

FDR's Court-Packing Plan: A Study in Irony

by Richard G. Menaker



Supreme Court Justices, ca. 1940. Four in the front row (from left: Owen Roberts, James C. McReynolds, Charles E. Hughes, and Harlan F. Stone) were on the Court in 1937. Photograph by Harris & Ewing. (Gilder Lehrman Collection)

The Great Depression of the 1930s was the nation's grimmest economic crisis since the founding of the American republic. After the 1932 elections, Franklin D. Roosevelt introduced a series of innovative remedies—his New Deal—but the entire recovery effort seemed threatened when the United States Supreme Court invalidated significant pieces of its legal foundation. Eventually Roosevelt proposed his so-called “court-packing” bill to circumvent the Court's unfavorable rulings. The events that followed qualify as one of the stranger chapters in the constitutional history of the United States.

Roosevelt brought relentless energy and creativity to Washington following his election in 1932. The problems before him were unprecedented in depth and scope. Since the crash of the stock market three years earlier, five thousand banks had failed, wiping out over nine million accounts. At least 25 percent of the work force was unemployed; national income was less than half what it had been in 1929. In the first hundred days of the new administration, Roosevelt and his team of advisors attacked the crisis with a panoply of legislative measures—an emergency banking act, a series of employment relief acts, a bill to refinance defaulted mortgages, and laws shoring up agriculture and regulating Wall Street. New instrumentalities of government were conceived—among others, the Agricultural Adjustment Administration (AAA), the Public Works Administration (PWA), and the National Recovery Administration (NRA)—thereby introducing the “alphabet agencies” that soon became a familiar feature of the New Deal.

Despite the widespread popularity of these initiatives, Roosevelt faced opposition from several quarters, including most of the nation's newspaper publishers, many business and financial interests, entrenched states'-rights supporters, and advocates of small government. Since the Gilded Age of the 1890s, those forces had controlled America's economic establishment and, after a brief eclipse during the progressivism of the Theodore Roosevelt and Woodrow Wilson administrations, they had assumed renewed primacy during the 1920s. Bolstering their position was a legal regime overseen by the US Supreme Court. In a line of cases following the end of Reconstruction, the Court had built a doctrinal superstructure conducive to modern laissez-faire industrialism and hostile to the claims of laborers and the indigent. Legal concepts like substantive due process had exalted private property and freedom of contract while limiting the power of government to regulate or otherwise interfere with entrepreneurship.

Roosevelt anticipated a recalcitrant Supreme Court when he took office. He had criticized it even before his election, noting during his presidential campaign that the Court was “in the complete control” of the Republican Party and thus implicitly an instrument of laissez-faire. The emergency

measures of the new administration's first hundred days were developed without illusions about the Court's ability to stymie them. Several decisions during the previous decade had applied substantive due process—the idea that certain rights (such as property rights) are so fundamental as to be beyond governmental regulation—to strike down state laws that regulated businesses by imposing extra costs upon them, for example, through minimum wages or safety rules. Shortly prior to the 1932 election, as if in warning to Roosevelt, the Court had invalidated on substantive due process grounds an Oklahoma law requiring the licensing of ice-making facilities. A wall seemingly had been installed around private business and government told to keep out.

Of particular concern to the New Dealers was a four-judge coterie on the Court, Justices Butler, McReynolds, Sutherland, and Van Devanter, who collectively embraced a settled anti-regulatory ideology hostile to interventionist government. Each of the so-called Four Horsemen was over the age of seventy in 1932. All four regularly voted in a block wherever substantive due process or delegation of powers issues were implicated, needing only a single recruit from the remaining five justices to defeat governmental initiatives that burdened private enterprise. The other justices were less predictable. Justice Brandeis, the eldest, was a Wilson appointee with strong progressive leanings but a predilection for limited government and small business. The chief justice, Charles Evans Hughes, a more conservative figure, had nevertheless served as governor of New York and was open-minded about regulation. Two other New Yorkers, Justices Cardozo and Stone, were genuine intellectuals who brought both compassion and respect for prior precedent to their deliberations. Owen Roberts, the youngest of the justices, was a career prosecutor and a 1930 Hoover appointee from Pennsylvania (at age fifty-eight) with no prior involvement in any legislature or business and thus an unknown on the constitutional issues of the day. His vote soon turned out to be critical.

During the first twenty-four months after Roosevelt was elected, his administration successfully steered clear of direct confrontation with the Supreme Court. Meanwhile, two 5-4 decisions by the Court in 1934 upholding state-based regulations hinted that a majority of the justices were sensitive to the emergency. Significantly, Roberts had voted against the Four Horsemen in both cases, and in one of them, *Nebbia v. New York*, he had written the majority opinion upholding price controls on the sale of milk. The resulting sense of relief among anxious New Dealers, however, proved premature. In January 1935, the Court issued its first ruling on a New Deal statute, striking down a provision of the National Industrial Recovery Act (NIRA) that had imposed new controls on the production and pricing of oil. The vote was an overwhelming 8-1 against the New Deal measure. The decision in the "Hot Oil" case was the first of a series of devastating losses for the Roosevelt legislative program in the Supreme Court. After surviving (by a 5-4 margin) a challenge to the government's currency regulation powers in the "Gold Clause" cases, the Administration saw its Railroad Retirement Act invalidated 5-4, with Roberts joining the Four Horsemen in declaring the law unconstitutional. Shortly thereafter, on "Black Monday," May 27, 1935, the Court issued three destructive decisions—*Schechter Poultry* (the infamous "sick chicken" case) cut the heart out of the NIRA, *Louisville Bank* struck down the Frazier-Lemke Act limiting mortgage foreclosures, and *Humphries' Executor* scaled back the President's ability to control the make-up of certain federal regulatory bodies. Each of the decisions was unanimous. Subsequent rulings included the invalidation of the wages-and-hours and price-control mechanisms of the Bituminous Coal Conservation Act (5-4, with Roberts the swing vote), invalidation of the processing tax in the Agricultural Adjustment Act (6-3, with Roberts writing for the majority), and vacatur of a New York State minimum wage law (5-4, Roberts again), a ruling with worrisome implications for a vast area of industrial regulation.

Roosevelt and his supporters looked on aghast at the path of destruction these decisions wreaked upon economic regulation generally and the New Deal in particular. Attorney General Homer

Cummings wrote privately, echoing the views of many in the administration and throughout the country, “I tell you, Mr. President, they mean to destroy us. . . . We will have to find a way to get rid of the present membership of the Supreme Court.” Roosevelt himself kept his public criticisms limited and his plans close to the vest, although shortly after *Schechter* he observed at a press conference, “We have been relegated to the horse-and-buggy definition of interstate commerce.” Even Herbert Hoover was reported as suggesting a constitutional amendment to restore at least to the states “the power they thought they already had.”

Amending the Constitution, logical as it might seem, was not the remedy favored by those whom Roosevelt put to work exploring ways around the Court’s obstructions. It was not just a matter of finding the right wording and getting it through Congress or a constitutional convention. As one of the young brainstormers, Thomas Corcoran, observed to Harold Ickes, a Roosevelt advisor, there were too many states “that would naturally be against a broadening amendment or in which money could be used to defeat it.” There was thus talk of instead limiting by statute the Court’s ability to invalidate legislation. Numerous such bills had been introduced in Congress following the Court’s attack on progressive-era legislation during the 1920s, and Roosevelt’s congressional allies continued the process following the most recent Court reversals. But even after the overwhelming victory by Roosevelt and the Democrats in the 1936 elections, the prospects of jurisdictional limitation seemed doubtful, particularly if the Court itself could ultimately rule on its constitutionality.

The most obvious other alternative was to change the composition of the Court. Getting the most elderly justices to retire and appointing friendly replacements would have been the ideal curative. Indeed, Van Devanter and Sutherland had both indicated their wish to retire, but the administration’s 1933 Economy Bill cutting pension benefits had ironically discouraged these two scourges of the New Deal from voluntarily stepping down. Any attempt to compel retirement by legislative fiat would run up against the life tenure protection in Article III of the Constitution, so the mandatory removal approach was eventually discarded.

There remained the possibility of changing composition by increasing the size of the Court through congressional act. Extensive precedent existed for such a move. Article III of the Constitution, which establishes the judicial branch, does not prescribe the number of justices on the Supreme Court. The Founders left that detail to legislation. Congress in the first Judiciary Act (1789) had set the number of Supreme Court seats at six. Thereafter, the number had varied from five (1801) to seven (1807) to nine (1837) to ten (1863) back to seven (1866) and finally to nine again (1869). In January 1937, Attorney General Cummings privately showed Roosevelt a formula that would link an increase in the size of the Court to the number of incumbent justices who reached the age of seventy and declined to retire, capped at a maximum of six new justices. The idea had been suggested by Edwin Corwin, a Princeton political scientist, who himself had received it from a government professor at Harvard, Arthur Holcombe. (The complex genesis of the plan is definitively mapped out in William Leuchtenberg, *The Supreme Court Reborn* [Oxford, 1995].) This approach appealed strongly to the President and became the core of the plan he ultimately advanced.

On February 5, 1937, Roosevelt sent his court-packing bill to Congress in the form of proposed legislation to “reform” the judiciary generally. His accompanying statement was framed not in terms of an obstructionist Supreme Court but rather as a response to overcrowded federal court dockets and the special problem occasioned by constitutionally imposed judicial life tenure, i.e., “the question of aged or infirm judges—a subject of delicacy yet one which requires frank discussion.” The President pulled no punches, bemoaning that a decline in “mental or physical vigor

leads men to avoid an examination of complicated and changed conditions.” He added, “older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.” Thus, under the proposed new law, when any federal judge (not just on the Supreme Court) with at least ten years’ service remained on the bench for more than six months after reaching the age of seventy, the President could add a new judge to that court. The maximum was six new justices for the Supreme Court and forty-four for the rest of the federal judicial system.

The small group of advisors who had secretly worked with Roosevelt in developing the bill and its rationale—Cummings, Corcoran, Stanley Reed, Samuel Rosenman, and Donald Richberg—were among the most constitutionally savvy lawyers in the administration. All were satisfied it met constitutional standards. And all assumed the huge new Democratic majority in both houses of Congress, beneficiaries of the President’s popularity in the 1936 national elections, would rapidly approve the measure. Roosevelt, however, had miscalculated. By keeping his thinking under wraps until the plan was unveiled, he had done nothing to build support behind the scenes among legislative allies. While respected administration backers like Joseph T. Robinson, the Senate majority leader, immediately announced for the bill, others such as House Speaker William Bankhead and House Judiciary Chairman Hatton Sumners resented the surprise and emerged lukewarm or outright hostile. Public sentiment was also largely negative, stirred up by vociferous opposition from a predominantly conservative press. As the weeks passed and the debate intensified, it became clear to the administration that the court-reform bill faced rocky going. One thing was sure—Congress would not quickly approve it.

Then came the unexpected, an about-face by the Supreme Court. On March 29, 1937, the Court handed down its decision approving a minimum wage law in Washington State, *West Coast Hotel v. Parrish*. The margin was 5-4, with Roberts voting with the majority. The decision effectively reversed the ruling that had invalidated New York’s similar wage law the previous June. Two weeks later, Roberts was on the winning side in five major decisions upholding the National Labor Relations Act. On May 24, the Court found the Social Security Act and related state legislation constitutional with the same five-man majority, supported surprisingly in one of the decisions by two of the Four Horsemen, Sutherland and Van Devanter. By this time, Van Devanter had announced his intention to retire, and it was clear Roosevelt would soon be able to appoint a new justice of his choice without any need for court-packing.

Meanwhile, the legislative prospects of the reform bill grew increasingly dimmer. When Vice President John Nance Garner as presiding officer of the Senate refused to support the bill, and when the Senate Judiciary Committee (dominated by Democrats) disapproved it, the proposal sustained a knockout punch. In July it was recommitted from the Senate floor to the Committee, where it was transformed into a minor procedural law. The compositional element died. New Dealers could always say their court-packing plan was never actually voted down, but the reality was clear—the proposal had lost its momentum, was deeply unpopular, and for all practical purposes was soundly defeated.

Yet on the doctrinal front, the administration had won the war. Beginning with Parrish, the decisions of the Supreme Court upholding government’s power to regulate set the pattern for the balance of Roosevelt’s presidency and for nearly a half century thereafter. The ideology that had stymied the New Deal and parallel state legislative efforts to control private economic relationships went into eclipse. The Court had gone through what some commentators have described as a “constitutional revolution.” Yet the apparent stimulus for turn-about was widely attributed to the court-packing initiative, which had ironically constituted one of Roosevelt’s most embarrassing defeats.

Several other facts reinforced the irony. Many contemporary observers noted the timing of Justice Roberts's apparent reversal from a swing voter against regulatory legislation to a swing voter in favor of it, a dramatic change described famously as the "switch in time that saved nine." By all indications, Roberts had been influenced by the court-packing bill. The facts, however, are more complex. Roberts actually rendered his critical vote in the *Parrish* case at least two months before Roosevelt announced his plan. Chief Justice Hughes had delayed releasing the decision to accommodate Justice Stone, who had been temporarily out of action due to illness. Moreover, Roberts had never shared the substantive due process ideology of the Four Horsemen. As he stated in his 1934 *Nebbia* decision for the 5-4 majority upholding New York's controls on milk prices: "Neither property rights nor contract rights are absolute." If that was Roberts's view nearly three years before the court-packing initiative, something else must have been going on in all those decisions that had rejected so much of the New Deal's regulation.

Under scrutiny, the change in the Supreme Court's outlook emerges as a peculiar chapter in a complicated story, with more twists to it than a simple switch by a swing man in reaction to Roosevelt's plan to pack the Court. As the legal historian Barry Cushman has persuasively suggested, constitutional doctrine was already evolving in a direction favorable to a more interventionist role for government well before Roosevelt introduced the court "reform" bill. Most of the earlier decisions invalidating New Deal legislation were 9-0 or 8-1 rulings, not 5-4 squeakers. Those decisions reflected a view shared by even the more progressive justices that the new laws had been sloppily drawn and poorly defended. Roosevelt's draftsmen soon learned from these mistakes and avoided them in subsequent legislation that the Court sustained. While it is certainly true that the eventual breakup and replacement of the Four Horsemen eased the Court in that direction, the fact remains that technically tighter draftsmanship greatly helped the New Deal cause in the Court's later rulings.

Accordingly, it seems unlikely the court-packing plan played much of a role in inducing the Supreme Court to change direction. On the other hand, there is also little doubt the plan had a harmful effect on Roosevelt's legislative program for the balance of the New Deal. Six months after achieving the most one-sided electoral victory in modern times, the Democrats were divided and in disarray; the unpopularity of the court-packing plan had undermined the President's moral authority and given lukewarm party members an excuse to abandon him. Never again would the Democratic leadership gather the momentum that had brought such consistent legislative successes during the first four years of the administration. "The whole New Deal," declared Henry Wallace, "really went up in smoke as a result of the Supreme Court fight."

Perhaps the most vexing question is why Roosevelt did not just drop the plan when the battle with the Court was clearly won. No one knows the answer for sure. A most gregarious of presidents, FDR was also among the most guarded and inscrutable. Was it a misplaced feeling of empowerment derived from the 1936 elections? Was it the sort of internal stubbornness that had won the day with Congress in the past? Robert H. Jackson, a Roosevelt confidant and future Supreme Court appointee, reached this general assessment: "The President was not a legalistic-minded person. He was not an economic-minded person. He was a strong thinker in terms of right and wrong, for which he frequently went back to quotations from the Scriptures. Certain things just were not right in his view." Having witnessed so many rulings by the Supreme Court that, in his view, just were not right, Roosevelt had set upon a remedial course that he stuck with to the end. How the drama played out is a study in the capriciousness of history.

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