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The Physics of Persuasion: Arguing the New Deal

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The late Robert Jackson, a 20th-century legend who served as Solicitor General, Attorney General, Supreme Court Justice, and chief U.S. prosecutor at the Nuremberg Tribunals, used to say that, as Solicitor General, he made three oral arguments for every case he presented to the Supreme Court.

> First came the one I planned – logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.**1**

I find it comforting to recall that confession of humility from such a great Supreme Court advocate. But Justice Jackson's observation also reflects a larger truth about advocacy: that it is not immune from the laws of physics. No matter how well-planned an argument is, at some point entropy – the tendency for any closed system to move from a state of order toward disorder – will set in.

That is the topic I plan to discuss today – not entropy (which I certainly hope will not manifest itself during the next hour), but rather what I call the physics of government advocacy before the Supreme Court. It has often seemed to me that analogues to ordinary principles of physics can sometimes help explain, and predict, the direction of Supreme Court decision-making. If I am rights about that, then it behooves any Solicitor General – and perhaps modern legal historians – to be mindful of those principles.

To explore this thesis, I intend to focus on one of the most difficult periods in the Nation's history – the Great Depression, the New Deal, and what has been called the constitutional moment of 1937.**2**

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Let me begin, though, with some general points. If the direction of the law is influenced by principles comparable to the laws of physics, then generally one would expect the force of the better legal argument ultimately to determine the destination of the law. Where stronger and weaker arguments oppose each other, the one with greater jurisprudential force should prevail. For example, the principle of judicial review is so fundamental to our constitutional system that it seems quite inconceivable that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), could have been decided differently; the force of the Court's opinion in *Gideon v. Wainwright*, 372 U.S. 335 (1963), makes the argument that produced it appear to have been almost self-evident; and the structure of our national economy renders seemingly obvious the conclusion that Congress can regulate practices that have a substantial effect on interstate commerce.

But in individual cases, force of argument alone does not determine outcome. Other forces can also influence the direction of the law. One of those forces is *friction*. And friction in litigation works just as it does in more familiar contexts. The broader the undertaking requested of a court – in other words, the more points a case touches – then the more friction it is likely to encounter. And the more massive the new program that the government asks the Court to uphold – in other words, the more ponderous its weight – then the more pronounced is friction's effect.

Another force is *magnetism*. One often hears attorneys say that the optics of a case are not good, the atmospherics are bad, or there is an unattractive odor to the matter. Those sensory descriptions all point to what is a singular phenomenon – courts often find particular results attractive or repellent for reasons other than the force of legal argument.

Forces like magnetism and friction can cause the law to begin moving in the wrong direction. And because principles like *inertia* and *momentum* also apply, once doctrine starts moving in a particular direction, it will continue to do so until other forces bring it to a halt.

Reference to these principles helps the Solicitor General evaluate which cases he is willing to take to the Supreme Court. Erwin Griswold, who served as Solicitor General under Presidents Johnson and Nixon (following his reign as dean of the Harvard Law School), called it a "basic rule of the Solicitor General's office '[n]ever [to] risk an important point on a weak case.'"[3] I would put the matter somewhat more neutrally: The Solicitor General has an obligation to the Court to ensure that the cases he presents to it are relatively free from extraneous influences that might artificially alter the development of the law. So, for example, the best case in which to ask the Court to extend existing law or to articulate a new principle is usually not a case in which forces like friction and magnetism oppose the force of argument.

Similarly, it is ordinarily unwise to test an uncertain area of law – the scope of federal power, for example – in a case that represents the most extreme application of the principle sought. Starting with an extreme case – perhaps in an effort to win the whole area of law in one fell swoop – courts a grave risk of loss, and thus of causing the law to flow in the wrong direction. And just as one cannot control results, so also one cannot control rationales. If the Solicitor General brings the Court an extreme case and loses, then the Court's reasoning – the flow of its logic – may close the door on less extreme cases that, had then been presented earlier, might have been decided differently. By endeavoring to move the law only slowly, the Solicitor General can help ensure that, when the law begins moving, it moves in the correct direction, even if gradually or tentatively.

Selecting cases in this manner serves the Court as an institution. Judges by temperament and training are incrementalists. The law creeps cautiously toward its end state; it rarely arrives through gigantic leaps into the unknown. Bringing cases in an appropriate order permits the Court, over time, both to address the content of constitutional doctrine, and to explore in step-by-step fashion its logical limits.

* * *

Let us see how this all worked during the New Deal. In 1933, when Franklin Roosevelt assumed the Presidency, the United States was in the midst of a terrible economic crisis. Unemployment stood at around 25 percent, the national income was less than half what it had been in 1929 before the stock market crash, and the economy was in a frustrating cycle of deflation – falling prices, falling income, and falling demand. The new President and Congress enacted sweeping laws to breathe life into the national economy. But with the Supreme Court dominated by an unmistakably conservative majority, the constitutional defense of New Deal legislation loomed as no small task.

And Roosevelt's first Solicitor General, James Biggs, was uniquely unsuited to the challenge. By the end of Biggs' first term, Justice Stone had commented that "Biggs was not fit to argue a cow case before a justice of the peace, unless the cow was fatally sick."[4] The Justices informally sent word to Roosevelt that Biggs should not be permitted to argue any case the United States hoped to win.[5] Attorney General Homer Cummings stepped in to ensure that important cases would be handled by attorneys outside the Solicitor General's office. Thus, even before the first New Deal case was argued in the Supreme Court, the Solicitor General – the person whose principal responsibility it is to represent the interests of the United States – was out. By the time a more capable successor took office, the New Deal was in deep legal trouble.

The first New Deal statutes were as sweeping and as unprecedented as the national economic emergency they were designed to address. And they were enacted with an emergency mentality – quickly and decisively, but without much attention to fine points. The centerpiece was the National Industrial Recovery Act or NIRA. It was modeled after the country's successful economic mobilization efforts during the First World War. The NIRA called for industry representatives, together with a new government agency created to administer the Act (known as the National Recovery Administration, or NRA), to create what were know as "Codes of Fair Competition." Representatives of the oil industry, for example, would meet to establish standards and rules, regarding wages for oil workers, rates of oil production, oil prices, and the like. The President would then review and approve each industry's Code, thereby giving it the force of law. The NIRA also gave the President broad powers with respect to specific industries, including, for example, the power to prohibit the interstate transportation of oil in excess of state production limits.

From the perspective of physics, the NIRA presented a great challenge. Legislation that is rough hewn will almost always encounter greater judicial resistance – that is, greater friction – than legislation that, having been extensively debated and modified in the legislative process, emerges more polished. Judges find it easier to defer to legislative and executive authority where it is apparent that such authority has been exercised after proper deliberation. But the NIRA was hastily enacted, and it lacked substantive content. The Act provided for a system of industry-specific Codes, but it was not altogether clear what those Codes were going to require.

To make matters worse, the NIRA was not limited to a few critical industries; rather, it was enormous in scope, increasing the potential friction exponentially. By early 1934 there were literally hundreds of Codes, covering every industry from steel to corncob pipes. The sheer enormity of the enterprise made judicial resistance inevitable. And overcoming that resistance would take great force of legal argument.

But bringing that force to bear would be difficult, because the NIRA represented an extreme exercise of the constitutional power that would be at issue. One of the greatest legal hurdles confronting federal intervention in the economy at the time was judicial skepticism about the extent to which the Commerce Clause permitted the national government to regulate seemingly local activities. The NIRA did not represent a limited federal foray; it embodied wholesale federal intervention. Using this statute in a test case risked violating the rule that the first case should not be the most extreme application of the principle to be established.

So the government's first strategy was to avoid conflict – to resolve disputes amicable and avoid enforcement actions that could be used as vehicles for judicial invalidation of the Codes. This seemed sensible; after all, the Codes were premised on the theory that industry itself knows what it needs to recover. And, with time, administrators of the National Recovery Administration (NRA) could refine the Codes, smooth out any problems, and make up for the rough-hewn nature of the underlying legislation. A smooth-functioning Code, with a proven record of success, would provoke less judicial resistance.

But the government's ability to forestall legal challenges was limited. Failure to enforce the Codes against blatant violations would doom them. And even if the government declined to prosecute, opponents could file actions seeking a declaration of the Codes' invalidity. Inevitable, the government's hand was forced.

In cases consolidated before the Supreme Court as *Panama Refining v. Ryan*, 293 U.S. 388 (1935), the Fifth Circuit upheld the constitutionality of the NIRA. These were the "Hot Oil" cases – "hot" signifying the fact that the oil was produced and sold in violation of production quotas established either by state law or the Petroleum Code. Two oil companies challenged Section 9(c) of the NIRA, which authorized the President to prohibit the transportation of Hot Oil in interstate commerce. The plaintiffs also challenged the federal government's authority to establish Codes of Fair Competition addressing petroleum production , which they viewed as *intra*state activity.

On their face, the Hot Oil cases seemed to present a good test. Hot oil was definitely an interstate problem of national significance – a problem no State could possibly resolve. And Section 9(c) had been crafted to act directly on interstate transportation: it permitted the President to prohibit, and the federal government to prosecute, interstate shipments. Prosecutions under Section 9(c) thus would clearly be based on conduct that any sentient being would consider "commerce among the States." So the government acquiesced in Supreme Court review.

But the Justice Department lawyers had not done their homework before bowing to surface appeal. In preparing their brief on the merits, they discovered that the Petroleum Code Administrators had not used the year and a half following the Code's hasty drafting to smooth it out and polish it. Instead, they had made hash of it.

First, a critical portion of the Petroleum Code – the provision making production in excess of assigned quota an unfair and therefore unlawful practice – had been accidentally deleted. The government was forced to admit that some oil producers had been indicted under a nonexistent provision.

What was more, the Code itself could not be found. There was no official compilation, and the State Department, which was supposed to be repository of all orders, amendments, and interpretations, didn't seem to have them all. During oral argument, the attorney for Panama Refining described in theatric detail his unsuccessful efforts to find the governing regulation in the NRA's national headquarters, in its regional headquarters, and in its state headquarters – only to discover that "the only copy of the law was in the hip pocket of the federal agent working in the next field to the east."[6]

These embarrassments were particularly damaging because petitioners had challenged the Petroleum Code not only under the Commerce Clause, but also under an obscure doctrine known as non-delegation. That doctrine reflects the separation-of-powers principle that, while the President has all executive authority under the Constitution, only Congress can make legislative judgments. But the Court's non-delegation standard has never been demanding, and the Court had never used it before to invalidate legislation. The government's attorneys did not consider the non-delegation issue to be a serious threat. In the context of this dreadful case, however, that was a mistake. No matter how the non-delegation principle is expressed, the Supreme Court cannot help but notice the manner in which delegated powers are exercised. Where they are incompetently deployed, it is much easier – almost attractive – to find the delegation excessive. And here, the Court's perception of administrative incompetence had a powerfully magnetic effect.

At oral argument, the Justices asked Assistant Attorney General Harold Stephens for the specific facts found by the President in determining that Section 9(c) should be put into force. Stephens explained that the President had acted on the basis of a finding made by the Oil Administrator. But he was unable to produce or explain the finding. The Court asked whether there was any official or general publication of the orders. Stephens conceded that he was not aware of one. Pressed for "any way by which one can find out what is in these executive orders when they are issued, "Stephens replied: "I think it would be rather difficult."[7]

The newspapers reported that the Justices "seemed astonished."[8] In his diary, Secretary of the Interior Harold Ickes said, "It makes me sick when I think of the way [Stephens] handled our oil cases before the Supreme Court."[9] I think it make Harold Stephens sick as well to see how the Code Administrators had bungled their important responsibilities too.

So the United States had acquiesced in a case that made it look as if the government had taken a grand delegation of power and behaved shamefully. And barely a month after oral argument, the Court ruled, 8 to1, that Section 9(c) was an unconstitutional delegation of legislative power. The Court found that it could not reach the validity of the NIRA Codes since the government had accidentally deleted the provision plaintiffs challenged. And having resolved the case on non-delegation grounds, the Court did not address the merits of the Commerce Clause challenge.

That may have seemed felicitous. Congress, after all, could resolve the non-delegation problem by providing the President with more intelligible standards. And since the Court had not passed on the Codes, they could still be enforced, as NRA officials loudly proclaimed.

But the Court's decision did not bode well, because whatever one might have though about the Code themselves, the provision the Court had actually struck down, Section 9(c), did not look like much of a delegation. Section 9(c) gave the President authority to decide whether or not to prohibit transportation of oil produced in excess of quotas the States had set. That was a binary decision. It was not all that different from the authority delegated to this day to the Attorney General, who can establish guidelines for when she will, and will not, prosecute violations of law.

The real loss in the Hot Oil cases was an opportunity. The ideal test case for determining the scope of the federal government's commerce powers – one of the primary powers it needed to combat the Depression – had been lost. And, in the bargain, the government had done nothing to incline the Court favorably toward the NIRA.

Looking for another test, the government asked the Supreme Court to decide *Belcher v. United States*, a prosecution for violations of the lumber industry's Code. But it soon turned out that serious errors of administration had infected the Lumber Code too. The President had made no findings in approving the Code. He had purported to adopt and approve the findings of the Code Administrator, but the Administrator had never made any findings either. And that was by no means all. In fact, the errors of administration were so bad that Don Richberg, the NRA's director and principal cheerleader, was on record as stating that he had declined to approve either the legality or the wisdom of the Lumber Code. *Belcher* was so manifestly flawed that when Roosevelt's new Solicitor General, Stanley Reed, took office, he asked the Supreme Court to dismiss the government's own petition.

But no good deed goes unpunished. The Lumber Code Authority accused the Justice Department of treachery. Legislators expressed outrage. *The New York Times* roared: "The Administration's action leaves the NRA more at sea legally than ever before."[10] In the end, fury and frustration overwhelmed the new Solicitor General's careful approach and forced the government's hand in a case that was, if anything, worse.

The day after the Supreme Court dismissed *Belcher*, two articles appeared on page 39 of T*he New York Times*.[11] The first explained that the Supreme Court had granted the motion to dismiss *Belcher*; the second announced that the Second Circuit had struck down portions of the NIRA in a case called *Schechter Poultry,* which involved intentional violations of the Poultry Code. In small type, the newspaper reported that the government had actually won most of *Schechter*: the court of appeals had sustained 17 of the 19 convictions. But more newsworthy was what the government had lost.

Roosevelt responded viscerally, and foolishly. Without consulting the Solicitor General, Don Richberg immediately radioed the President to stress that failure to bring *Schechter* to the Supreme Court would "destroy [the] industrial recovery program."[12] The President's cryptic response was taken as affirming Richberg's determination to appeal. And so the very next day the government announced that it would seek Supreme Court review. Stanley Reed warned the President of *Schechter*'s weakness, but the decision had been made. *Schechter* became the test case for the NIRA.

It was the worst conceivable vehicle for exploring the scope of the federal commerce power. At that time, the Supreme Court's Commerce Clause precedents sanctioned federal regulation of intrastate practices only if they directly affected interstate commerce. *Indirect* effects on interstate commerce were considered an insufficient basis for federal regulation. But *Schechter*, unlike the oil or lumber cases, did not involved the production of important industrial goods that would directly affect interstate commerce as they entered its flow. It was a case about chickens – and in particular, chickens on the final and purely intrastate phase of their journey to the dinner table. As the government's brief explained, the chickens would be shipped into New York to their purchasers, who were called commission-men. And it was between the in-state commission-men and their in-state customers that the regulations challenged in *Schechter* applied.

One regulation, for example, required what was called "straight-killing," which meant that the purchaser had to accept the first chicken pulled from the coop. In other words, the Code banned free choice for purchasers of live chickens, and the Schecters were charged with unlawfully letting their customers select "individual chickens taken from particular coops."[13] That left the Solicitor General with the unenviable job of convincing the Court that unlawful chicken choosing in New York so directly affected interstate commerce as to warrant federal intervention.

Other provisions of the Poultry Code were not so obscure. One barred the sale of chickens unfit for human consumption; another established a minimum wage for slaughterhouse workers. But those regulations, no matter how important, would still be tested against Supreme Court cases declaring that Congress lacks the power to regulate an activity unless it has a *direct* effect on interstate commerce. If the regulations had addressed chickens going into interstate commerce, the burden of showing a "direct" effect might have been attainable. But these regulations addressed chickens that had already come to their final rest in New York. Anything that happened to them after that almost by definition would have only an indirect effect on interstate commerce.

Reed did the best he could. He emphasized that 96 percent of all poultry in New York came from out of state; that New York was the dominant market for live poultry; and that, by a peculiar mechanism, intrastate purchases in New York affect prices elsewhere. But with momentum already running against the NIRA, the Supreme Court was not about to be waylaid. At oral argument Justice Sutherland asked, "Is everything the defendants do, which affects the poultry, done after it had passed to them, after the poultry had come to rest in the slaughterhouse?" "It has," Reed answered.[14] And as if that answer alone had decided the Commerce Clause question, the Justices immediately turned to their new toy – the non-delegation doctrine.

Here, Reed seemed on stronger ground. The Poultry Code had been properly promulgated and published; there were findings by the President; there were no bizarre errors of administration. And whereas the delegation in Section 9(c) had not provided guidance as to when to prohibit interstate shipments, the NIRA did describe the sort of Code the President could approve – it could not promote monopolies or suppress small enterprises; it had to effectuate Congress's declaration of policy; and it had to be a code of "fair competition."

Reed's arguments on delegation would probably have sufficed to move a well-crafted, narrow piece of legislation through the courts. But invoking them to defend the NIRA was like trying to push a skyscraper with a toothpick. A loose standard like "reasonable rates" might be sufficient where a particular industry is being regulated, but something more definite was almost certainly going to be required of a statute that authorized the governmental regulation of almost every industry in the Nation.

And Reed's argument was thin, even for a toothpick. Seeking to impress the Court with the content of Congress's standards, he drew the Justices' attention to the similarity between "unfair competition" – a common-law standard used by the FTC to prohibit injurious economic activity – and the "fair competition" the NIRA Codes were supposed to mandate. But the Justices compelled Reed to admit that "fair competition" was whatever the industry had decided and the President had agreed to. And then the Justices forced Reed to concede that some actions that the FTC considered to be "unfair competition" – price fixing, for example – could actually be mandated by Codes of "Fair Competition." That was the end of Reed's argument on delegation.**15**

This time, the government lost 9-0, and on both grounds. The grant of authority to promulgate Codes of Fair Competition was held to be, in Justice Cardozo's words, a "delegation running riot." And the Court, knowing that Congress would use its decision as a road map for further legislation, also declared the Act beyond the commerce power. In the context of this awful case, straight killing, or underpaying slaughterhouse employees, was a bridge much too far for the Court of Charles Evans Hughes.

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So the NIRA was dead. The Administration had placed its defense of the Act on its most extreme applications, and the entire edifice had fallen as a result. In a single term, the law had shifted decisively against federal intervention in the economy.

Stanley Reed believed he could change that. The new Solicitor General (and future Supreme Court Justice) had earned the respect of President Roosevelt and his unofficial legal adviser, Felix Frankfurter, as the tireless general counsel of an important New Deal agency. Well aware of the challenge he faced as Solicitor General, Reed scrapped the staff he had inherited from the undistinguished James Biggs. In its place, Reed hired a now legendary roster of young attorneys – Paul Freund, Robert Stern, Henry Hart, Charles Wyzanski, Charles Horsky, Warner Gardner, Harold Leventhal – even a Frankfurter protégé named Alger Hiss. These Young Turks were confident they could turn the Court around. But inertia was working strongly against them, and it would take a powerful set of arguments and a well-planned campaign to slow, stop, and reverse the momentum.

Reed worked with a frenzy. Early in the 1935 term, he argued three New Deal cases in two weeks – and physically collapsed in the midst of the third. Page one of the *The New York Times* read: "Reed Collapse; AAA Cases Halted – Federal Pleader Is Taken Ill in Midst of New Hail of Questions by Judges."**16**

Reed's collapse reflected both his tremendous effort and the magnitude of the challenge he faced. Consider, for example, the first of the three cases the Court decided. *Butler v. United States*, 297 U.S. 1 (1936), involved a challenge to the Agricultural Adjustment Act. The Act sought to restore purchasing power to farmers, and to do that it relied not on Congress's authority over interstate commerce, but rather on its power to tax and spend. The government entered into contracts with farmers and paid them to reduce production. Reduced production halted the cycle of falling prices and falling demand. The contract payments were funded by a tax on mills and other processors of agricultural products. Unlike the NIRA, the AAA was not coercive. Farmers were free to enter into contracts with the government, and they were free not to. The Act did not involve a delegation to industry: the Secretary of Agriculture made the decisions. And the statutory directions to Secretary were specific: the Secretary was required to calculate the amount of reduced production to be purchased, how much to pay farmers for that reduction, and how much of a processing tax was required to fund those payments. Since the Constitution accords Congress the power to tax and spend "for the general welfare," the AAA seemed to fit comfortably within the constitutional text. And, unlike the Petroleum or Poultry Codes, the AAA had proven successful. After two years of smooth operation, the prices of corn, wheat, and cotton had risen by 50 percent.

The government stressed all these points, and more. Reed pointed out that, unlike the NIRA, the AAA had been carefully considered by Congress in session after session. And this was not a case about the scope of national power, he argued; it was about a company that didn't want to pay a tax. The company, he contended, could challenge the validity of the tax, but it lacked standing to challenge the way those revenues were used.

Reed's arguments slowed the Court down, but didn't stop it. At oral argument, he was pounded with questions about (what else?) the non-delegation doctrine. "How had the taxes been calculated?" he was asked. "What were the different line items in the calculations?" **17** In hindsight, all of this seems very odd, because the principles set forth in AAA were not merely intelligible – they were explicit. What the Court's focus on delegation showed was just how much momentum was at work. While Reed was trying to litigate the case as an unexceptional exercise of taxing power, the Supreme Court was still fulminating against the overreaching it had perceived in *Schechter* and the incompetence it had observed in *Panama Refining*.

Reed's argument demonstrated to the Court that its momentum could not find expression in a delegation rationale. But it found expression elsewhere. Six to three, the Supreme Court struck down the Act as an unlawful invasion of the domain of the States.

Although few seemed to recognize it at the time, there was a victory in principle – in an important principle – amidst that devastating loss. Today, Congress's constitutional power to tax and spend for an end it deems to be in the "general welfare" of the United States is largely unquestioned. But in the 1930s, there was substantial debate over whether that authority encompassed any public purpose, or was limited to exercises of the specific federal powers enumerated in the Constitution. During the constitutional conventions, Alexander Hamilton had espoused the former view, James Madison the latter. Reed championed Hamilton's position, and the Court accepted it.

But the Court went on to hold that, even if aiding agriculture were a matter of public welfare, the AAA invaded the reserved rights of the States. Congress, the Court held, could not directly regulate agriculture. And "it must follow," the Court continued, "that it may not indirectly accomplish those ends by taxing and spending to purchase compliance."**18**

That rationale was not satisfying. If Congress can tax and spend for the public welfare, why can it not do so for the purpose of raising agricultural prices if the national interest so requires? In retrospect, it seems clear that a majority of the Court was still on the trajectory charted by the Hot Oil cases and *Schechter*. Indeed, the majority opinion reads as if it were the broad and ill-conceived enforcement of the NIRA, not the narrowly defined spending of the AAA, that was at issue.,

But Reed had managed to alter the trajectory. Justice Stone, Brandeis, and Cardozo joined in a dissent that Justice Jackson later called “hardly paralleled in the century and a half of the Court’s existence for its scathing rebuke to the majority.”[19] Today, it is difficult to read that dissent without concluding that the majority simply got the case wrong. With the law’s momentum running so strongly against the congressional authority, however, it would take more time and effort to get the doctrine right. Not long after *Butler* was decided, Attorney General Cummings summoned Reed into his office and told him, “Stanley,” you might be about to set “a record that no other Solicitor General” has ever achieved. Expecting a compliment, Reed asked what the record was for. Cummings responded: “If you don’t watch out, you’re going to be the only Solicitor General that never won a case.”[20]

But three convergent strategies were emerging to turn the Court around. First, and most obvious, was the legislative retrenchment. As the Court struck down Acts, Congress would amend them just enough to respond to the Court’s rationale. For example, when the Court held that Congress had exceeded its authority under the Commerce Clause, Congress often amended the relevant statute to add a jurisdictional requirement that the conduct “affect interstate commerce,” thereby limiting the statute’s intended scope to constitutional applications. Similarly, when the Court struck down the processing tax in *Butler*, the Act was amended so that the contracts with farmers were funded not by a tax but rather by general Treasury revenues.

Legislative retrenchment worked in tandem with what in physics might be called forces of *diffuse pressure*. In the midst of his litigation defeats, Roosevelt won reelection by a landslide. His unparalleled popularity, and that of the programs he championed, could not help but exert pressure on the Court. And Roosevelt had a plan to convert the diffuse pressure of popular will into focused political heat. He and the Attorney General enlisted one of Stanley Reed’s assistants to find a method, short of constitutional amendment, to prevent the Supreme Court from overturning New Deal laws. The proposal that the assistant came up with – legislation to increase the number of Justices on the Supreme Court – eventually became Roosevelt’s Court-packing plan.

Once publicly announced, that plan would inevitably turn the heat up on the Court. But the Court’s response could not be predicted. A chemist will tell you that heat is a catalyst; it tends to promote and speed up change. But an engineer might tell you that the change – like firing pottery in a kiln – can sometimes harden the object rather than alter its outward appearance. The Court-packing plan had the potential to produce either effect. It might cause the Court to reconsider its prior views in order to preserve its integrity against a naked political assault. But it might instead harden the Court’s resolve to show that its judgments are dispassionate and legal, uninfluenced by politics.

So the Court-packing plan was kept secret while Roosevelt bided his time. He was convinced that if the Supreme Court kept striking down popular legislation, at some point the Nation would become so fed up that the public would support a Court-packing proposal. Stanley Reed, for his part, distanced himself from the plan. It seemed impolitic for the Solicitor General, a man with such a close relationship to the Court, to be plotting against it. Instead, Reed maintained his focus on setting up an ideal set of cases for turning the Court around. His opportunity came in the field of labor relations.

From the moment the Wagner National Labor Relations Act was passed in July 1935, the staff of the agency Congress created to implement it, the National Labor Relations Board, understood that its authority to address labor disputes would be subject to challenge under the Commerce Clause. Unlike the malad-ministered New Deal agencies I mentioned earlier, the Board developed a plan.**21**

To locate and promote appropriate test cases, the Board identified the factors that would make its exercise of authority easiest to sustain. Most critical was the relationship between the industry and interstate commerce. Those industries in which employees were involved in interstate commerce itself – trucking or shipping, for example – were prime candidates for enforcement.

But victory in those cases would gain little ground, so next in line were cases in which employees worked on, but did not substantially alter, products that flowed in commerce. The Board focused on stockyards and grain elevators, industries that were not engaged in "manufacture," or "production" – activities the Supreme Court considered local – but rather operated as facilities in the stream of interstate commerce.

Third came the industries that *affected* commerce – industries that produced goods for interstate sale and shipment, and businesses that received those goods. But the Board was not going to risk its jurisdiction by focusing on small, local businesses that merely received goods that had once been in interstate commerce – businesses like Schechter Poultry. Instead, it trained its attention on automobiles, steel, textiles, and rubber – industries that were critical to the national economy and dispersed in their activities.

Finally, the Board looked to cases involving potential strikes. Congress's ability to address impediments to interstate commerce might seem less problematic than a power to address mere effects on commerce.

From the application of those criteria arose a group of potential test cases. By filing petitions for rehearing in some cases but not others and by negotiating with opposing counsel regarding stays and extensions, the NLRB and the Solicitor General managed to ensure that five of those cases would be presented to the Court in proper succession.

There was, first, a case involving the unionization of drivers and garage workmen in an interstate bus company: *Washington, Virginia and Maryland Coach Co. v. NLRB*, 301 U.S. 132, 142 (1937). There was next a case involving the Associate Press, a hub of interstate distribution: *Associated Press v. NLRB*, 301 U.S. 103 125-126 (1937). There were two cases against large manufacturers of important products in industries where production was threatened by strikes. One suit was against Jones & Laughlin Steel Corporation, an industrial behemoth with integrated operations in several states: *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 26 (1937). The other was against Fruehauf Trailer Company, which sold 80% of its products out of state: *Fruehauf Trailer Co. v. NLRB*, 301 U.S. 49, 53 (1937). Finally, there was a case against a small garment maker, Friedman-Harry Marks, which had integrated production facilities in two States and operated in an industry plagued by unrest: *NLRB v. Friedman-Harry Marks Clothing Co*., 301 U.S. 58, 59-60 (1937).

Fortuity provided yet another good case, *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), in which the United States participated as *amicus curiae* to defend the constitutionality of the Railway Labor Act – a sort of mini-Wagner Act specific to railroads. Argued first, this case was the easiest. It seemed intuitively obvious that Congress should be permitted to regulate labor issues for such a clearly interstate enterprise. But the case did present a challenge, because the Railway Labor Act covered not only employees who actually operated the trains in interstate commerce, but also employees who worked only in local shops, repairing trains and making parts. Because these so-called "back-shop" employees were engaged in manufacture and production, there activities where not "commerce" as the Supreme Court had construed that term. And the effect their activities had on interstate commerce was indirect.

But *Virginia Railway* presented a good vehicle because the law did not need to move far. The Court had already upheld Congress's power to regulate labor relations between interstate railroads and their engineers and conductors; and it had even addressed Congress's power over labor relations between railroads and clerks who sold tickets for interstate travel. Extending federal power from local railway clerks to local back-shop employees represented a small step.

Indeed, it was not only small, but also undramatic, for the government was seeking to regulate in a single industry, and not one bearing a tenuous connection to interstate commerce. Rather, Congress was seeking to address a problem that could obstruct interstate commerce altogether. Labor unrest by back-shop employees could just as easily bring a railroad to a standstill as could unrest involving employees who actually operated the trains.

In addition, the potential sources of friction were minimal. The contours of the Railway Labor Act had been smoothed by judicial construction over years of application; and the Act had proven history of preventing labor conflicts that, in earlier times, had cripples interstate railways.

And as a final flourish, in the context of this focused test case and the five others that immediately followed it, the President announced his Court-packing plan.

Under these circumstances, legal doctrine was almost bound to give way – and it did. In deciding *Virginian Railway* the Court did not overrule its long-standing distinction between indirect and direct effects. It just ignored the doctrine. The activities of the back-shop employees, the Court explained, "have such a relation to the other confessedly interstate activities of the petitioner they all are to be regarded as part of them."**22** The possibility of a labor dispute, the Court continued, created a

> substantial [danger] of interruption of the transportation service. The cause is not too remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible.**23**

Suddenly, for facilities of interstate commerce at least, the test was no longer direct versus indirect effects, but remoteness, tenuousness, and the impact on commerce. The Court's opinion was unanimous.

With that decision in March 1937, it was clear the Court had taken a step – a small step to be sure – toward a more expansive view of the federal commerce power. Yet to come were the decisions in the other five cases. They too, though, had principles of physics working in their favor. Although the Wagner Act was much broader legislation than the Railway Labor Act, Congress had included a jurisdictional provision that limited its reach to unfair labor practices "affecting" interstate "trade, traffic, commerce, transportation, or communication." Therefore, a decision upholding the Act's application in a particular context would not necessarily open every issue to federal regulation; only those where the necessary effect on commerce could be found.

In addition, friction had been minimized: the NLRB's findings were clear, coherent, and detailed. And again, the movement requested was not much beyond what had been required in *Virginian Railway*. If the government could regulate local labor practices to prevent strikes at an interstate railroad, it should be able to do likewise with respect to the Associated Press, which operated as an interstate distributor of news. And from there it was but another short step to Jones & Laughlin, the steel company with integrated operations in many States. And then it was only one further step to *Fruehauf Trailer* and *Friedman-Harry Marks*. At oral argument in each case, the government stressed its unique circumstances and explained the sufficiency of the relationship to interstate commerce. Charles Wyzanski's summation in the last of the cases, which involved the small garment maker, masterfully laid out the government's incremental theory in each.**24**

Two weeks after the Supreme Court decided Virginian Railway it ruled for the government of each of the five NLRB cases. Using Jones & Laughlin as the lead opinion, the Court explained that Congress had "plenary" power to protect interstate commerce no matter what the source of the dangers that threaten it. "The question is one of degree," the Court held:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.**25**

The Court expressly declined to analyze the question of direct and indirect effects in what is now called "an intellectual vacuum." " When industries organize themselves on a national scale," the Court pronounces, "their relation to interstate commerce" becomes "the dominant factor in their activities."**26** Consciously extending its two-week-old decision in *Virginian Railway*, the Court asked rhetorically: "Of what avail is it to protect the facility of transportation, if interstate commerce is throttle with respect to the commodities to be transported?"**27**

Thereafter, the law built more and more momentum in its new direction. Five years later the Court formally abandoned the indirect/direct effects distinction. In *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Court held that even purely local activity "may be reached by Congress if it exerts a substantial economic effect on interstate commerce, whether such effect is what may at some earlier time have been defined as 'direct' or 'indirect.'" That standard survives today.

* * *

It is fair to ask, in hindsight, whether, if the principles I have called the physics of advocacy had been applied from the outset, the New Deal would have avoided the defeats it suffered in its early years. The answer to that question is unknown and unknowable. Many theories have sought to explain why the Court's jurisprudence moved as it did. But we all see the world by our own lights, and by mine the labor cases would probably have been decided the same way if *they* had been the test cases for federal power rather than Hot Oil and *Schechter Poultry*.

There is another line of New Deal cases – decided in favor of the government before the election of 1936 and the Court-packing plan – that strongly supports my thesis. The so-called Gold Clause cases concerned the Administration's efforts to battle spiraling deflation by devaluing the dollar by 41 percent, thus creating a 59-cent dollar. Before Congress devalued the dollar in 1934, its value was pegged at about 25 grams of gold; after devaluation, it was equivalent to roughly 15 grams.

For years, sophisticated institutions had anticipated a possible currency devaluation. To protect themselves, many had included in their written contracts clauses calling for payment not in dollars, but rather in a specified weight of gold coin (25 grams per dollar owed), or its currency equivalent. So long as the dollar and gold maintained parity of value, those clauses sat dormant. But when the dollar deflated relative to gold, these gold clauses threatened many obligors with financial ruin. Debtors, whose income was devalued dollars, would be required to discharge their obligations in the equivalent of pre-1933 dollars; a debt of $100 would instantly require $169 to pay it off. More important, so many obligations had gold clauses – somewhere between $100 billion and $500 billion worth – that their enforcement itself threatened the entire purpose of the devaluation. (To place these numbers in perspective, consider that the Nation's gold reserves then totaled a mere $4 billion, and world reserves were perhaps $11 billion.)

Anticipating these problems, just prior to devaluing the dollar, Congress prohibited the possession of gold and barred enforcement of gold clauses. A fundamental constitutional question thus presented itself: was the congressional invalidation of gold clauses an impairment of contracts, a violation of due process, or a taking or private property? A "no" answer imperiled the good faith and credit of the United States as a reliable actor on the world economic stage. A "yes" answer risked placing thousands into financial ruin and jeopardizing the Administration's entire fiscal recovery plan.

In several respects, the Gold Clause cases were the antithesis of the Hot Oil cases (in which decisions were announced, coincidentally, the day before the Gold Clause cases were argued). First, unlike the NIRA, the law at issued in the Gold Clause cases was narrow and targeted, and it rested on well-established constitutional authority. This legislation was not an effort to give the President, through roving boards and commissions, the power to regulate the spectrum of economic life. Instead, it addressed an issue the federal government is unquestionably empowered to regulate – the value and usage of currency. Under Article I, Section 8 of the Constitution, Congress is expressly empowered "[t]o coin money [and] regulate the value thereof."

Second, there was natural attraction to resolving the case in favor of the government. Whereas the NIRA had proven ineffectual, the gold clause prohibition and devalued dollar had been accepted in the year that elapsed between the devaluation and Supreme Court review. Economists predicted chaos if devaluation were upset.

Third, and perhaps most important, the Gold Clause cases were presented in an orderly fashion that permitted momentum to work in the government's favor. There were, in fact, four cases. Two of the cases involved the invalidation of gold clauses in private contracts between commercial parties. Two concerned the invalidation of gold clauses in government obligations.

Agreeable to principles of momentum, the cases were argued in ascending order of difficulty.

First came the two cases involving private contracts: *Norman v. Baltimore & Ohio RR and United States v. Bankers Trust Co.,* 294 U.S. 240 (1935). In those cases, the government's position was not unattractive. With respect to private contracts, the government was in the position of a disinterested third party. Congress had no commercial stake in invalidating gold clauses in private contracts. Instead, it acted as an unbiased sovereign seeking to control the value of currency and to prevent private contracts from undermining that effort. Five members of the Supreme Court had little difficulty concluding that invalidation of private gold clauses was within Congress's power as necessary and appropriate to the exercise of its power to regulate the value of currency. To conclude that Congress could not invalidate private contracts that interfered with the exercise of that sovereign power, the Chief Justice wrote for a majority of the Court, in effect would permit private contracts to nullify governmental power.**28** The law thus began to move in the government's direction.

The government contract cases, argued immediately after the private contract case, were more difficult. It is one thing to say that the government, as a disinterested governing body, can invalidate contracts by private parties where those contracts interfere with the exercise of sovereign authority. But it is quite another thing to say that the government can invalidate its own sovereign promises. Yet that was what the government had done with respect to its own obligations, which often contained gold clauses. The Justices were clearly repelled by the argument that the government could breach its promises. At the oral argument, Chief Justice Hughes hounded Assistant Solicitor General Angus MacLean: in its hour of need during the First World War the United States had borrowed money by issuing Liberty Bonds to finance the war effort, and it had promised to repay those loans in gold; what was the source of Congress's authority to break that promise?**29** There were pragmatic forces at work here too. The Chief Justice in particular feared that undermining "the binding character" of the government's promises "might have a serious effect on the public attitude toward government bonds in the future."**30**

Anticipating that concern and the resistance it created, Solicitor General Reed and Attorney General Cummings developed an argument so narrow and so fact-bound that it would not trigger the concern at all. And it was also so narrow and fact-bound that its acceptance would not move the law perceptibly. The argument they devised was the greatest of all technicalities – but it could save the legislation in those desperate times. And with respect to the Gold Clause cases, it was the result, not the principle, that mattered.

The argument came to be known as the "Malolo Doctrine," named after the ship on which Reed and Cummings were traveling from Hawaii when they dreamed it up. The basic idea was that the invalidation of the gold clauses had not caused the creditors any harm. Superficially, the argument was grossly counter-intuitive. If the gold clauses were upheld, a creditor who had made a $100 loan would receive $169; if they were invalidated, the creditor would receive only $100. How could such a great difference in payment be no harm.

Consider, however, the first of the two government cases. In *Nortz v. United States,* 294 U.S. 317 (1935), the plaintiff had attempted to trade in his gold certificates – dollars that were backed by gold held in the Treasury – for gold dollar coins before the dollar had been devalued. But at the time Nortz turned in his gold certificates, Congress had already outlawed the possession of gold coins, banned their export, and required all gold dollar coins to be traded in at face value for paper dollars. Thus, if the government had paid Nortz $100 in the pre-devaluation, 25-gram gold coins, Nortz would have been immediately required to trade that $100 in coins into the Treasury for $100 worth of paper dollars. Those paper dollars later would then have been subject to devaluation just like all other paper dollars. Nortz, the government thus argued, had not suffered any damages as a result of the government's refusal to pay him in gold coins. His injury instead resulted from the fact that the government had required gold dollar coins to be traded in for paper dollars and then had deflated the currency – two things, unrelated to the contract, that the government had the power to do. The Supreme Court accepted the argument, and the law took a very small, almost imperceptible, technical step, again in favor of the government's position.

The momentum generated was crucial to the Court's decision in the final, and most important, case, which posed a much more difficult application of the no-damages theory. At issue in *Perry v. United States*, 294 U.S. 330 (1935), were not gold certificates, which were themselves currency, but rather Liberty Bonds – government obligations sold during World War I, which the government had solemnly pledged to redeem in gold coin weighing 25 grams for every dollar of debt. Moreover, the plaintiff in *Perry*, unlike the plaintiff in *Nortz*, had attempted to cash the bonds after the dollar had been devalued; thus, payment in pre-devaluation gold coin, as required by the bond, would have brought him gold that, on the world market, was worth substantially more than the deflated paper dollars he was offered, and more than the 15-gram gold dollars those paper dollars represented.

But the Court held in favor of the government nonetheless – causing the Nation, or at least its economists, to breath a collective sigh of relief. In *Nortz* and the two private contract cases, the Court had gone three-quarters of the way toward upholding the legislation and avoiding economic chaos; momentum seemed to carry it the rest of the way. There was little resistance because the result could be reached without undermining public trust in the credit of the United States. In fact, eight members of the Supreme Court expressly agreed, in deciding *Perry*, that the United States could not default on its obligations to pay in gold without being liable in damages. But the five members of the Court, following reasoning similar to that in *Nortz*, held that, on the specific facts created by the Great Depression, the plaintiff had suffered no damage.

First, the Court noted that even if Perry had been paid in pre-devaluation gold dollars, he would not have been permitted to sell or export them. In fact, there was by then no longer a market for gold in the United States, its possession and export having been outlawed. Thus, the plaintiff had not shown that his buying power had in fact been reduced by his receipt of paper dollars rather than gold coins, as the latter could not be used legally in any event.**[31]**Second, the Court asserted that enforcing the gold clause would unjustly enrich the plaintiff.**[32]** Recall that one of the effects of the depression was *deflation* – dropping prices. If the plaintiff recovered $1.69 for every dollar owed, in an economy of falling prices, he would end up with far greater buying power than if he had been paid dollar for dollar, in pre-devaluation currency, before the Depression. The purpose of the gold clauses, the Court seemed to speculate, was not to permit bondholders to profit from an increase in the value of gold; it was to protect them from a fall in the value of the dollar. Since the devaluation of the dollar merely offset an increase in the dollar's buying power caused by the Depression, the bondholders in essence got everything they had bargained for – the money they receive had precisely the buying power the gold clauses seemed to guarantee them. The purpose of the gold clauses was thus fulfilled, the Court decreed, and the bondholders had suffered no damage.

It has been rightly pointed out that this reasoning is not entirely persuasive. The fact remains that, if Congress had not invalidated the gold clauses and the terms of the contract had been literally fulfilled, the plaintiff would have gotten more than the government ultimately ended up giving him; and it may well have been that the holders of the Liberty Bonds had contracted for a windfall. But even if the force of the Malolo argument was not itself overwhelming, forces of physics working strongly in its favor – in particular, momentum from the first three cases – proved persuasive enough.

I will not belabor the point, and I do not mean to overstate it. Rigid determinism in legal history is a bloodless exercise, and it's just plain no fun. Still, I think history validates a more modest, but nonetheless important thesis. By taking careful account of the physics of advocacy in selecting cases to bring before the Supreme Court, the Solicitor General best serves his country by assisting the Court in its most important function – providing for the orderly development and progress of the law.

Thank you.

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3 Erwin N. Griswold, *Ould Fields, New Corne* 109 (1992).

4 Warner M. Gardner, *Pebbles From the Path Behind* 63, n.1 (1989).

5 Lincoln Caplan, *The Tenth Justice* 63 (1987).

6 Gardner, *supra* note 4, at 57.

7 II Marlo J. Pusey, *Charles Evans Hughes* 734 (1952).

8 U.S.L.W., Dec. 18, 1934, at 1; *N.Y.Times*, Dec. 12, 1934, at 27.

9 Harold L. Ickes, *The Secret Diary of Harold L. Ickes* 247 (1853).

10 See *N.Y. Times*, Mar. 28, 1935, at 20; *N.Y. Times*, Mar. 31, 1935, at 18; *N.Y. Times*, Mar. 30, 1935, at 1.

11 *N.Y. Times*, Apr. 2, 1935, at 39.

12 Radioprogram to the President, Apr. 3, 1935 (Richberg Papers, Library of Congress, Box 45) (Reed Papers, Box 7, Schechter Poultry, Folder 1).

13205 U.S. at 527-528.

14 Tr. Oral Arg., May 2, 1935, at 8.

15 Tr. Oral Arg., May 2, 1935, at 11-13.

16 *N.Y. Times*, Dec. 11, 1935, at 1, 19.

17 See Tr. Oral Arg. Dec. 9, 1935, at 27-28, 31-42 (Reed Papers, Box 10, Folder U.S. v. Butler [Hoosac Mills] #2).

18 279 U.S. at 74.

19 R. Jackson, *The Struggle for Judicial Supremacy* 134-135 (1941).

20Columbia Oral History Project 183; see also John D. Fasset, *New Deal Justice* 116 (1994).

21 See Jeremy Irons, *The New Deal Lawyers* 240-241 (1993).

22 300 U.S. at 556.

23 *Ibid*.

24 Tr. Oral Ar. 171-173.

25 305 U.S. at 37.

26 *Id*. At 36.

27 *Id*. At 37.

28 294 U.S. at 305, 307-311.

29 *N.Y.Times*, Jan 1, 1935, at 14, col. 1.

30 II M. Pusey, *supra* note 7, at 736.

31 294 U.S. at 357.

32 *Id*. At 357-358.
