while the nondelegation doctrine is alive and well, it has not prevented the greatest delegation of all, namely congressional delegation to the Circuit Review Court to complete its task of legislative drafting. At the same time, the Circuit Review

Act has effectively limited the force of the Supreme Court to constitutional questions. But since that Court has proved unable to resolve many difficult constitutional questions, including those involving the powers of Congress and matters of race, the effect has often been to transform once-constitutional questions into quasi-statutory ones. As a result, commentators have observed that since the New Deal, our system has increasingly resembled civilian jurisdictions in favoring congressional power over federal judicial power, even with respect to protecting minorities and fundamental rights. Commentators have further noted that since the Circuit Review Court was established, our system has more closely resembled civilian regimes, including most notably France and Germany, in another respect, namely in effectively splitting constitutional and nonconstitutional courts. In light of this, do you consider it surprising that Circuit Review Court Justice Marshall Stevens declined a "promotion" to the Supreme Court? Finally, as you are no doubt aware, for the past few years, efforts to expand the jurisdiction of the Circuit Review Court to include certain constitutional issues, or to create a parallel review court for that purpose, has gained increasing support.

At this time, I would be happy to take some questions. . . .