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It all began with the great slump of 1931. . . . There followed the iron 30s, . . . the dark and leaden 30s, to which, alone of all periods, no one . . . wishes to return, unless indeed they lament the passing of Fascism.

—Isaiah Berlin, “President Franklin Roosevelt,” 1955

Much of the history of the New Deal is hagiolatry of Franklin Delano Roosevelt (FDR). The Greatest Generation, so called (Brokaw 1998), not only sacrificed its blood and its treasure to defeat the first axis of evil, but earlier those same heroic men and women helped to save the American way of life by wisely electing and following a leader who purged capitalism of its worst excesses and rescued the economy from the depths of depression.¹

Such is the conventional wisdom. Like most reductionist accounts of complex episodes, however, the popular history of the New Deal era is seriously mistaken as well as excessively reverential. Whatever else has been said about the policies and programs that took their name from a line in FDR’s speech accepting the Democratic

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1. Black 2003 is the most recent addition to what Cushman calls “a vast and remarkably homogeneous literature” (1998, 3). Quoting from a letter written by Felix Frankfurter to FDR on February 7, 1937, the title of the chapter Black devotes to the events analyzed in this article is “Save the Constitution from the Court and the Court from Itself.” For a more iconoclastic evaluation of the New Deal, see Powell 2003.
Party’s presidential nomination in 1932—“I pledge you, I pledge myself, to a new deal for the American people” (qtd. in Black 2003, 239)—the promised economic recovery never materialized. The New Deal did not work.

Christina Romer marks the following dates by which industrial production had recovered to predepression levels: “1932 for New Zealand; 1933 for Japan, Greece, and Romania; 1934 for Chile, Denmark, Finland, and Sweden; 1935 for Estonia, Hungary, Norway, and the United Kingdom; 1936 for Germany; and 1937 for Canada, Austria, and Italy.” In contrast, “the United States . . . did not recover before the end of the sample in 1937” (1993, 23–24). As a matter of fact, the embryonic economic revival having been aborted by the “Roosevelt Recession” of 1937–38, gross national product (GNP) in 1958 prices remained below its 1929 level until 1939 (Couch and Shughart 1998, 26). Genuine prosperity did not resume until after World War II (Higgs 1997).

Standard accounts of the drama that began to unfold early in January 1935, when the U.S. Supreme Court ruled on the first of the challenges to New Deal legislation that came before it, frequently ignore these uncomfortable facts. As the story usually is told, the Old Court stubbornly blocked FDR’s policies by invalidating on constitutional grounds the bold experiments undertaken during his first term to deal with the nation’s extraordinary economic emergency. Thwarted at nearly every turn, often by narrow five-to-four vote margins, and emboldened by his stunning reelection to the White House in November 1936, FDR responded the following winter by threatening to pack the Court with up to six additional members, thereby ensuring a more compliant majority. To diffuse that threat, the Court abruptly changed course, executing its famous “switch in time that saved nine,” and began to sustain most of the president’s policies and programs, especially in the area of economic regulation.

The New Deal’s failure to stimulate the economy places the foregoing events in an entirely new light. Prosperity would not have returned earlier had the Supreme Court been more accommodating before 1937. The majority’s subsequent submission to the president’s policies cannot be credited with clearing the path to recovery, either. As a matter of fact, the Court’s opportunistic change of interpretive course arguably prolonged the nation’s economic misery.

2. Referring to the upcoming struggle to wrest the White House from Republican control, FDR went on to say that “this is more than a political campaign; it is a call to arms. Give me your help, not to win votes alone, but to win this crusade to restore America to its own people” (qtd. in Black 2003, 239). Franklin Roosevelt was the first presidential candidate in U.S. history to appear personally at a national political convention to accept his party’s nomination (Black 2003, 238).

3. Eichengreen (1995) argues that the order in which the world’s industrialized economies recovered from the Great Depression followed closely the sequence of national decisions to abandon the gold standard, a necessary condition (but evidently not a sufficient condition because not all countries took advantage of it) for pursuing reflationist monetary policies.

4. Alsop and Catledge 1938 and Baker 1967 are the standard sources. William Leuchtenburg (1966, 1969, 1985) is the most prolific modern student of the Supreme Court during the Roosevelt era. His previously published writings on that topic are updated and collected in Leuchtenburg 1995.
These observations do not mean that the Supreme Court’s apparent capitulation to external political pressures did not have far-reaching consequences. The year 1937 undeniably marks a watershed in federal judicial history. By abandoning long-standing constitutional protections for economic liberties, the Court thereafter actively fostered the growth of the modern regulatory state. In so doing, it repeatedly upheld statutes that plainly were intended not to advance the general welfare but to redistribute wealth to politically powerful special-interest groups.

Although it is certainly true that “no one who did not participate in the conferences of the Court will ever know the answers” to all of the important questions raised by this critical episode in judicial history (Stern 1946, 681), the episode bears examining again in more detail. Three lessons can be drawn from such a reexamination. First and foremost, the so-called constitutional revolution of 1937 casts doubt on the federal judiciary’s ostensible “independence” from the executive and legislative branches. The Court’s adjustment to the changed political environment of the 1930s is broadly consistent with rational-actor models of judicial behavior. Although seven of the nine justices by and large held their constitutional ground throughout the decisive period, the “switch in time” is eloquent testimony to the chief justice’s pivotal role in coordinating the Court’s responses to shifts in the political equilibrium.

Second, however, the Court’s change of direction was less sharp than usually acknowledged. Prior to 1937, majorities had both sustained a number of important New Deal statutes and afforded state legislatures more freedom in justifying economic regulation as a legitimate exercise of government’s police powers. The absence of a sharp dividing line between the Old Court and the New suggests that events preceding the announcement of the president’s packing plan also played crucial roles in explaining the behavior of the Court’s swing voters.

Third, the political damage FDR suffered by launching his attack on the Supreme Court, damage worsened by his attempt to purge his own party of New Deal adversaries during the midterm election campaigns of 1938, turned out to have been needless. Justice William Van Devanter, one of the original “Four Horsemen” who voted consistently against the president’s legislation, retired at the end of the Court’s 1937 term, to be replaced by the more accommodating Hugo Black. Within two and a half years of submitting his court-packing plan to Congress, FDR had appointed five new justices with unwavering loyalties to his economic policies. The Court would have changed course eventually in any case. There would have been a constitutional revolution in the absence of the court-packing plan, a bit later perhaps, but of no less moment.

The Supreme Court Prior to 1935

The contrast between the Old Court and the one that midwifed the welfare state from 1937 on has received close examination by a number of scholars (for example, Swisher 1939; Shenfield [1976] 1998; Siegan 1980; Epstein 1988; Maidment 1991;
Leuchtenburg 1995; and Cushman 1998). Nearly everyone agrees that 1937 was a year of “constitutional revolution” (Leuchtenburg 1995, 213), whose chief casualties were the Constitution’s Commerce and Due Process Clauses. In short order, the Court jettisoned the time-honored distinction between intrastate and interstate commerce, and it began to deny that the Fifth Amendment accorded protection to economic liberties. Whether those reversals, which freed government to grow significantly in size and scope, were good things or bad things is a matter of continuing controversy.

The Commerce Clause

Article I, Section 8, of the Constitution of the United States declares in part that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In the first case that required meaning to be imparted to the second of those three phrases, a unanimous six-member Supreme Court7 in 1824 struck down a New York law granting to inventor Robert Fulton and his partner Robert Livingston the exclusive right to operate steamboats in the state’s waters.8 Thomas Gibbons, who operated a rival steamship company out of Elizabethtown, New Jersey, challenged Fulton’s monopoly after being instructed by local authorities to shut down his engines and hoist sail when his ships crossed into New York. Writing for his brethren, Justice William Johnson concurring, Chief Justice John Marshall defined commerce as “intercourse,” a definition that comprehended “certain kinds of interstate transactions—sales, bills of lading, contracts of common carriage” as well as “navigation” (Epstein 1988, 10).9 In so construing the federal government’s constitutional authority, the Court effectively proscribed actions by the states that threatened to disrupt the free flow of commerce among them.

But, importantly, Marshall also wrote that Congress’s power to regulate commerce was not unconstrained. In particular, its constitutional authority “did not

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5. Cushman is the exception. Examining the Court’s jurisprudence in detail, he takes issue with the contention that external political pressures caused the justices to change course in 1937. He argues instead that the “conventional tale of an abrupt volte face” (1998, 5) seriously underrates the importance of the Court’s erasure three years earlier, in Nebbia v. New York (291 U.S. 502 [1934]), of the constitutional boundary between public and private enterprise, a boundary that had imposed significant constraints on government’s regulatory powers. Given that Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts cast decisive votes in the five-to-four Nebbia decision and, moreover, that the latter authored the majority opinion, Cushman concludes that “the presidential author of the ‘Constitutional Revolution of 1937’ . . . was not the man the people had overwhelmingly returned to office the preceding November. It was instead, ironically, the man the electorate had repudiated in Roosevelt’s favor in 1932: Herbert Hoover” (1998, 225), who had appointed both Hughes and Roberts to the Court in 1930.


7. The number of Supreme Court justices was not fixed at nine until 1869 (Nelson 1988, 276).


9. Commerce, in other words, was “conceived of primarily as transportation” (Cushman 1998, 152, emphasis in original).
extend to those affairs that ‘preceded’ commerce,” such as “inspection and quarantine laws” (Epstein 1988, 10). Nor did it comprehend commerce “which is completely internal, which is carried out between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States (Epstein 1988, 11, emphasis added).

The Court thereafter generally adhered to Marshall’s distinction, holding, for example, that manufacturing was not commerce10 and, for the same reason, that Congress had exceeded its constitutional authority in prohibiting the interstate shipment of goods produced by child labor.11 To be sure, the Court from time to time found that federal regulation was justified by its “police powers,”12 but Marshall’s narrow interpretation of the Commerce Clause by and large still controlled when New Deal legislation faced its first major constitutional test.13

The Due Process Clause

Fifth Amendment guarantees that “no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation” joined the Commerce Clause as victims of the so-called constitutional revolution of 1937. The key question raised by the amendment’s language is whether the guarantee of due process is substantive—that is, does it require a showing that a governmental “taking” of private property is consistent with and justified by some wider public purpose—or merely procedural, in which case it is enough for a legislature or administrative body not to have acted arbitrarily or capriciously? An ancillary question is whether the Fourteenth Amendment, by incorporation, imposes the same constitutional constraint on state governments.

Four landmark decisions established the precedent that bound the Old Court when Fifth Amendment issues came before it in 1935. These four decisions, later treated with contempt by Justice Black (Siegan 1980, 110),14 all held that the constitutional guarantee of due process is indeed a substantive one that, moreover, the

10. “Commerce succeeds to manufacture and is not part of it” (United States v. E. C. Knight Co., 156 U.S. 1, 12 [1895]). Lower federal courts did not necessarily construe the Commerce Clause as narrowly, however. Four years later, in United States v. Addyston Pipe & Steel Co., (85 F. 271 [6th Cir. 1898]), Judge Taft held that the manufacture of cast-iron pipe “affects” commerce.
12. Hoke and Economides v. United States, 227 U.S. 308 (1913) (upholding the constitutionality of the Mann Act of 1910, which made it a federal crime to transport women across state lines for immoral purposes) and Brooks v. United States, 267 U.S. 432 (1925) (sustaining the National Motor Vehicle Theft Act of 1915, which prohibited the interstate shipment of stolen automobiles).
13. An activity was deemed to be within reach of the federal government’s commerce power, after 1905, when it could be located within a “current of commerce among the States” (Swift & Co. v. United States, 196 U.S. 377, 399 [1905]). As Cushman points out, this rather amorphous doctrine clearly “had the capacity to transform the local into the national” (1998, 152).
states must respect. In the first decision, Allgeyer v. Louisiana (165 U.S. 578 [1897]), a unanimous court ruled that a state law prohibiting any person or corporation from obtaining marine insurance on Louisiana property from an out-of-state insurer not licensed to do business in the state violated both the Fifth and Fourteenth Amendments. Allgeyer established two principles: first, that “the right to make lawful contracts was a liberty protected by the Due Process Clause” and, second, that “freedom of contract was the rule and restraint the exception, the reasonability of which states had to justify” (Hall 1992, 28).

Adair v. United States (208 U.S. 161 [1908]) and Coppage v. Kansas (236 U.S. 1 [1915]) extended the liberty of contract doctrine to labor relations. In both cases, the Court invalidated statutes, one federal and one state, forbidding employers from conditioning employment on workers’ agreement not to join or to remain members of a labor union, conditions the unions called “yellow dog” contracts. But it is Lochner v. New York (198 U.S. 45 [1905]) that serves as the poster child of the critics of the due process protections the Old Court accorded to private contracts at the expense of vague notions of “social justice.” That case involved a challenge to an 1895 New York law that limited the working hours of employees of bakeries and confectionaries to maximums of ten hours per day and sixty hours per week (Siegan 1980, 113). By a five-to-four vote, the Court rejected the state’s argument that the restrictions constituted a legitimate exercise of police power, whose purpose was to protect workers’ health. Writing for the majority, distinguishing an earlier case in which the Court had upheld an eight-hour workday for workers in Utah’s mine and smelting operations,Justice Rufus Peckham declared that an act “which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor” must “have a . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before [it] can be held to be valid” (Siegan 1980, 113–14).

The era of substantive due process had arrived. With some important exceptions to be discussed later, the Court subsequently overturned a number of economic regulations on Fifth and Fourteenth Amendment grounds. One such law established a board to set minimum wages for women and minors employed in the District of Columbia. Another declared the manufacture and distribution of ice to be a “public business” in Oklahoma and regulated conditions of entry by making it a misdemeanor for anyone to engage in that trade without first obtaining a certificate of convenience and necessity from the state’s corporation commission. And in Morehead v. New York ex rel. Tipaldo (298 U.S. 587 [1936]), which one commentator has called the “most unpopular decision of the 1935–1936 Supreme Court term” (Hall 1992, 562), a five-to-four majority stuck down a minimum-wage law for women and children enacted by the State of New York.

In Defense of the Old Court

What is frequently overlooked by commentators anxious to apply a gloss of public-spiritedness to the New Deal is that much of the economic regulation overruled by the Old Court demonstrably was designed not to promote the general welfare but to protect politically powerful special interests. Consider the much-maligned *Lochner* decision.18 As noted earlier, the 1895 statute at issue imposed limits on the working hours of the employees of bakeries and confectionaries in the State of New York. At the time, the baking industry was undergoing rapid technological change. Although many small, family-owned businesses still operated, larger, more capital-intensive bakeries were emerging. Those two sets of firms employed different production processes and filled different competitive niches. The smaller bakeries typically ran single work shifts (from twelve to as many as twenty-two hours per day), delivering their baked goods to customers in the morning, then in the afternoon and evening baking to fill the next day’s orders. To accommodate the long hours of small-scale production, the bakeries’ owners frequently furnished sleeping quarters for their employees, many of whom were recent, non-English-speaking immigrants. The large bakeries, in contrast, with their greater production capacities and shorter production cycles, ran two work shifts per day, one for baking and another for delivery.

“*Lochner* was not brought by disgruntled workers seeking shorter hours” (Epstein 1988, 17). Enforcement of the statute was championed instead by the large bakeries and by the labor unions that represented their employees. Limiting work schedules to ten hours per day throughout the industry imposed a competitive disadvantage on the smaller bakeries, whose production technologies and production schedules could not be adapted easily to shorter shifts. By raising costs for those firms and thus driving many of them out of business, the statute would have destroyed job opportunities for immigrants who had not yet learned to speak English; it would have benefited organized workers by propping up union wage scales and institutionalizing their restrictive work rules; and it would have harmed consumers by elevating the prices of baked goods. Hence, under the guise of safeguarding workers’ health and safety, the New York statute would have produced an intra-industry transfer of wealth, benefiting one group at the expense of another.19

Indeed, the five-to-four *Lochner* majority grasped the New York statute’s special-interest basis. Justice Peckham wrote that he and his four colleagues “find it impossible to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality passed from other motives” (198 U.S., at 64).


19. Epstein sees another “telltale sign” of the differential impact on large and small bakeries in “the other provisions of the [New York] statute that regulated the sleeping conditions of workers while on the job” (2003, 71).
Now move forward to 1932: in *New State Ice* the Court refused, six to two, Justice Louis Brandeis dissenting, Justice Benjamin Cardozo not participating, to uphold the conviction of a new entrant who, in violation of an Oklahoma statute that declared the manufacture and distribution of ice to be a “public business,” had failed to obtain a certificate of convenience and necessity from the state corporation commission empowered to regulate the industry (Siegan 1980, 132–33). That law, whose passage had been backed strongly by the ice industry (Siegan 1980, 133), not only had the effect of protecting the economic interests of incumbent producers but also imposed a disproportionate burden on low-income consumers who could not afford newfangled refrigerators to preserve their perishables (Siegan 1980, 137).

Just two years later, however, in *Nebbia v. New York* (291 U.S. [1934]), the Court, again by a five-to-four vote, upheld a 1933 statute whose explicit purpose was to raise dairy farmers’ incomes at consumers’ expense, harming especially the “urban poor” (Epstein 2003, 61). Faced with sharply declining milk prices, which by 1932 supposedly were below the cost of production, the New York legislature effectively declared the dairy industry to be a public utility, “establishing a three-member milk control board” with sweeping regulatory powers, “including setting prices at the retail level” (Siegan 1980, 138). Under its grant of legislative authority, the board subsequently made it a misdemeanor for any retailer to sell milk for less than nine cents per quart. Leo Nebbia, the owner of a small store in Rochester, N.Y., was convicted of violating the law by selling two bottles of milk and a loaf of bread for eighteen cents (Siegan 1980, 139).

In sustaining the New York legislature’s exercise of police powers in concert with the narrow interests of dairymen, the Court “signaled the approaching end of economic due process” (Siegan 1980, 139). Foreshadowing a new willingness to defer to legislative judgments, the majority wrote that if such laws “have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.” The Court also said that “the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power” (*Nebbia*, at 537, 538).

Writing for the majority, Justice Owen Roberts swept aside the long-established distinction between purely private businesses, which the courts had placed beyond the reach of government regulation, and those “affected with a public interest,” which it had not.20 “It is clear,” Roberts declared, “that there is no closed class or category of businesses affected with a public interest. . . . The

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20. Prior to *Nebbia*, the list of businesses determined to be “affected with a public interest” included grain elevators, railroads, water supply, oil pipelines, stockyards, the Chicago Board of Trade, and fire insurers (Cushman 1998, 50). The conceptual framework for the public-private distinction was established in *Munn v. Illinois*, 94 U.S. 113 (1877).
phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.” Roberts concluded that “there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its parts, including the prices to be charged for the products or commodities it sells” (Nebbia, at 532–37).

Tipaldo, which struck down New York’s minimum-wage law for women, may have been general welfare’s last stand. Within a year, that decision, along with Adkins, would be overturned explicitly. No longer would women constitute “a reserve force of cheap labor” (Siegan 1980, 148), competing for jobs held by men and consequently threatening to lower their wages. These reversals were, according to Cushman, preordained by Nebbia: “if the dairy industry [could] be protected by minimum price laws, the states [could] be permitted to extend similar aid to the far more helpless women workers” (1998, 82). Hence, Cushman argues that the constitutional revolution was launched not in 1937, but in 1934.

The Great Depression and the Political Economy of the New Deal

There are many theories of the causes of the Great Depression and of why the economic collapse was both more severe and longer-lasting in the United States than anywhere else. Although scholarly consensus has not yet been reached, monetary policy certainly played a central role. A recession was under way by late summer of 1929, an unremarkable economic slowdown that has been attributed to the tight-money policy the Federal Reserve (the Fed) adopted in the spring of 1928 (Romer 1993, 26). That decision reversed the easy-money policy the Fed had pursued, following a clandestine July 1927 meeting with the heads of Great Britain’s and Germany’s central banks to support Great Britain’s return to the gold standard (Couch and Shughart 1998, 12). The restoration of monetary discipline was a belated attempt to rein in the bulls then running rampant on Wall Street (Williams 1994, 125–26).

In a series of moves that in hindsight appears ill conceived, the Federal Reserve Bank of New York raised the discount rate from 3.5 percent in February 1928 to 5 percent in July, the highest the rate had been since 1921. In addition, between January and July 1928, the Fed’s Open Market Committee sold government securities worth more than $480 million, thereby reducing the stock of money to an amount that was allowed to remain relatively constant until August 1929, when the discount rate was raised once again, to 6 percent. These monetary policy initiatives, which were in large part shaped by the Fed’s worries about a speculative bubble on Wall Street that was in all likelihood fueled by its earlier easy-money stance, did not have the intended effect: they “clearly failed to stop the stock market boom. But they did exert steady deflationary pressure on the economy” (Friedman and Schwartz 1963, 289–90).
The monetary roof then collapsed. Between the economy’s peak in August 1929 to its trough in March 1933, “the stock of money fell by over a third,” a reduction more than triple the 9 percent monetary declines of 1875–79 and 1920–21, the two most severe contractionary periods in U.S. history prior to this point (Friedman and Schwartz 1963, 299). Although an expansionary policy resumed thereafter, it was too late to undo the damage to the banking system—“more than one-fifth of the commercial banks in the United States holding nearly one-tenth of the volume of deposits at the beginning of the contraction suspended operations because of financial difficulties” (Friedman and Schwartz 1963, 299)—and to the economy as a whole: “Net national product in current prices fell by more than one-half from 1929 to 1933 and net national product in constant prices by more than one-third” (Friedman and Schwartz 1963, 299). Real output per capita decreased by 31 percent over those four years (Vedder and Gallaway 1993, 75), producing dramatic increases in unemployment and extraordinary declines in money incomes.

Monetary policy is also a prime suspect in precipitating “the brief but sharp recession of 1937–38” (Friedman and Schwartz 1963, 12). That downturn followed the Fed’s fateful decision in 1936, when recovery finally seemed to be well under way, to use its newly acquired powers to double member banks’ reserve requirements over the ensuing six months (Friedman and Schwartz 1963, 12).

Although the monetary policies of the 1920s and 1930s surely contributed to the economic Armageddon, the modern literature on the New Deal has advanced three complementary explanations for the Roosevelt administration’s failure to end the Great Depression. Beginning with the work of Gavin Wright (1974), economic historians and public-choice economists have discovered evidence that presidential politics was a significant factor in determining the distribution of New Deal spending across states (Wallis 1984, 1987; Anderson and Tollison 1991; Couch and Shughart 1998). Other things being the same, including indicators of economic distress, states that were important to FDR politically, electoral-vote-rich states in which races for national elective office traditionally had been close, received disproportionate shares of the federal dollars appropriated for emergency relief. These findings help to explain why the solidly Democratic South, which FDR repeatedly called the “nation’s number one economic problem,” consistently was shortchanged by the New Dealers.

Evidence of the vote motive underlying the federal government’s spending priorities also helps explain why the Great Depression persisted in the United States longer than...
anywhere else: rhetoric aside, FDR was more concerned with shoring up his electoral base than with responding to economic need.23

Yet another explanation for the failure of the programs FDR launched, especially those enacted during the flurry of legislative activity remembered ever since as the First Hundred Days, focuses on the economic ideology that FDR and his “Brain Trust” carried to Washington. The administration’s mindset was colored strongly by Marxist notions that free-market institutions inevitably are self-destructive. Competition was seen not as beneficially expanding output, lowering prices, and increasing wealth, but as fostering ruinous overproduction that impoverished capitalists and workers alike. Confusing effect with cause, the New Dealers interpreted the unprecedented collapse of prices, wages, and employment that began in the fall of 1929 as evidence consistent with the supposed evils of unfettered markets. “Hence arose the anomalous but widely supported policy proposal to cure the depression, itself a catastrophic decline of real output and employment, by cutting back on production” (Higgs 1987, 174).

Virtually all of the programs of the so-called First New Deal (1933–35) were aimed at raising prices and incomes by reducing the output of goods and services dramatically, notoriously so under the first Agricultural Adjustment Act, which sharply restricted farm acreage and mandated the wholesale slaughter of hogs during a period of widespread hunger,24 and more generally under the National Industrial Recovery Act’s “codes of fair competition,” which established output-restricting producer cartels in more than seven hundred U.S. industries. The First New Deal thus prescribed the wrong economic policy medicine at the worst possible time.

When in 1935 the Supreme Court declared key statutes enacted during FDR’s first term to be unconstitutional, the administration’s rhetoric turned decidedly more strident. Coupled with major new policy initiatives, including the Social Security Act and the Emergency Relief Appropriation Act, which established the Works Progress Administration at an annual cost of $5 billion, then “the largest appropriation in American history and the largest accretion to the national debt” (Conkin 1975, 76), the antibusiness tone of the Second New Deal (1935–41) created a climate of uncertainty that chilled private investment incentives, thereby retarding the economy’s recovery (Higgs 1997).

23. According to Wallis (1998), the explanatory power of presidential politics in cross-sectional models of New Deal spending is lessened if Nevada is excluded from the analysis. The hypothesis that politics shaped the Roosevelt administration’s spending priorities is bolstered by a counterexample from the South. Concerned in the spring of 1935 by the inroads into his electoral base being made by populist firebrand Huey Long, FDR “ordered all agencies to give no aid to Long.” As a result, “the billions that were being spent on emergency unemployment relief largely bypassed Louisiana” (Black 2003, 341). Roosevelt also used “the Internal Revenue Service and the Justice Department to pursue his enemies.” Indeed, although “this practice did not begin or end with” him, “it appears that President Franklin D. Roosevelt may have been the champion abuser” (Black 2003, 393).

24. In a bit of understatement, Black writes that “the spectacle of destroying tens of millions of bushels of wheat and millions of hogs was a serious public relations challenge in a country with millions of hungry people” (2003, 307).
Contradicting the predictions of the Keynesian model, the New Deal failed despite massive increases in federal government spending. Approximately $45 billion was spent altogether in priming the economic pump. That sum, which admittedly seems paltry by modern standards, amounted nonetheless to nearly half of the $97 billion in goods and services produced by the private sector in 1928, the last pre-depression year, and it came close to the amount of the U.S. economy’s 1933 GNP, $56 billion. Federal expenditures grew by 136 percent between 1932 and 1940, with little apparent stimulative effect (Couch and Shughart 1998, 22).

Within this environment of apparently intractable economic paralysis, the Supreme Court shifted position on important constitutional questions. Considered against the backdrop of policy failure, pro–New Deal scholars have missed the point in condemning the Old Court for frustrating FDR’s economic agenda. Recovery would not have materialized earlier had the majority been more submissive prior to 1937 because it simply is not possible to reverse declines in output and employment by restricting output even further. Rulings invalidating the administration’s wrong-headed efforts to prop up wages and prices did, however, allow FDR to make the Supreme Court a convenient scapegoat for the First New Deal’s policy failures.

Neither does the New Court merit the credit doled out by the New Deal’s partisans for freeing the federal government to pursue therapeutic recovery programs. Prosperity did not resume after the Court changed course. Recovery was retarded in part because the majority’s willingness to support the administration’s antibusiness policies contributed to the climate of uncertainty faced by private investors (Higgs 1997). Depression also persisted because much of the economic regulation was sustained by the Court in 1937 and later was designed not to increase the nation’s wealth, but to transfer existing wealth to favored political constituencies. Although the votes of some members of the Supreme Court undoubtedly were influenced by the surrounding economic environment, the historic shift in the majority’s position from 1935 to 1937 has more parochial origins.

### The Old Court and the New Deal

It is worth emphasizing that the membership of the Supreme Court remained unchanged during the decisive years from 1935 to 1937. The “Nine Old Men” then sitting on the bench consisted of Chief Justice Charles Evans Hughes and Associate Justices Louis Brandeis, Pierce Butler, Benjamin Cardozo, James McReynolds, Owen Roberts, Harlan Fiske Stone, George Sutherland, and Willis Van Devanter.25 Van Devanter was the Court’s longest-serving member, having been appointed in 1910 by

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25. The pejorative label was attached to the Court by brain-truster Adolf Berle in 1933 and became popular three years later following the publication of Drew Pearson and Robert S. Allen’s book *The Nine Old Men* (Leuchtenburg 1995, 119).

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President William Howard Taft. Hughes, appointed as an associate justice by Taft the same year, was serving his second term on the High Court. After stepping down in 1916 to run unsuccessfully as the Republican Party’s presidential nominee against incumbent Woodrow Wilson, he had been reappointed as chief justice in 1930 by Herbert Hoover. Roberts, also appointed in 1930, and Cardozo, appointed in 1932, likewise were named to the Supreme Court by President Hoover. McReynolds and Brandeis were Wilson appointees of 1914 and 1916, respectively; Butler and Sutherland were appointed by Warren G. Harding in 1922; and Stone was appointed by Calvin Coolidge in 1925 (Hall 1992, 975).

The Court, whose advanced age FDR would make a political issue,26 frequently but not always divided into two camps, neither of which constituted a majority on its own. Justices Brandeis, Cardozo, and Stone fairly reliably cast votes supporting the constitutionality of the New Deal’s legislation. Justices Butler, McReynolds, Sutherland, and Van Devanter, collectively known as the “Four Horsemen,” consistently voted against it. The outcomes in many of the cases the Court decided before the constitutional revolution of 1937 therefore hinged on the votes of Hughes and Roberts. As we shall see, it was Justice Roberts’s siding with the Four Horsemen that often produced five-to-four majorities invalidating the major policy initiatives of Roosevelt’s first term.

The Supreme Court’s first chance to rule on New Deal legislation involved the so-called hot-oil cases, *Panama Refining Co. et al. v. Ryan et al.* and *Amazon Petroleum Corp. et al. v. Ryan et al.* (293 U.S. 388 [1935]). In a dual decision handed down on January 7, 1935, an eight-member majority, Justice Cardozo dissenting, invalidated part of the “Petroleum Code” promulgated under the authority of the National Industrial Recovery Act of 1933. At issue was the president’s power “to prohibit . . . the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted . . . by any state law or valid regulation.” The hot-oil decision rested not on the Commerce Clause but on the majority’s finding that the regulations before it represented an unconstitutional delegation of legislative power.

However, it was “Black Monday,” May 27, 1935, that is often credited with triggering Roosevelt’s confrontation with the Supreme Court. The Court handed down three unanimous decisions that day, two of which invalidated key provisions of FDR’s policies. The third denied that the president could replace members of independent regulatory bodies at will.

In *Louisville Bank v. Radford* (295 U.S. 555 [1935]), the Court declared the Frazier-Lemke Act, which provided mortgage relief for bankrupt farmers, to be

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26. Citing Tribe (1985, xv), Nelson (1988, 268) notes that at the time the justices averaged seventy-two years old and constituted the oldest Court on record. Brandeis was eighty in 1937, Van Devanter seventy-seven, Hughes and McReynolds seventy-five, Sutherland seventy-four, Butler seventy, Cardozo sixty-six, Stone sixty-four, and Roberts sixty-one (Black 2003, 405).
unconstitutional. *Humphrey’s Executor v. United States* (295 U.S. 602 [1935]) overturned FDR’s firing of a by-then deceased Federal Trade commissioner.\(^{27}\) Announcement of the *A. L. A. Schechter Poultry Corp. et al. v. United States* (295 U.S. 495 [1935]) decision, however, drew the most attention. Writing for a unanimous Court, Chief Justice Hughes declared the “Live Poultry Code,” authorized by §3 of the National Industrial Recovery Act, to be invalid in part because it unconstitutionally delegated legislative powers to the president and in part because it regulated a business, namely the purchase of chickens for slaughter and resale, that was not interstate commerce.\(^{28}\)

*Schechter* rang the death knell of the National Recovery Administration (NRA), the legislative centerpiece of the First New Deal. Although no one suspected at the time, it also represented the Court’s last attempt to grapple with the increasingly thorny problem of determining where the effect of local commerce on interstate commerce was “direct”—and therefore subject to regulation by Congress—and where the effect was only “indirect”—and therefore beyond the federal government’s constitutional reach. Instead of articulating a clearer test, the Court responded, as we shall see, by abandoning altogether the distinction between direct and indirect effects.

Black Monday portended rough sailing for other programs of the First New Deal that were being tested in the courts. Indeed, the Supreme Court thereafter added to the administration’s string of defeats that began with the hot-oil cases. The list includes *Railroad Retirement Board v. Alton Railroad Co.* (295 U.S. 330 [1935]), which struck down, five to four, the Railway Retirement Act of 1934; *United States v. Butler* (297 U.S. 1 [1936]),\(^{29}\) which stuck down the Agricultural Adjustment Act of 1933 on a six-to-three vote; and *Carter v. Carter Coal Co.* (298 U.S. 238 [1936]),\(^{30}\) in which a five-to-four majority struck down the Bituminous Coal Conservation (Guffey) Act of 1935 (Leuchtenburg 1969, 70–71).

\(^{27}\) *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Majority control of the five federal trade commissioners was important to the president because authority to administer the Securities Exchange Act of 1934 had, somewhat surprisingly, initially been vested in that body (Leuchtenburg 1995, 55). Humphrey was decidedly not in FDR’s political camp.

\(^{28}\) “Defendants do not sell poultry in interstate commerce” (*Schechter*, at 521). The Court reached that conclusion even though the Schechter Corp. routinely obtained live chickens from out-of-state suppliers. All of the slaughtered poultry was resold locally, however, at Schechter’s Brooklyn, N.Y., location.

\(^{29}\) The plaintiff William M. Butler was a former campaign manager for Calvin Coolidge and Republican Party chairman. “Butler’s lawyer, George William Pepper, a former Republican Senator, was an intimate and lifelong friend of Supreme Court Justice Owen Roberts, and had persuaded Coolidge to name Roberts to the bench.” In the circumstances, Roberts, who wrote the majority opinion, “should have recused himself” (Black 2003, 377–78).

\(^{30}\) When the Guffey Act was before Congress in July 1935, FDR wrote to the chairman of the House committee “where the bill was bottled up because of fears about its constitutionality” that “I hope your committee will not permit doubts about constitutionality, however reasonable, to block the proposed legislation” (qtd. in Black 2003, 358).
Still, the Old Court did not reject every element of the president’s program. In 1934, for example, the Court sustained by a vote of five to four a mortgage moratorium law enacted by Minnesota. The following year, five-to-four majorities in three companion cases validated Congress’s action in 1933 abrogating clauses in private and public contracts stipulating payment in gold. And in 1936, the Court upheld the constitutionality of the Tennessee Valley Authority on an eight-to-one vote and rejected six to three a challenge to the procedures of the Securities and Exchange Commission. Indeed, one month before the president launched his attack, the Court unanimously sustained the Ashurst-Sumners Act, which forbade the shipment of convict-made goods into states prohibiting their use, sale, or possession (Leuchtenburg 1995, 230).

Combined with the Court’s decisive support for economic regulation in Nebbia, these victories for the administration caused FDR to worry that the public might conclude that the Court was acting judiciously, invalidating statutes only when they exceeded government’s constitutionally delegated powers. These worries were grounded in reality:

there is no dearth of evidence to suggest that the fate of the First New Deal can be explained by the fact that the statutes were drafted with scant attention to (and even flagrant disregard for) existing constitutional law; that inadequate attention was given to the selection and cultivation of promising test cases; and that the legal arguments offered in its defense were poorly framed and infelicitously presented. (Cushman 1998, 36)
Nevertheless, according to Secretary of the Interior Harold Ickes, the Court’s failure to strike down every piece of New Deal legislation was something of a disappointment to the president.37

Crisis for the Court: The Subversion Bid

It is not known which of the Old Court’s anti–New Deal decisions infuriated FDR the most. It might have been Tipaldo or Schechter or Humphrey’s Executor.38 FDR’s reaction to the second of these decisions certainly was swift and, given the public outcry it elicited, not particularly well thought out. At a presidential news conference four days after Black Monday, he condemned the Court for relegating the nation “to the horse-and-buggy definition of interstate commerce” (qtd. in Nelson 1988, 269; Leuchtenburg 1995, 89–90).

In any event, doubts were raised about the constitutionality of two of the Second New Deal’s most radical measures, the Social Security Act and the National Labor Relations (Wagner) Act, which also were being tested in the courts. In addition to the narrowness of many of the administration’s defeats—the Old Court’s unanimity on Black Monday was unusual—FDR’s frustration apparently was reinforced by the realization that he was fast becoming only the second president in U.S. history to serve a full term without having had the opportunity to name even one new Supreme Court justice (Kyvig 1989, 465).39

In 1936, a presidential election was being held, however. Despite the inevitability of a confrontation between the executive and judicial branches, FDR chose not to make the Supreme Court’s obstruction of New Deal legislation a campaign issue. Although the Democratic Party had made significant gains in the 1934 midterm elections, picking up nine seats in the House and ten in the Senate (Nelson 1988, 271), the president’s reelection seemed far from assured. During the summer of 1936, “the newly established Gallup poll gave FDR only a five-point margin” over his Republican challenger, Alf Landon, “and the Literary Digest survey, which had never been wrong and had predicted Roosevelt’s victory in 1932, foresaw an overwhelming defeat for the President” (Leuchtenburg 1995, 107).40

37. “There isn’t any doubt at all that the President is really hoping that the Supreme Court will continue to make a clean sweep of all New Deal legislation, throwing out the TVA Act, the Securities Act, the Railroad Retirement Act, the Social Security Act, the Guffey Coal Act, and others. He thinks the country is beginning to sense this issue but that enough people have yet to be affected by adverse decisions so as to make a sufficient feeling on a Supreme Court issue” (qtd. in Leuchtenburg 1995, 101).

38. Nelson (1988, 285) thinks that the last of these decisions broke the Rooseveltian camel’s back. Leuchtenburg opts for Tipaldo, to which FDR reacted by saying that the Court had created a “no-man’s-land” where “neither the federal nor state governments could act to protect the worker” (qtd. in 1969, 71).

39. Kyvig asserts that FDR was “the first president ever to serve a full term without having named even one new justice to the high court” (1989, 465). That honor in fact belongs to James Monroe, who did not make his first appointment to the Supreme Court until 1823, the midpoint of his second term. See Nelson 1988, 268, and Hall 1992, 973.

40. A remarkable 80 percent of the nation’s newspaper editors endorsed Republican Alf Landon’s candidacy in 1936 (Leuchtenburg 1995, 145).
That prediction was reinforced by other polls pointing both to the unpopularity of some of the president’s programs—a Gallup survey, published the day before Butler invalidated the Agricultural Adjustment Act of 1933, “showed [that] a majority of the country disapproved of the AAA” (Leuchtenburg 1995, 98)—and to the political risk of drastic proposals curbing the Court’s powers. Only 31 percent of individuals surveyed by a Gallup poll in the autumn of 1935 responded affirmatively to the following question: “As a general principle, would you favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional?” Fifty-three percent of the respondents said no; 16 percent had no opinion (Leuchtenburg 1995, 94). Hence, the political payoff to risking another controversy similar to the one that followed the president’s Black Monday news conference appeared to be low.

FDR’s unanticipated landslide on Election Day 1936 ended the “studied silence” with which he had treated the Supreme Court throughout the campaign (Leuchtenburg 1995, 107). Although some commentators have faulted the president for thereby fumbling away the opportunity to secure a mandate for judicial reform in his second term (Leuchtenburg 1995), his victory helped to crystallize plans for confronting the Nine Old Men that had been percolating for some time, perhaps as far back as a campaign speech in Baltimore on October 5, 1932, in which, departing from his script, FDR had “blurted out” that, “after March 4, 1929, the Republican party was in complete control of all branches of the government—the Legislature, with the Senate and Congress, and the executive departments, and I may add, for full measure, to make it complete, the United States Supreme Court as well” (qtd. in Leuchtenburg 1995, 83).

The administration’s thinking on how to overcome the Old Court’s obstructionism traveled for some months down two parallel tracks. One of the strategies considered was to amend the Constitution either “to define Congress’s legislative powers more expansively” (Nelson 1988, 273) or to make it more difficult for the Court to overturn legislative acts. An example of the former was a proposal, explored by FDR aide Thomas Corcoran and NRA attorney Jack Scott between January and September 1935, to enlarge the General Welfare Clause by incorporating language from the Virginia Resolutions of 1787. Wrapping themselves in the cloak of George Washington, who on Virginia’s behalf had asked the Constitutional Convention to grant Congress the power “to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation” (Kyvig 1989, 471), the New Dealers hoped to provide a constitutional safe harbor for acts the Supreme Court might otherwise invalidate on Due Process or Commerce Clause grounds. Ideas also were floated for amending the Constitution in ways that would limit the Court’s powers more directly. Included were Senate Judiciary Committee chairman George Norris’s proposal that a legislative act remain in force unless two-thirds of the justices voted to strike it down (Kyvig 1989, 470) and a proposal that explicitly would have allowed Congress to override an adverse Court ruling by repassing the legislation in its next session (Kyvig 1989, 472).
Meanwhile, “the years 1935–1937 saw more ‘Court-curbing’ bills introduced in Congress than in any other three-year (or thirty-five year) period in history” (Nelson 1988, 273). Most of these legislative proposals, which synchronized with the second strategy the administration was considering for overcoming judicial roadblock, contemplated somehow creating new vacancies on the Supreme Court. The alternatives included “increasing the size of the Court to eleven or fifteen, mandating retirement at age 65 (or 70), or establishing a ten-year term for [federal] judges” (Nelson 1988, 273).

The consensus among students of the period is that FDR ultimately abandoned the constitutional amendment strategy owing to fears that it would take too long and to uncertainty about the prospects for ratification, defeat being the outcome if just thirteen states voted down the proposed amendment. Influenced heavily by Attorney General Homer Cummings, who told him that “the problem is not with the Constitution but with the judges who interpret it,” and by the advice of former NRA general counsel Donald Richberg, “who frequently conferred with FDR and Cummings on the Court,” the president opted to solve his judicial problem legislatively (Kyvig 1989, 473).

“Abruptly, without warning,” FDR submitted his court-packing plan on Friday, February 5, 1937 (Leuchtenburg 1995, 129, 133). The president’s final legislative proposal called for authority to appoint up to six additional justices, one for every sitting member of the Court who had served at least ten years and had not resigned or retired within six months of reaching seventy years of age (Swisher 1939, 362).

The accompanying message to Congress, no member of which apparently had been consulted beforehand, justified the plan on two grounds. One was a supposedly overcrowded federal court docket; the other raised worries about the advanced ages of the sitting justices (Leuchtenburg 1969, 73). FDR, the consummate politician, had blundered (Leuchtenburg 1995, 138). The president’s assertion of docket crowding was rebutted effectively by Chief Justice Hughes in a letter read by Senator Burton Wheeler in the course of the latter’s testimony before the Senate Judiciary Committee (Leuchtenburg 1995, 140). FDR’s raising of the age issue was offensive to

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41. Kyvig, for one, thinks that these concerns were unfounded: “The history of the five previous amendments, all but one of which involved major constitutional change and all of which were ratified within fifteen months of passage by Congress, together with the 1936 election results reinforce Norris’s opinion that an amendment effort led by FDR would have had a good chance of success” (1989, 479).

42. Morrison argues that the president acted rashly, given that the probability of a seat’s becoming vacant on the Court was quite high at the time the court-packing plan was submitted to Congress. Modeling the incidence of Supreme Court vacancies as a Poisson process, he concludes that “when Roosevelt decided to change the Court by creating additional seats, the odds were already eleven to one in his favor that he would be able to name one or more justices by traditional means that very year” (1977, 144, emphasis in original). That likelihood was borne out, we now know.

43. Besides expanding the Supreme Court, the president’s proposal would have created forty-four additional judgeships in the lower federal courts.

44. Denying that the Supreme Court was behind in its business or that adding more justices would increase its efficiency, the chief justice anticipated the logic of collective action (Olson 1965): “there would be more judges to hear, more justices to confer, more judges to discuss, more judges to be convinced and to decide” (qtd. in Leuchtenburg 1995, 140–41).
many, not least to the admirers of octogenarian Louis Brandeis (Nelson 1988, 282). By March, in consequence, the president had abandoned his original justifications in favor of what was widely suspected to be the plan’s true motivation: to marginalize the votes of the Court’s “conservative Justices who were making it impossible for the national government to function” (Leuchtenburg 1995, 139).

The president’s original proposal never was reported out of the Senate Judiciary Committee. A compromise plan formulated in June 1937, authorizing the appointment of one additional Supreme Court justice each calendar year for every member who remained on the bench after reaching seventy-five years of age—a compromise that might well have passed—likewise expired following the untimely death of Senate majority leader Joseph Robinson in July (Leuchtenburg 1985).45

The Switch in Time and Its Aftermath

FDR’s court-packing plan, in addition to the political firestorm it ignited, was undermined by West Coast Hotel v. Parrish et al. (300 U.S. 379 [1937]), announced on March 29, 1937. Justice Roberts, who had voted with the Four Horsemen in Tipaldo, switched sides, joining with Chief Justice Hughes and Justices Stone, Brandeis, and Cardozo to sustain, again five to four, a Washington minimum-wage law that on its face did not differ from the New York statute the Court had ruled unconstitutional the previous summer. Justice Roberts’s opportune reversal “converted a 5–4 division against New Deal legislation to 5–4 in favor” (Leuchtenburg 1995, 142) and has been celebrated ever since as the “switch in time that saved nine.”

Writing for the majority, Chief Justice Hughes declared that “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process” (Parrish, at 391). He then went on to say that the State of Washington’s legislature was entitled to adopt measures to reduce the evils of the “sweating system.” . . . The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of evil and as to the means adapted to correct it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment. (Parrish, at 398–99)

45. “Under this so-called ‘compromise,’ FDR lost very little.” Although four sitting justices were older than seventy-five, and it would take until 1940 for the president to expand the Court to thirteen members, “the most immediate effect of the measure would be to permit Roosevelt by the beginning of January 1938—only six months away—to add three Justices . . . one for the 1937 calendar year, one for the 1938 calendar year, and one to fill Van Devanter’s slot” (Leuchtenburg 1995, 148). (Van Devanter, as noted earlier, retired at the end of the Court’s 1937 term.) Before the Grim Reaper intervened, Senator Joseph Robinson was widely thought to have been FDR’s first choice to fill a Supreme Court vacancy (Leuchtenburg 1995, 145 and 181).
That new deference continued in the following year when the Court sustained defendant Carolene Products Company’s conviction for selling so-called filled milk in violation of a 1923 federal law—milk defined as “any product resembling milk or cream that was in fact a blend of skimmed milk and a fat or oil other than milk fat” (United States v. Carolene Products Co., 340 U.S. 144 [1938]). Writing for the majority, Justice Stone declared that “the existence of facts supporting the legislative judgment is to be presumed for regulatory legislation affecting ordinary commercial transactions.” Inquiries by the courts, he said, “by their very nature . . . must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it” (Carolene Products, at 152, 154; see also Siegan 1980, 185). Carolene Products established that the state’s police powers can be used to protect incumbent producers by denying consumers the right to purchase a cheaper substitute (Siegan 1980, 188). Thus were the regulatory floodgates thrown wide open.

The Commerce Clause suffered a similar fate. Whereas “commerce as trade was the lesson of John Marshall’s opinion in Gibbons v. Ogden, . . . commerce as everything was the position taken in NLRB v. Jones & Laughlin Steel Corp”46 (Epstein 1988, 8), one of five cases decided on April 12, 1937, that on five-to-four votes, the Four Horsemen dissenting, upheld the constitutionality of the National Labor Relations Act. In sustaining the federal government’s authority to grant workers the right to organize unions and to prohibit employers from discriminating against union members, the Court “adopted what is still the accepted view that, under the Commerce Clause, Congress can reach and regulate not only interstate commerce itself but also any activity affecting commerce, whether directly or indirectly” (Hall 1992, 573).

Beginning in the spring of 1937, when Marshall’s interpretation of the Commerce Clause was rejected decisively, the New Court (soon to be called the “Roosevelt Court” as the confirmations of Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy solidified an acquiescent majority)

ruled favorably on every one of the New Deal laws whose constitutionality was challenged. It expanded the commerce power and the spending power so greatly that it soon became evident that there was almost no statute for social welfare or the regulation of business that the Court would not uphold. While the Court had once held that the national government lacked the power to regulate even major industries, because it said these industries were not in interstate commerce, the Court now extended the range of the federal government to the most remote businesses. In one case, it held that a farmer was engaged in interstate commerce even when he grew wheat wholly for his own consumption on his own farm [in Wickard v. Filburn, 317 U.S. 111 (1942)]. (Leuchtenburg 1969, 108)

It is known, but perhaps not emphasized enough, that the Court cast its deciding votes on the minimum-wage case before the president submitted his proposal to Congress (Leuchtenburg 1995, 143). The court-packing plan therefore cannot be the proximate cause of the famous “switch in time that saved nine.”

Washington is porous, so one cannot rule out the possibility that the Court became aware of the forthcoming presidential bombshell prior to February 5. The justices certainly could not have been ignorant of the many bills being introduced in Congress to limit their powers. Indeed, just short of a month before announcing his plan, FDR had put the Supreme Court on notice during his State of the Union address of January 6, 1937. He said on that occasion that

the vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it. Difficulties have grown out of its interpretation; but rightly considered it can be used as an instrument of progress, and not as a device for prevention of action. . . .

The Judicial Branch also is asked by the people to do its part in making democracy successful. We do not ask the Courts to call nonexistent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good. (qtd. in Black 2003, 400)

“This was,” according to Conrad Black, “a clear warning to the justices seated before him” (2003, 400). However, FDR did not propose then any specific measures for dealing with the judiciary’s obstruction of his legislative agenda, and modern scholarship stresses the secrecy surrounding the development of Roosevelt’s plan to pack the Court; only the attorney general and NRA counsel Richberg apparently were taken into the president’s confidence (Leuchtenburg 1966, 1969, and 1995).

An alternative explanation for the sudden course change signaled by Parrish and thereafter fulfilled in a demonstrated willingness to uphold New Deal legislation is that Hughes foresaw the threat to the Court’s independence and prestige, as manifested in the 1936 election returns, and he convinced Roberts to join him in averting it (Stern 1946, 681–82). Indeed, the president personally may have pressured the

47. Recognizing that “the Court reversed itself before the court-packing plan was announced,” Gely and Spiller (1982, 47, emphasis in original) present theory and evidence supporting the hypothesis that Roosevelt’s 1936 electoral landslide was the proximate cause of the constitutional revolution of 1937. Cushman disputes that conclusion: “The Supreme Court did not follow the election returns of 1934” (1998, 26), when, as Black points out, reversing the normal losses sustained by the party of the incumbent president, “the Democrats picked up nine congressmen and the astounding number of ten senators” (2003, 335). According to Cushman, “If the Court felt no compunction about gutting the New Deal in the wake of the Democrats’ spectacular success in 1934, one is led to inquire, why would the Court respond so differently to the election of 1936?” (1998, 27). The same question might as well be asked about 1932, when FDR carried forty-two states and subsequently was inaugurated to preside over a Congress in which the Democrats held almost a two-to-one seat margin in the Senate and a nearly three-to-one margin in the House (Black 2003, 250).
chief justice. There is some reason to believe that FDR “flouted tradition” by approaching Hughes at some point before the announcement of his plan to suggest that the two of them “consult in advance” about cases pending before the Court. If so, that suggestion was rebuffed (Swisher 1939, 355–56).

The standard accounts of the “switch in time” come perilously close to advancing a “devil theory” in which a single man, perhaps succumbing to the chief justice’s influence, altered history’s course. That explanation does contain a grain of truth, however. Roberts, whom Hoover had appointed after the Senate had failed narrowly (on a vote of thirty-nine to forty-one) to confirm his first choice to replace the deceased Edward Stanford, “established a record of inconsistency probably difficult to equal in his voting on the bench” (Abraham 1999, 151–52). Roberts’s “vacillating course” (Stern 1946, 682) wound from joining the majorities in Blaisdell, Nebbia, the “gold clause” cases, Ashwander, Jones, and Kentucky Whip & Collar, all of which were considered victories by the Roosevelt administration, to siding with the Four Horsemen repeatedly in striking down the most glittering legislative ornaments of the First New Deal, and then to moving back again to the Rooseveltian fold in Parrish and later decisions.

Justice Roberts’s political ambitions may have contributed to his seemingly inconsistent voting record. He had his eye on the 1936 Republican presidential nomination, and supporters had encouraged him to position himself as a savior of the Constitution. He later conceded that those ambitions might have influenced his jurisprudence. As noted earlier, Hughes had set the precedent for such a move by stepping down from the Supreme Court to run for the presidency in 1916 (Leuchtenburg 1995, 43–44).

Whether FDR’s landslide victory in 1936 or the prospect of court packing caused Roberts and Hughes to change direction, they certainly did so. On May 24, five-to-four majorities sustained key elements of the Social Security Act, and rarely again would the dissenters marshal as many votes. Indeed, “in the ten terms from 1937 through 1946, the Court reversed thirty-two of its earlier decisions” (Leuchtenburg 1995, 233). Although the president had lost the political battle over his court-packing plan, he had won the war for the hearts and minds of the Supreme Court. That victory was assured by the five new members he appointed to the Court over the next two and a half years, applying litmus tests of “(1) absolute loyalty to the principles of the New Deal, particularly to governmental regulatory authority; (2) firm adherence to a liberal and egalitarian philosophy of government”; and once the Axis had become a clear and present danger, “(3) full support of [the administration’s] war aims” (Abraham 1999, 160).

That victory came at a high political price, however. The court-packing plan created major rifts in Roosevelt’s supporting coalition. Those divisions were widened further by the president’s appointment of Alabama senator Hugo Black, whose nomination to the Supreme Court was nearly defeated following revelations that he had been—and perhaps still was—a card-carrying member of the Ku Klux Klan (Leuc-
tenburg 1995, 180–212), and by the president’s unsuccessful effort to purge his own party’s ranks of New Deal foes during the 1938 midterm elections (Couch and Shughart 1998, 212). The bold economic experimentation begun in 1933 thereafter hit a political dead end, not to be resumed until “Dr. Win-the-War” replaced “Dr. New Deal” as the chief dispenser of Rooseveltian policy medicine.

The Supreme Court in Public-Choice Perspective

Few scholars who have written about the Supreme Court attribute its sudden change of heart in the spring of 1937 to “anything inherent in the cases themselves—their facts, the arguments presented, or the authorities cited” (Stern 1946, 681). It is more common to focus on the sharp differences in the reasoning that the Old Court and the New Court brought to bear in interpreting the Constitution’s language, especially the Due Process and Commerce Clauses. Those who applaud the constitutional revolution of 1937 see the New Court’s unprecedented willingness to defer to the judgments of Congress and state legislatures in the realm of economic regulation as a triumph of progressivism over conservatism, a belated adaptation of the Constitution to meet the demands of the twentieth century (for example, Leuchtenburg 1995).

In a crisis atmosphere, the need for bold experimentation seemed obvious to the members of the Greatest Generation who stood on unemployment lines, as it did to the members of the political class who viewed the New Deal as a necessary and salutary response to the Great Depression, a view that many continue to hold. However time-honored the existing constitutional limits on governmental authority might have been, how could they be allowed to stand in the way of therapeutic public policies that promised to provide relief to the downtrodden masses and to promote economic recovery? The Supreme Court was not immune to that sentiment, as illustrated by Justice Brandeis’s famous line in New State Ice that the nation faced “an emergency more serious than war” (at 306).  

49. FDR intervened personally in an attempt to defeat incumbent Democratic senators Walter George of Georgia, “Cotton Ed” Smith of South Carolina, and Millard Tydings of Maryland, going so far as to disperse campaign funds to their challengers in that year’s primary elections. All three incumbents were reelected. Roosevelt was more successful in unseating Congressman John J. O’Connor of New York City, who was added to the administration’s enemies list at a presidential press conference on August 16, 1938. According to FDR, “week in and week out O’Connor labors to tear down New Deal strength, pickle New Deal legislation” (qtd. in Black 2003, 459).

50. As Black writes, “the president, the Congress, and the public could not be stalled indefinitely by five or six septuagenarian humbugs snuffling in their dickies in the Supreme Court robing room about antiquarian legal fineries” (2003, 406).

51. Dissenting in Parrish, n. 62, at 402, Justice Sutherland retorted that “the meaning of the Constitution does not change with the ebb and flow of economic events.” Brandeis’s declaration illustrates the extent to which emergency conditions can supply a pretext for breaching the limits on government’s constitutionally delegated powers. During such times, what Higgs (1988) calls the “Crisis Constitution” swallows the “Normal Constitution.” Moreover, the history of Supreme Court jurisprudence provides ample evidence that once an emergency has passed, “reversion to the status quo ante will not occur, that private rights once surrendered are unlikely ever to be recovered fully” (Higgs 1988, 384). Also see Higgs 1987.
Assertions about the “needless ‘waste’ and ‘destructiveness’ of competition”52 or about the government’s responsibility to protect the public’s health and safety notwithstanding, modern theories tell “us to look, as precisely and carefully as we can, at who gains and who loses, and how much, when we seek to explain a regulatory policy” (Stigler 1975, 140). Moreover, because “the announced goals of a policy are sometimes unrelated or perversely related to its actual effects, . . . the truly intended effects should be deduced from the actual effects” (Stigler 1975, 140, emphasis in original).

That lesson, understood by the Lochner majority and by and large respected by the Court until 1932, was forgotten in 1934 and discarded for good in 1937. Considered in an interest-group perspective, Nebbia marks a turning point in Supreme Court history as significant as West Coast Hotel v. Parrish.53 Although Roberts was the “swing” vote in both decisions, it is no defense of him or of the justices who joined in the majority to say that they thought they were unleashing the governmental powers necessary to deal with the nation’s economic crisis. Those powers were instead being unleashed in service to politically powerful special interests—the milk bloc, the farm lobby, the labor unions, and so on—who were demanding government action not to advance the public’s interest, but to secure benefits for themselves at the public’s expense.

It is of course even less a defense of the Court to conclude that in 1937 it yielded to political blackmail from the executive and legislative branches. FDR personally enjoyed wide popularity; many of the New Deal’s programs did not. By 1939, fully 54 percent of the respondents to an American Institute of Public Opinion poll answered yes when asked, “Do you think the attitude of the Roosevelt administration toward business is delaying business recovery?” (Higgs 1997, 577). Given popular discontent with the president’s policies, perhaps the justices could have weathered the court-packing storm rather than bending before it.

However, models of self-interest help to explain judicial behavior, as they help to explain the behavior of more ordinary actors. The interest-group theory of government views the “independent” judiciary’s role as one of ensuring the durability of the contracts negotiated between the politically well-organized demanders of wealth transfers and the politically self-interested legislator-suppliers of those transfers. By basing its rulings on the intentions of the enacting legislature and by deferring to established legal precedent (stare decisis), the courts prevent the current legislature from acting opportunistically to undermine the terms of the deals interest groups have struck with past legislatures, thereby increasing the values of the original bargains and hence the prices interest groups are willing to pay for wealth transfers in their favor (Landes and Posner 1975).54

52. Theories of competitive overproduction were central to the reasoning underlying Justice Brandeis’s dissent in New State Ice (Siegan 1980, 134).

53. Cushman argues forcefully that Nebbia was by far the more significant of the two decisions. Writing for the Parrish majority, Hughes quoted from Nebbia “far more extensively than [from] any other case to which he referred in his opinion” (1998, 87).

54. See Shughart and Tollison 1998 and Anderson 2001 for recent summaries of this literature. Crain 2001 considers the problem of political contract durability more generally.
A key question that the interest-group theory raises is, What motivates life-
tenured judges to behave as the Landes-Posner model predicts? The justices certainly
did not do so in 1937. The Supreme Court abruptly began to authorize Congress to
break existing legislative contracts and to write new ones. One possible explanation
for the Court’s change of course focuses on the judicial branch’s responsiveness to
shifts in the ideological complexions of the congressional committees having over-
sight responsibilities with respect to the judiciary, changes that are transmitted
through the budget process (Toma 1991) and coordinated by the chief justice (Toma
1996). In that view, the 1936 election returns signaled a permanent change in the
political equilibrium to which the Court rationally adapted.

Faced with threats to their life tenure under some reform proposals and to the
values of their votes under others, Hughes and Roberts blinked. It did not matter
in the long run that they did. Age was on FDR’s side, as it had been from the begin-
ning. Starting with the retirement of Van Devanter at the end of the Court’s 1937
term, FDR, the longest serving chief executive on record, eventually named more
members to the Supreme Court—eight—than any other president except George
Washington. Ironically, the president’s constitutional appointment powers, more than
the Court’s opportune “switch in time,” merits history’s approval or reproach for the
constitutional revolution of 1937.

Summary and Conclusions

The Great Depression and the Roosevelt administration’s policy responses to it rep-
resent perhaps the most studied period in U.S. economic history. Those events are for
economists what the Big Bang is for physicists (Margo 1993). One of the most criti-
cal of the episodes in that eventful decade involved FDR’s announcement on Febru-
ary 5, 1937, of his plan to remove the obstacles that the judiciary had put in the way
of New Deal legislation by “packing” the Supreme Court with up to six new justices.
Perhaps responding to that threat or instead to the overwhelming electoral majority
that had reelected FDR to a second term the previous November, the Court executed
its famous “switch in time that saved nine,” voting thereafter to uphold virtually every
piece of economic regulatory legislation that came before it and, in the process,
greatly expanding the government’s regulatory powers.

The Court’s constitutional change of course had been adumbrated three years
earlier in a case sustaining New York’s authority to regulate the retail price of milk.

55. Cushman’s (1998) valiant attempt to impart consistency to Roberts’s jurisprudence and hence to reject
the orthodoxy identifying 1937 as a year of constitutional revolution is undermined by Roberts’s own
words: “Looking back” to “the tremendous strain and the threat to the existing Court, of which I was fully
conscious,” he confessed, “it is difficult to see how the Court could have resisted the popular urge” (qtd.
in Higgs 1988, 383, citing Leonard 1971, 144 and 155). FDR also thought that although his subversion
had been unsuccessful legislatively, it had ultimately had the desired effect: “The Court yielded. The Court
changed. The Court began to interpret the Constitution instead of torturing it” (qtd. in Black 2003, 418).
Indeed, prior to 1937, the Court had upheld the constitutionality of some important New Deal programs and policies, such as the Securities and Exchange Commission, the Tennessee Valley Authority, and the administration’s abrogation of clauses in private contracts stipulating that payment be made in gold. What the Court had struck down was legislation—such as the producer cartels organized under the National Industrial Recovery Act’s codes of “fair competition” and the fees collected from farmers to orchestrate output-restricting agricultural cooperatives under the first Agricultural Adjustment Act—that it deemed to have exceeded Congress’s constitutional powers. Indeed, the majority’s willingness to uphold some New Deal statutes while condemning others disappointed the president, at least according to Harold Ickes, because the public might conclude that it was he, not the Court, who was being unreasonable.

FDR held the Supreme Court in contempt, an attitude he put on public display at his news conference following the announcement of three unanimous anti–New Deal decisions on so-called Black Monday, May 27, 1935, and later reinforced by the naming of Hugo Black as his first Court appointment.56 Furious that the Court had struck down the legislative centerpieces of the First New Deal, but remaining silent on the issue until a second term in office was assured, he formulated his court-packing plan without consulting anyone beyond a close circle of advisers and timed its announcement on February 5, 1937, with evident care.

In the end, however, the court-packing plan turned out to be a needless and politically counterproductive effort to bend the Supreme Court to the president’s will. Within months of its announcement, Van Devanter had retired from the bench, soon to be replaced by the ultraliberal Black, whose confirmation, as a matter of Senate courtesy, was never in jeopardy despite his Klan connections. The opportunities that shortly would unfold for FDR to appoint four more new justices ensured that a supermajority of the Court would rule in favor of liberal legislation no matter how far beyond the government’s constitutional constraints that legislation might have been considered prior to this period. The Rooseveltian constitutional revolution might have been delayed a year or so had Roberts not performed his interpretive somersault in the spring of 1937, but in any event the president’s constitutional appointment powers rendered a revolution inevitable.

References


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56. Personal enmities between the president and at least one sitting member of the Court seemed to have gone both ways. Reacting to FDR’s stunning 1936 electoral victory, Justice McReynolds reportedly said, “I’ll never resign as long as that crippled son-of-a-bitch is in the White House” (qtd. in Leuchtenburg 1995, 121).


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