

“Second-Place Mo”  
and  
“The Switch in Time”

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Government 20 Honors

## Second-Place Mo

“We have got to win Wisconsin or our campaign is in trouble,”<sup>1</sup> explained presidential candidate Mo Udall before the 1976 Wisconsin Democratic primary. Udall knew Wisconsin was his last chance to salvage his run for president, and he went to bed the night of the primary thinking he had won. Yet at 2 am, Jimmy Carter, from Plains, Georgia, was waving the early edition of *The Milwaukee Sentinel* with the headline “Carter Upset By Udall”<sup>2</sup> – and he was proclaiming himself the victor.

Though Carter, the more conservative candidate, received one percent of the vote in a January 1976 poll, he went on to become president.<sup>3</sup> Udall was the “favorite candidate of the left-wing establishment,”<sup>4</sup> according to Elaine Kamarck, but at the end of the race he got a new nickname: “Second-Place Mo.”<sup>5</sup> While five states still used a winner-take-all system to allocate delegates to the Democratic National Convention in 1972, party rules abolished this system in 1976.<sup>6</sup> This change made candidates focus on winning as many votes as possible, not just states. The party added nine more presidential primaries in 1976, bringing the total to 30.<sup>7</sup> The Iowa caucuses, however, were in the media spotlight<sup>8</sup> and by the time the Udall campaign realized Iowa would be important, it was too late.<sup>9</sup> Carter’s win gave him momentum, while Udall was stuck in second place.

The Wisconsin primary could have been the turning point for Udall’s campaign. The state contained the ideal combination of voters: “a mix of progressive thought, farm vote, and ethnic blue-collar big-city vote,” according to Donald Carson and James Johnson.<sup>10</sup> While early polling showed him far behind Carter, the race tightened as the primary drew near.<sup>11</sup> Wanting to make a final push, Udall did not have the funding to

compete with Carter's TV commercials.<sup>12</sup> The night of the primary, the election returns were leaning in his favor, and Udall declared himself the winner at 10:30 pm.<sup>13</sup> But the local paper, as well as ABC and NBC had reported the results too early "on a basis of computer projections," according to *The New York Times*.<sup>14</sup> Carter won 37 percent of the vote, compared to Udall's 36 percent.<sup>15</sup> The next morning, Udall addressed the press: "I'd like to ask each of you to take those statements I made last night and in every instance where you find the word 'win' strike it out and insert the word 'lose.'"<sup>16</sup>

Still, Udall did not give up. As Peter Goldman wrote, his showing in Wisconsin and coming in second in New York the same day kept Udall's candidacy alive "with a respirator."<sup>17</sup> It didn't last much longer. After losing all 22 primaries he competed in and coming in second seven times,<sup>18</sup> Udall released his 329.5 delegates to vote for whomever they chose. He endorsed and campaigned for Carter. In a *Washington Post* editorial years later, Mark Shields explains, "Mo lacked that all-consuming conviction that the fate, fortune and future of the planet depended upon his being elected."<sup>19</sup>

After the election, the Democratic National Committee amended primary and caucus rules to decrease the impact of the first contests and shorten the primary season.<sup>20</sup> Udall advocated reform: "These early primaries really have become media events and there's a momentum which develops out of them that, to a considerable degree, does not equalize the power of Democrats in each of the different states."<sup>21</sup> The new rules let New Hampshire and Iowa to have earlier contests, however it caused other states to hold their primaries or caucuses as early as was allowed.<sup>22</sup> Today, the two first states still generate momentum and media coverage and the nominating process lasts as long as ever.

## The Switch in Time

“The switch in time that saved nine.”<sup>23</sup> While an intriguing explanation for Justice Owen Roberts’s change of position concerning New Deal legislation, he did not cast his vote with the majority in *West Coast Hotel Co. v. Parrish*<sup>24</sup> to prevent President Roosevelt from expanding the Supreme Court from nine to 15 justices. Appointed in 1930 by President Hoover after John J. Parker failed to be confirmed by the Senate by one vote, Justice Roberts was a swing vote. In cases heard in the beginning of his term, he sided with a group of four conservative justices – known as the Four Horsemen – to strike down laws “aimed at relief and recovery and sought reform in the country's social and economic systems,”<sup>25</sup> according to *The Philadelphia Inquirer*.

With Roberts and Chief Justice Charles Evan Hughes usually in the majority, the Court nullified the most legislation it ever has in a single year.<sup>26</sup> FDR and Congress were not pleased. On February 5, 1937, after being reelected by a landslide, President Roosevelt announced a plan to “pack the court” by allowing the president to appoint one new member every time a justice declined to retire more than six months after his seventieth birthday.<sup>27</sup> FDR claimed the justices were over-worked by serving at an old age, but his real goal was to appoint liberal justices to uphold New Deal legislation.<sup>28</sup> Many members of Congress supported the proposal.<sup>29</sup>

FDR discovered he did not need to expand the Court for it to uphold his legislation. Just over a month after he announced his plan, the Court reversed its previous rulings and upheld a Washington state law setting a minimum wage for women.<sup>30</sup> Originally deemed a violation of the “freedom of contract”<sup>31</sup> in *Adkins v.*

*Children's Hospital*,<sup>32</sup> Justice Roberts joined the Court in reaffirming the ruling in *Morehead v. New York*.<sup>33</sup> His "change of heart" in *Parrish* was attributed to the threat of the court-packing plan, however the first case votes were cast before FDR's announcement.<sup>34</sup> Roberts later asserted that he voted with the majority in *Morehead* "only because New York had not presented the issue in the right manner,"<sup>35</sup> according to William E. Leuchtenburg. Roberts was not an opponent of all New Deal legislation prior to *Parrish*. He wrote the majority opinion in *Nebbia v. New York*,<sup>36</sup> a 1934 case upholding regulations on the price of milk.<sup>37</sup> With Roberts in the liberal majority, the Court went on to uphold various New Deal statutes,<sup>38</sup> rendering Roosevelt's plan unnecessary.

A new reason to expand the Court emerged when conservative Justice Willis Van Devanter resigned. For political reasons, FDR was expected to appoint Senator Joe Robinson, a 65-year-old conservative.<sup>39</sup> To keep a liberal majority, the court-packing plan had to go through. Public approval of the plan was down to 41% and Congress was wavering.<sup>40</sup> In an attempt to compromise, the legislation was rephrased to allow the president to appoint one additional justice per year only after a justice turned seventy-five.<sup>41</sup> Once again, the bill gained support. Robinson campaigned for its passage, literally till his death.<sup>42</sup> The court-packing bill was returned to committee and died.<sup>43</sup>

Before joining the court, Felix Frankfurter called Justice Roberts's decision in *Parrish*, a "somersault."<sup>44</sup> Roberts's ideological shift lasted throughout his tenure, however it was not a change designed to prevent the Court from expanding. The new liberal majority protected programs that are still in effect today, such as Social Security.<sup>45</sup>

According to Leuchtenburg. “these rulings marked a historic change in constitutional doctrine.”<sup>46</sup> Thus, it is known as “the Constitutional Revolution of 1937.”<sup>47</sup>

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<sup>1</sup> Donald W. Carson and James W. Johnson, *Mo: The Life and Times of Morris K. Udall* (Tuscon, AZ: The University of Arizona Press, 2001), 163.

<sup>2</sup> R.W. Apple Jr., “Jackson, Carter and Udall Turn to Pennsylvania,” *The New York Times*, 8 April 1976, 77.

<sup>3</sup> Elaine C. Kamarck, *Primary Politics: How Presidential Candidates Have Shaped the Modern Nominating System* (Washington, D.C.: Brookings Institution Press, 2009), 55.

<sup>4</sup> Kamarck 54.

<sup>5</sup> Carson & Johnson 171.

<sup>6</sup> Kamarck 82-83.

<sup>7</sup> Kamarck 53.

<sup>8</sup> Kamarck 53.

<sup>9</sup> Carson & Johnson 161.

<sup>10</sup> Carson & Johnson 164.

<sup>11</sup> Carson & Johnson 164.

<sup>12</sup> Carson & Johnson 164.

<sup>13</sup> Carson & Johnson 165.

<sup>14</sup> Apple 77.

<sup>15</sup> Apple 77.

<sup>16</sup> Mark Shields, “Mo Udall’s Monuments,” *The Washington Post*, 23 April 1991, A19.

<sup>17</sup> Carson & Johnson 166.

<sup>18</sup> Carson & Johnson 172.

<sup>19</sup> Shields A19.

<sup>20</sup> Kamarck 54.

<sup>21</sup> Kamarck 54.

<sup>22</sup> Kamarck 57.

<sup>23</sup> Kermit L. Hall, *The Oxford Guide to Untied States Supreme Court Decisions* (New York, NY: Oxford University Press, 1999), 329.

<sup>24</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>25</sup> Joseph S. Kennedy, “Owen J. Roberts and the New Deal,” *The Philadelphia Inquirer*, 1 May 2005, L04.

<sup>26</sup> William E. Leuchtenburg, *The Supreme Court Reborn* (New York, NY: Oxford University Press, 1995), 133.

<sup>27</sup> Leuchtenburg 133-134.

<sup>28</sup> Leuchtenburg 139.

<sup>29</sup> Leuchtenburg 135.

<sup>30</sup> Leuchtenburg 142.

<sup>31</sup> Hall 329.

<sup>32</sup> *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>33</sup> *Morehead v. New York*, 298 U.S. 587 (1936).

<sup>34</sup> Hall 330.

<sup>35</sup> Leuchtenburg 177.

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<sup>36</sup> *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>37</sup> Kennedy.

<sup>38</sup> Leuchtenburg 178.

<sup>39</sup> Leuchtenburg 145.

<sup>40</sup> Leuchtenburg 146.

<sup>41</sup> Leuchtenburg 148.

<sup>42</sup> Leuchtenburg 151-152.

<sup>43</sup> Leuchtenburg 153.

<sup>44</sup> Christopher Shea, "Supreme Switch; Did FDR's Threat to 'Pack' the Court in 1937 Really Change the Course of Constitutional History?" *The Boston Globe*, 4 December 2005, D1.

<sup>45</sup> Leuchtenburg 142.

<sup>46</sup> Leuchtenburg 142.

<sup>47</sup> Leuchtenburg 162.