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ATTRIBUTION TIME: CAL TINNEY’S 1937 QUIP, “A SWITCH IN TIME’LL SAVE NINE”

JOHN Q. BARRETT*

Abstract

In the history of the United States Supreme Court, 1937 was a huge year—perhaps the Court’s most important year ever. Before 1933, the Supreme Court sometimes held that progressive policies enacted by political branches of government were unconstitutional. Such decisions became much more prevalent during President Franklin D. Roosevelt’s first term, from 1933 through 1936. In those years, the Court struck down, often by narrow margins, both federal “New Deal” laws and state law counterparts that sought to combat the devastation of the Great Depression.

Then, in early 1937, President Roosevelt proposed to “pack”—to enlarge—the Court, so that it would become supportive of New Deal laws. Within weeks, the Supreme Court began to change course, announcing broader constitutional interpretations of federal and state government legislative powers.

The Court’s switch took the air out of the Court-packing balloon. This change became known as “the switch in time that saved nine.” That line first appeared in 1937. It was repeated by many, especially in Washington. It has been quoted ever since. Just who coined it has been debated but never established.

Until now.

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Introduction

Everyone who studies the United States Supreme Court knows that 1937 was a momentous year. It marked a dramatic change in the Supreme Court’s course—until 1937, the Court was an active check on progressive legislation, but then it began to step out of the way. Almost immediately, the public, including legal scholars and historians, began to study, teach, and debate what happened at the Court in 1937 when those events were fresh, and those discussions have continued ever since.1 Because that year brought such major changes in how the Supreme Court interprets the U.S. Constitution, we likely will always be writing and talking about 1937.

In the decades leading up to that pivotal year, at least five justices viewed themselves as charged with enforcing constitutional limits on the powers of Congress and state legislatures. This was especially true from 1933 through 1936—President Franklin D. Roosevelt’s first term in office and the four “New Deal” years immediately preceding 1937. Those years marked a period of the Court striking down, often narrowly, both federal New Deal laws and state law counterparts that sought to combat Depression devastation.

Then, in February 1937, President Roosevelt proposed to pack the Supreme Court. He sought legislation that would add new seats to the problematic nine-justice Court. He then would have added New Deal-minded justices, transforming the old Court into a new one that would uphold progressive federal and state laws.

Within weeks, and with no change in Court membership, the Court changed course. In a series of decisions, it announced much broader constitutional interpretations of federal and state government legislative powers.

That Court switch took the air out of the Court-packing balloon. The Court’s change was—and here is the quip that everyone learns in law school, if not earlier—“the switch in time” that “saved nine.”

That line appeared in 1937. It was repeated by many, especially in Washington. It has been quoted ever since. Just who coined it has been debated and never established.

Until now.

Before the Switch: President Roosevelt’s Court-Packing Plan

Law professors, law students, lawyers, and many others know the general story of President Roosevelt’s “Court-packing” proposal. During his first term, the Supreme Court invalidated a number of progressive federal and state laws. In November 1936, President Roosevelt was nonetheless reelected in a landslide. In early 1937, just weeks after his inauguration, he proposed that Congress pass “Court reform” legislation. The proposal included pension incentives designed to induce older, anti-New Deal justices to retire. Roosevelt also sought a new law that, in the event that any justice over age seventy—as six of the nine Justices then were—chose not to retire, would create a new Supreme Court seat alongside that justice. This proposal ostensibly assisted each “aged” justice by providing either for his comfortable retirement or for a new colleague who would assist him in getting the Court’s work done. In fact, the proposal was Roosevelt’s transparent effort to create immediate opportunities to appoint more New Deal-friendly justices who would become the new Court majority.

In the end, Congress refused to pass President Roosevelt’s proposal to pack the Court. He “lost the battle” but nonetheless “won the war” against


4. Id. at 53–54 (discussing “the question of aged or infirm judges” throughout the federal courts).
the Supreme Court because, during the months following his proposal, the Court changed course in pending cases and began to hold that progressive federal and state laws were constitutional.

Justice Roberts Saves Nine

Justice Owen J. Roberts, appointed to the Supreme Court in 1930, was perhaps the leading actor in these Court events. Roberts, a Philadelphia Republican, came to national prominence in the 1920s as a prosecutor of Teapot Dome corruption. In 1930, President Hoover nominated Roberts to serve on the Court. He became a generally “conservative” justice who often was in the majority, sometimes as the decisive vote, in Court decisions holding New Deal statutes and related state laws unconstitutional. These included decisions that struck down the federal ban on interstate oil shipments above federal quotas (8-1), the federal pension system for railroad workers (5-4), the federal law authorizing the president to regulate business and labor competition (9-0), the federal law limiting banks’ powers to repossess bankrupt farms (9-0), the federal law providing price supports to farmers (6-3), the federal law setting coal prices (5-4), the federal law reducing debts of bankrupt businesses (5-4), and New York State’s minimum wage law for women (5-4).

As 1937 began, this Supreme Court record caused many to expect that the justices would soon strike down additional progressive laws, such as the National Labor Relations Act and the Social Security Act, that were being challenged in federal court.

Then, in early February 1937, President Roosevelt proposed to pack the Court.

Within eight weeks of that announcement, Justice Roberts seemed to change course. On March 29, he was part of the 5-4 Court majority that held, in *West Coast Hotel v. Parrish*, that Washington state’s law imposing a minimum wage for women was constitutional. The *Parrish* decision was, quite visibly, a dramatic change of course. It expressly overruled the Court’s 1923 decision holding a federal minimum wage law for women unconstitutional. *Parrish* also distinguished a ten-month-old decision in

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5. See Chambers, *supra* note 1, at 45.
6. See *supra* note 2 (citing those decisions).
8. See *id.* at 400 (“Our conclusion is that the case of Adkins v. Children’s Hospital [261 U.S. 525 (1923)] . . . should be, and it is, overruled.”).
which the Court had— with Justice Roberts voting in the majority— invalidated a similar New York law.9

Two weeks after Parrish, Justice Roberts was also part of the 5-4 Court majority in National Labor Relations Board v. Jones & Laughlin Steel Corporation. The Court held that Congress acted within its constitutional powers when it passed the National Labor Relations Act, which protected workers’ rights to unionize.10 In that decision, the Court distinguished other recent decisions, in which Roberts had been in the majority, that struck down other New Deal laws as beyond Congress’s constitutional powers to legislate.11

In the context of these dramatic 1937 changes in Supreme Court voting, some clever person turned a phrase that became famous at the time and has remained famous ever since. Justice Roberts had made, it was said, “a switch in time that saved nine.” He had switched, in other words, to upholding progressive laws, a move that created a new Supreme Court majority and made it unnecessary to enlarge the Court beyond nine justices. And indeed, Roberts’s switch, plus other developments, including the Court upholding the constitutionality of the Social Security Act in May 1937,12 seemed to kill the political support for President Roosevelt’s bill.

Who Was the Quipster?

So who was the person who first used the phrase “switch in time” to describe these events? In spring 1937, the “switch” line obviously was crafted by someone. It then got repeated, widely and swiftly, albeit sometimes in slightly varying words.13

It showed up, for example, that May in private, high-level correspondence. Professor Edward Corwin of Princeton University, writing

10. 301 U.S. 1, 43, 49 (1937).
13. See LEUCHTENBURG, SUPREME COURT REBORN, supra note 1, at 177 (“Within days after the [Parrish] decision was handed down, Washington insiders were regaling one another with a saucy sentence that encapsulated the new legislative situation: ‘A switch in time saved nine.’”).
to President Roosevelt’s Attorney General Homer Cummings on May 19, asked “[a]propos of the recent shift by the Court[,] have you heard the quip, ‘a switch in time saves nine’?”

So the quip had reached Corwin in New Jersey. Back in Washington, Cummings, who had supervised the Department of Justice process that produced the Court-packing proposal, replied to Corwin that he (Cummings) had not previously heard the line.

During the next month (June 1937), the quip was on many lips in Washington. In one four-day period early that month, for example, journalist Raymond Clapper heard it from four different people:

- On Wednesday, June 9, George Creel, a journalist and the former head of the U.S. Committee on Public Information during the Great War (not yet called “World War I”), told Clapper that he had heard someone say that “A switch in time saves nine.” Creel “[s]aid he wished he had said it first, [he] would have given [his] right arm to have said it.”

- On June 10, Clapper told Attorney General Cummings the “switch” line that he (Clapper) had heard the previous day from Creel. In response, Cummings did not mention, it seems, that he already had seen the line in the letter he had received from Professor Corwin. Instead, Cummings asked Clapper if Creel had claimed credit for the line. When Clapper said no, Cummings said, “I told him that.” Clapper replied, “So you thought it up?” Cummings repeated, “I told Creel that.”

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16. See Letter from Homer S. Cummings, U.S. Att’y Gen., to Edward S. Corwin, Professor at Princeton Univ. (May 24, 1937) (on file in Homer S. Cummings Papers, U. of Va. Library, Box 88) (“I had never heard the quip referred to in the last paragraph of your letter. It is very apropos.”).

seemed to Clapper that the Attorney General “was trying to claim credit [for coining the line] but not actually doing so.”

- On June 11, Clapper saw Sir Wilmott Lewis, The Times of London’s Washington correspondent, at a White House press conference and told him that he (Clapper) had heard a witty line that sounded like something that Lewis would say. Clapper recited the “switch in time” line, and Lewis responded, “Yes I said that back in March.”

- On June 12, Clapper reported the “switch” line to lawyer Donald Richberg, a close adviser to President Roosevelt and, until June 1935, a New Deal lawyer. Richberg replied, “I first heard it in February at the White House.” Clapper understood Richberg to be intimating that Roosevelt himself had said the line. But Clapper also recognized that it would not have made much sense until the Supreme Court had “switched,” meaning at earliest when it decided Parrish on March 29.

To Ray Clapper, all of this just “[s]howed how stories travel around.” Indeed, these claims regarding “switch in time saves nine” caused Clapper to make another great quip: “It’s a wise crack that knows its own father!”

I have found no evidence that supports Wilmott Lewis’s private boast to Clapper in June 1937 that he uttered the “switch in time” line back in March. Nor have I found support for the idea that President Roosevelt had

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18. Id. Cummings might indeed have been the person who told the “switch in time” line to Creel—they had lunched together two days before this Clapper-Cummings conversation. See Diary Entry of Homer S. Cummings, U.S. Att’y Gen. (June 8, 1937) (on file in Papers of Homer S. Cummings, Small Special Collections Library, Univ. of Va., Box 235) (“Luncheon at the Carlton [Hotel] with John Montgomery and George Creel.”). But as Cummings had written back to Corwin on May 24 that he (Cummings) had not heard the line until he read it in Corwin’s May 19 letter, see supra note 16 and accompanying text, it is clear that Cummings did not originate the line.

19. Clapper, supra note 17.

20. See id. (quoted and cited in SHESOL, supra note 1, at 590).

21. Id.

22. OLIVE EWING CLAPPER, WASHINGTON TAPESTRY 132 (1946). This book is the memoir of Raymond Clapper’s widow. He was killed, at age fifty-one, in a military airplane crash while covering World War II in the Pacific Theater. See Edward T. Folliard, Air Crash Kills Raymond Clapper as He Covers Marshalls Invasion, WASH. POST, Feb. 4, 1944, at 1 col. 2–4, 2 col. 6.
clairvoyantly uttered the line in February 1937, before Justice Roberts had made a vote that could be called a switch. The “switch in time” line did show up prominently in a national newspaper, and pinned to Justice Roberts by name, in mid-June 1937, just days after Clapper had heard the above sequence of apparently false authorship claims. On June 14, at a dinner during Rutgers University’s annual Institute of Labor meeting, Yale University professor Abe Fortas said that “Mr. Justice Roberts’s theory must be a switch in time serves nine.” Fortas’s audience applauded the line. More importantly—at least as it became a basis for attribution—Fortas’s line was quoted in the next day’s New York Times.

People kept on using the line after 1937’s Court-packing saga had concluded. In March 1938, for example, when journalists Joseph Alsop and Turner Catledge published their book The 168 Days, an insiders’ account of the Court-packing battle, they used “A Switch in Time Saves Nine” as a chapter title, but they did not attribute the line to anyone. Later writers credited various people with being the original “switch in time” quipster. One credited Fortas, citing to the June 1937 New York Times story on Fortas’s Rutgers University speech. Another, apparently seeing the line for the first time in Alsop’s and Catledge’s best-selling book,
thought they originated the quip. 27 Harvard University historian Arthur Schlesinger gave credit to his close friend Professor Thomas Reed Powell of Harvard Law School, 28 but that attribution seems incorrect because Powell, in his famous December 1937 presidential address to the American Political Science Association, said explicitly that the line came from an unnamed “wag”; Powell did not take credit for the line. 29

In recent years, various writers have continued to investigate who deserves credit for coining “switch in time saved nine.” A law professor cataloged, from what others had published, a universe of possible “switch in time” quipsters. 30 A journalist did the same and then, relying on the fact that Professor Corwin told Attorney General Cummings by letter in May 1937 of the “switch in time” quip, added that Corwin was “[t]he best guess, according to scholars.” 31 A political scientist also concluded that Corwin


29. See Thomas Reed Powell, From Philadelphia to Philadelphia, 32 AM. POL. SCI. REV. 1, 23–24 (1938) (“From some source has come new light about the Constitution which has penetrated the marble walls of the Temple of Justice and wrought a change in judicial attitude. . . . There may have been more than mere wit in the wag who said that a switch in time saves nine.”). This address, delivered in Philadelphia on the evening of December 27, 1937, was a leading story in many of the next day’s newspapers. See, e.g., Lawrence E. Davies, Hails Court ‘Chastisement’ for Its ‘Prattling of Myths,’ N.Y. TIMES, Dec. 28, 1937, at 1 (reporting on Powell’s speech).

30. See Ariens, supra note 27, at 623 n.11 (citing publications that name Thomas Reed Powell, Joseph Alsop, and Abe Fortas as possible originators of the “switch” line).

“evidently” “coined this witticism.”\textsuperscript{32} A scholar of Court-packing, by contrast, after also noting the line’s possible originators, concluded that the quipster is not known.\textsuperscript{33}

The quipster is known now, as he was known in fact to many, at least briefly, in spring 1937. The “switch in time” line was crafted that April by Cal Tinney.\textsuperscript{34}

In 1937, Cal Tinney was a young newspaper columnist with a humorous writing style. And he was the person who launched this excellent line in public, in newsprint. On Wednesday, April 14, 1937, two weeks after the Supreme Court’s decision in \textit{Parrish} and two days after its decision in \textit{Jones & Laughlin}, the \textit{New York Post} published, quite deep inside the paper, in a small box at the bottom of page twenty-one, which was the front page of its second section, this short item by Mr. Tinney:

As a result of Monday’s decisions Mr. Roosevelt may not trade in for a new Supreme Court. He may just drive the old model with a new paint job.

Course, I don’t guess there is any doubt about the outcome if he wants to go ahead [with his Court-packing plan]. Both [newspaper columnist Walter] Winchell and [Democratic Party national chairman and U.S. Postmaster General James A.] Farley say the President’s plan will pass Congress, and what Winchell can’t find out Farley can guess.

The [anti-Roosevelt] Liberty League is plum mad about the five-to-four [Supreme Court] decisions [Roosevelt has won]. They are hollering for a constitutional amendment requiring a two-thirds majority before the Supreme Court can declare a New Deal law constitutional.

I’ve been thinking for a[n] explanation of why Justice Roberts switched from the conservatives to the liberals. Is this it?—Maybe he figures that a switch in time’ll save nine.\textsuperscript{35}

\textsuperscript{32} Franck, supra note 15, at xv. Interestingly, Professor Franck also noted that while Corwin himself “attributed the quip to an unnamed ‘columnist,’” \textit{id.} at xlv n.21 (citing Edward S. Corwin, \textit{Constitutional Revolution}, Ltd. 72 (1941)), he (Franck) had found no such publication by a columnist, \textit{id.}

\textsuperscript{33} See SHESOL, supra note 1, at 434.

\textsuperscript{34} A caveat: That is my best judgment, because I have, after researching widely, found no documentation that anyone said or wrote the line before Tinney published it on April 14, 1937. Anyone who does find such evidence should please share it and supplant this article.
Within a week, student editors of the campus newspaper at New York’s City College put Tinney’s line, subtly amended, with attribution, in a box atop its front page:

“A switch in time saves nine.”
—Cal Tinney of the “New York Post” referring to Justice Roberts.  

To my knowledge, that is the only publication since the New York Post published Tinney’s original item six days earlier that ever gave him credit for the line.

Cal Tinney: The Forgotten Quipster

So, who was Calvin Tinney? He was born in 1908 in Pontotoc County, Oklahoma. In the 1920s, Tinney met fellow Oklahoman Will Rogers, the nation’s leading humorist.


By 1937, Cal Tinney was a journalist at the New York Post. That winter and spring, he wrote two types of items. He wrote a series of “Man of the Week” columns profiling, often glibly, public officials, including Major General Malin Craig, the U.S. Army Chief of Staff, U.S. Senator Joseph Guffey (D.-Pa.), U.S. Department of Labor official James F. Dewey, and U.S. Senator Joseph Guffey (D.-Pa.), U.S. Department of Labor official James F. Dewey,

Tinney also wrote shorter, humorous takes on news events. Of these, eight items between January 19 and April 27, 1937 concerned the U.S. Supreme Court. Four of these mentioned, directly or obliquely, the Court’s hostility toward President Roosevelt. Six mentioned his proposal to pack the Court. Four explicitly mentioned the Court’s youngest member, sixty-two-year-old Justice Owen J. Roberts. And one item—the one that is the focus of this article—published on April 14, ventured “a[nn] explanation of why Justice Roberts switched from the conservatives to the liberals. . . . Maybe he figures that a switch in time’ll save nine.”

Cal Tinney later moved back to Oklahoma and became a real estate developer. In 1993, at age eighty-five, he died in Tulsa. Nothing indicates that he ever claimed, or even that he knew that he should claim, his notable place in the history of U.S. Supreme Court-related quippery.

52. See Curtis, supra note 38.
Origin of the Phrase

Where did Tinney get the line? It seems to be a slight variation on an eighteenth century (or earlier) American proverb urging action rather than delay: “A Stitch in time, may save nine; Many a little will make a mickle.” Although at least one writer attributed this proverb to Benjamin Franklin’s Poor Richard’s Almanack, in fact, that publication did not include this piece of wisdom. The original author of “stitch in time,” in other words, remains unknown.

American publications during the nineteenth century used “a stitch in time” to advocate expeditious action rather than procrastination. For example, an 1852 advertisement for cough syrup read as follows:

‘TIS STRANGE BUT TRUE, THAT MANY WILL neglect a Cough, month after month, and then wonder at last that they have Consumption. How much wiser to nip this disease in the bud, which can always be done by using DR. ROGERS’S SYRUP of LIVERWORT, TAR, and CANCHALAGUA, “A stitch in time saves nine.”

That same year, a New York City newspaper criticized “Two-Penny Economy.” Saving money in the short run can be, the paper editorialized, a failure to make “a stitch in time, waiting till the rent needs nine to make it whole.” An 1867 news story criticized a Harlem baker for making slipshod repairs to a broken wooden awning over a sidewalk—the “repaired” awning collapsed under the weight of snow, injuring two men and proving the truth of “[t]he old commonplace proverb that ‘a stitch in time"


55. See SOLOMON, supra note 31, at 161 (“[O]ne of Benjamin Franklin’s famous maxims that had made such a commercial success of Poor Richard’s Almanack [was] Early to bed and early to rise, makes a man healthy, wealthy, and wise. A stitch in time saves nine.”). This book includes no source note for this claim.


time saves nine.” An 1889 stereographic photograph, showing a young girl sewing her doll’s dress, was sold commercially with the printed caption “A Stitch in time saves nine.” In 1890, the New York Times put that same caption on a letter urging lawmakers to require ferryboat operators to make life preservers more accessible to passengers. And early in the twentieth century, a variation on the “stitch” proverb was used to urge economic wisdom generally. The Washington Post, for example, editorialized in 1905 that the City of Philadelphia had “neglect[ed] for a quarter century to apply that maxim, to take the stitch in time to prevent a disastrous ripping,” leading to “scores of millions” of dollars, plus the city’s good name, being lost.

In that same general time period, punsters fiddled with this proverb, turning “stitch” to “switch” and using it to endorse corporal punishment. In 1880, for example, an anonymous humor columnist wrote, “[o]f interest to mothers—A switch in time saves nine.” In 1902, the New York Press published this piece of tough wisdom: “A switch in time saves the child from the cat-o'-nine.” A couple of years later, the New York Telegraph published a similar thought using both “stitch” and “switch”: “A stitch in time may save nine, but a ‘switch’ in time may save ten.” And in 1908, the Chicago News described a predictable result of such punishment: “A switch in time makes boys whine.”

58. General City News: Sad Results from Carelessness, N.Y. TIMES, Feb. 24, 1867, at 5 col. 5.
63. See Reflections of a Bachelor, WASH. POST, Feb. 15, 1902, at 6 col. 6 (reporting this New York Press item). A cat-o'-nine-tails is a whip made of nine cords knotted together. The New York Press also reported in 1902 that “A switch in time saves baldness.” See Reflections of a Bachelor, WASH. POST, Aug. 15, 1902, at 6 col. 7 (reporting this item). I have no idea what that means.
64. See Turf Topics, WASH. POST, Aug. 14, 1904, pt. 2 (sporting section), at 4 col. 2 (reporting this New York Telegraph item).
65. See Pointed Paragraphs, WASH. POST, June 29, 1908, at 6 col. 7 (reporting this Chicago News item).
Cal Tinney grew up to become a wordsmith during the years when these “stitch” and “switch” proverbs swirled around the number nine. It makes sense that in 1937, as he thought about President Roosevelt’s proposal perhaps to change the size of the Supreme Court and then Justice Roberts’s votes causing that nine to be saved, Tinney’s clever mind thought of the proverb and tweaked it into something special.

Belatedly Crediting Cal Tinney

So why was Tinney not credited? It seems that his quip, published somewhat obscurely in New York City, was the thing that attracted all the attention. The line, not his authorship, was the memorable gem. Then the line moved quickly, apparently by word of mouth, to Princeton, Washington, Cambridge, and elsewhere. Then it was repeated by many people, none of whom, if he even knew who or what publication to credit, was taking the trouble to mention such details. Then alternative theories of authorship developed over ensuing decades, and they became conventional wisdom. The correct answer was preserved deep in New York Post microfilm. I have found no indication that anyone found it. Until recently, there was no database in which to find such an item. That has changed because of the efforts of Tom Tryniski, an upstate New Yorker who values newspapers and the history they document. At his home in Fulton, New York, Mr. Tryniski has scanned rolls of microfilmed old newspapers borrowed from local libraries, digitized nearly 50 million newspaper pages dating back to the 1800s, and made them available at http://www.fultonhistory.com/, a free, searchable database.66

Thanks to technology, Mr. Tryniski, and the wonderful database and search engine that he created, researchers now can find Cal Tinney’s April 14, 1937, “switch in time” line—actually, he used the unusual contraction “time’ll,” which probably makes it tougher to locate by computer search—about Justice Owen Roberts’s changed votes in the face of threatened Court-packing.

The origin of “switch in time” is no longer lost to time.