

acrossanct about the nine-justice Court that Roosevelt. At various times in the Court's history Congress seven, and ten justices as the high bench's stat-Roosevelt awkwardly tried to justify his proposed table charges of inefficiency and with gratuitous, ves about the senility of the current justices. s—a subject of delicacy," Roosevelt conceded — had an examination of complicated and changed e, new facts become blurred through old glasses needs of another generation; older men, assum- e same as it was in the past, cease to explore or or the future."⁷

truth in what Roosevelt said. The average age of seventy-one. Louis Brandeis was the oldest at derly Brandeis, along with Benjamin Cardozo ke Stone (sixty-four), made up the Court's most The notoriously conservative "Four Horsemen" : James C. McReynolds (seventy-five), George), Willis Van Devanter (seventy-seven), and Chief Justice Charles Evans Hughes was n J. Roberts, the Court's youngest at sixty-one, that held the balance of power.

nor age was the real issue, and Roosevelt knew he normally pro-New Deal *New York World*-osevelt's scheme as "too clever, too damned loyal associate Samuel Rosenman later la-he too much cleverness" of Roosevelt's plan.⁸ o fiddle with one of the most respected and institutions, one designed by the Founders and hology as the ballast whose unshifting weight steady the ship of state. It did the president's that he opened the national discussion about ansparingly disingenuous note.

velt's exasperation with the Court were gen- inted not one of the nine sitting justices; he t president since Andrew Johnson not to have mination. His Democratic predecessor and

former chief, Woodrow Wilson, had appointed the liberal Brandeis and the conservative McReynolds. Republican presidents had named all the others, just as they had named a heavy majority (nearly 80 percent) of judges then sitting at all levels of the federal judiciary.⁹ Though its mem- bers were not monolithic in their thinking, the "Court of Methuselahs" regularly produced majorities, with the Four Horsemen as their nucleus, for decisions that threatened everything the New Deal was trying to accomplish.

In the broadest sense, the Court's power derived from the doctrine of judicial review, a concept not defined in the Constitution but first asserted by John Marshall in *Marbury v. Madison* in 1803, when he claimed for the Supreme Court the ultimate authority to define the meaning of the Constitution and set limits to legislative action. The doctrine lay dormant for half a century thereafter, not revived again until the Dred Scott case in 1857. But in the decades following the Civil War, as both state legislatures and the federal Congress tried to assert some control over the rapidly industrializing economy, the Court was increasingly inclined to stay the legislators' hands. The specific restraint it invoked most often was one fashioned from the elusive concept of substantive due process.

Substantive due process amounted in practice to the proposition that some "substantive" rights were so inviolable — especially property and contract rights — that they lay beyond the reach of any imaginable "process," or law. Though in explaining its decisions the Court cited various specific points of the law, such as restrictions on the commerce power or freedom of contract, the envioning idea that since the 1890s had shaped the Court's basic attitude toward economic legislation was the principle of laissez-faire, or noninterference in the market economy. Applying that principle made the judiciary the most powerful arm of government, though its power was wholly the power to veto. Reformers from Theodore Roosevelt onward, including on occasion jurists like Brandeis and Stone, had decried this meddling judicial activism, beseeching the black-robed, unelected justices to defer to the will of democratically elected legislatures. But they pleaded in vain. In the

9. Hughes and Van Devanter had been appointed by President Taft, Sutherland and Butler by Harding, Stone by Coolidge, and Cardozo and Roberts by Hoover, who had also elevated Hughes to the position of chief justice. In 1933 approximately 191 of the 266 federal judges were Republican appointees. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 79, n. 5.

1920s alone, no fewer than nineteen socioeconomic statutes had fallen to the judicial ax, including laws that prohibited child labor and defined minimum wages for women workers. In the 1930s the flood of New Deal legislation made a titanic duel with the judiciary all but inevitable.

The Court had already thrown down the gauntlet to the New Deal. On "Black Monday," May 27, 1935, in *Schechter Poultry Corporation v. United States*, known ever after as the "sick chicken" case, the justices had unanimously declared the National Industrial Recovery Act to be unconstitutional. Congress, said the Court, had impermissibly delegated its inalienable lawmaking authority to the National Recovery Administration — "delegation run riot," said Justice Cardozo. The opinion not only voided the NRA but jeopardized the very concept of rulemaking independent regulatory agencies like the Securities and Exchange Commission or the National Labor Relations Board. For good measure, the Court also went out of its way to define the Schechter brothers' Brooklyn kosher-poultry business as exclusively intrastate in character. The decision thus put the Schechters' violation of NRA wage and hour codes, not to mention their sale of diseased poultry, beyond the reach of federal power, which was constitutionally confined to the regulation of interstate commerce.¹⁰

The *Schechter* decision stunned Roosevelt. What was at stake, he instantly recognized, was nothing less than what the *New Republic* called "the very foundation of national power in a modern industrial society." Could the government act in the face of the greatest economic calamity in American history, or was it to be forever hog-tied by the strictures of the Constitution? "We have been relegated to the horse-and-buggy definition of interstate commerce," Roosevelt complained. "I tell you, Mr. President," Attorney General Homer Cummings fulminated, "they mean to destroy us. . . . We will have to find a way to get rid of the present membership of the Supreme Court."¹¹

Worse soon followed. In the first week of 1936 the Court took up residence in its new classic-revival temple on Capitol Hill. "It is a mag-

10. *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935). On the same day as the *Schechter* decision, the Court also handed down two other decisions harmful to the New Deal. In *Louisville Bank v. Radford* (295 U.S. 555), the Court invalidated the Frazier-Lemke mortgage moratorium act. In *Humphrey's Executor v. United States* (291 U.S. 602), it sharply circumscribed the president's power to remove members of regulatory commissions.

11. Leuchtenburg, *Supreme Court Reborn*, 43, 85, 88.

nificant structure," said a *New Yorker* writer, "with fine big windows to throw the New Deal out of."¹² On January 6, in the case of *United States v. Butler*, the Court by a six-to-three vote tossed out the Agricultural Adjustment Act. The tax on processors that went to pay farmers who limited crop production, the Court declared, unconstitutionally encroached on regulatory powers reserved to the states by the Tenth Amendment. Justice Stone in dissent said that the majority's decision in the AAA case proceeded from "a tortured construction of the Constitution. . . . Courts are not the only agency of government that must be assumed to have capacity to govern," he admonished, in what was by then a familiar criticism.¹³ In March 1936, again citing the Tenth Amendment as well as limitations on the commerce power, the Court struck down the Guffey Bituminous Coal Conservation Act, a "little NRA" law enacted after *Schechter* to shore up the chronically ailing coal industry.

Then came the crowning blow. Just weeks later, in *Morehead v. New York ex rel. Tipaldo*, Owen Roberts joined the Four Horsemen to form a scant five-to-four majority that invalidated a New York minimum wage law as an unconstitutional infringement on freedom of contract. The Court's other decisions in the 1936 term had circumscribed federal power, largely in the name of states' rights. Now the *Tipaldo* decision sharply curtailed the regulatory powers of the states themselves.

For the critics of substantive due process, *Tipaldo* was the final insult. Justice Stone dissented with unusual vigor. "There is grim irony," he wrote, "in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together." Privately, Stone wrote to his sister that the *Tipaldo* decision climaxed "one of the most disastrous" terms in the Court's history. "[*Tipaldo*] was a holding by a divided vote that there was no power in a state to regulate minimum wages for women. Since the Court last week said that this could not be done by the national government, as the matter was local, and now it is said that it cannot be done by local governments even though it is local, we seem to have tied Uncle Sam up in a hard knot." For his part, Roosevelt trenchantly remarked that with the *Tipaldo* decision the Court had for all practical

12. *New Yorker* quoted in Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933-1941* (Boston: Houghton Mifflin, 1970), 639.

13. *Butler v. United States*, 297 U.S.1 (1936).

purposes marked off a "no man's land where no Government—State or Federal—can function."¹⁴

Reflecting the accumulating frustration with the Court's dogged devotion to judicial nullification, more than one hundred bills were introduced in Congress in 1936 to redefine the balance of power between the legislative and judicial branches of government. After *Tipaldo*, even Herbert Hoover called for a constitutional amendment to restore to the states "the power they thought they already had," and the Republican platform of 1936 strongly advocated such an amendment.¹⁵

Against this background, Franklin Roosevelt's aggravation with judicial obstruction was neither unwarranted nor singular. Nor was it precipitate. As early as November 1935, Harold Ickes had recorded in his diary: "Clearly, it is running in the President's mind that substantially all of the New Deal bills will be declared unconstitutional by the Supreme Court. This will mean that everything that this Administration has done of any moment will be nullified."¹⁶ Throughout 1935 and 1936, at Roosevelt's urging, Justice Department lawyers had struggled to draft a constitutional amendment to curb the Court's power. But they wrestled in vain with a grotesquely cumbersome formula that would have conferred explicit powers of judicial review on the Court, while providing, after an intervening election, for legislative override of Court findings of unconstitutionality—a kind of indirect popular referendum, designed by Rube Goldberg. By early 1937 two years of effort had not yielded an acceptable draft.

The amendment process was in any case designedly difficult, requiring two-thirds approval in each house of Congress and ratification by three-fourths of the states. It was also time-consuming. The example of the amendment prohibiting child labor, first approved by Congress in 1924 but still unpassed by the requisite number of states thirteen years later, weighed heavily in the president's thinking. Time, Roosevelt knew, was of the essence. Cases testing the validity of the National Labor Relations Act, the Social Security Act, and a bundle of state minimum wage and unemployment compensation laws were already on the Court's docket by the end of 1936. Unless something were done, the new year might bring a constitutional Armageddon. The distinct possibility

14. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), 632; Leuchtenburg, *Supreme Court Reborn*, 159, 100.

15. Leuchtenburg, *Supreme Court Reborn*, 100–101.

16. Ickes Diary 1:495.

loomed that when the Court reconvened in January the entire New Deal might be summarily repealed by wholesale judicial annihilation—a bitterly ironic sequel to Roosevelt's smashing 1936 electoral victory. Roosevelt was understandably appalled at this prospect. "When I retire to private life on January 20, 1941," he said, dramatically revealing his own estimate of the gravity of the impending crisis, "I do not want to leave the country in the condition Buchanan left it to Lincoln."¹⁷

SMALL WONDER, THEN, that Roosevelt pursued Attorney General Cummings's suggestion to "get rid of the present membership of the Supreme Court." Given the decades-long agitation against "judicial supremacy," and among the array of nostrums prescribed at the time for judicial reform, the plan that Roosevelt advanced on February 5 stood out not for its boldness but for its mildness. It defined no new constitutional role for the Court and thus left the time-honored system of checks and balances unperturbed. It did not in fact propose literally to "get rid" of the Court's sitting justices but asked merely for an expansion, under stipulated conditions, of the Court's personnel, and asked for that expansion in the larger context of streamlining the entire federal judiciary. Roosevelt's Court plan was no wanton blunder. It was a calculated risk, and not an unreasonable one. He was waging a modest challenge to the tradition of an independent judiciary against the prospect of the entire New Deal's judicial extinction.

But Roosevelt woefully underestimated the strength of popular devotion to the Court's traditional role. He also miscalculated badly in his choice of tactics and timing. From the moment of its unveiling, his Court plan stirred a nest of furies whose destructive power swiftly swelled to awesome proportions, well beyond the president's ability to control.

What the president called judicial reform a mighty host of critics throatily assailed as "Court-packing." "If the American people accept this last audacity of the President without letting out a yell to high heaven, they have ceased to be jealous of their liberties and are ripe for ruin," wrote the columnist Dorothy Thompson. A fatal elision took root in the public's mind between the Court plan, the contemporaneous sit-down strikes, and the president's role in each. Somehow, Roosevelt managed to be perceived as both the acknowledged perpetrator of one affront to traditional notions of constitutional order (by attacking the Court) and the indulgent patron of another (by remaining silent on the sit-

17. *Time*, March 8, 1937, 13.

downs). Americans overwhelmingly told pollsters that they disapproved of the sit-down strikers. Before 1937 was out, 45 percent of respondents in one Gallup poll deemed the administration "too friendly" to labor.¹⁸

Nor did it help matters that just weeks before his Court message, Roosevelt had asked Congress for legislation to reorganize the executive branch. The executive reorganization bill was a sensible proposal, incorporating the recommendations of independent experts to bring the federal executive into line with the principles of modern management science. But in company with the Court-reform bill, it opened Roosevelt to charges of seeking "dictatorship" by weakening other branches of government and aggrandizing the power of the presidency. Ominously, a Gallup poll in the weeks just after the bombshell Court message—when the furor over the sit-downs was at its height—showed a solid majority (53 percent) opposed to the president's Court proposal.¹⁹

Roosevelt seemed to have been deserted by the political muses who had guided him so surely throughout his career. He unaccountably compounded his already abundant errors by shrouding his intentions in secrecy until the last minute, robbing himself of the indispensable congressional support that might have come with the lawmakers' sense of participation in the plan's development. The first that congressional leaders heard of the Court scheme was on the morning of February 5, when Roosevelt gave them a perfunctory briefing at the White House just hours before his special message went up to Capitol Hill. Kentucky senator Alben W. Barkley, usually a staunch Roosevelt supporter, later reflected that in this case Roosevelt was a "poor quarterback. He didn't give us the signals in advance of the play." In Vice-President Garner's car headed back to the Capitol, House Judiciary Committee chairman Hatton Sumners of Texas turned to the others. "Boys," he said, "here's where I cash in." When the bill was read later that day in the Senate, Garner stood in the lobby, ostentatiously holding his nose and turning his thumb down.²⁰ A few weeks later, disgusted alike with Roosevelt's silence on the sit-down strikes and with the Supreme Court bill, Garner betook himself on an extended vacation to Texas. His departure deprived Roosevelt of crucial leadership in the Congress, where Garner had long

been a representative and now served as presiding officer of the Senate. "This is a fine time to jump ship. . . . Why in hell did Jack have to leave at this time for?" Roosevelt fumed to Jim Farley. "I don't think the President ever forgave Garner," Farley concluded.²¹

Sumners and Garner were not the only defectors. Many southern Democrats abandoned the president, fearing that a more liberal Court might open the door to a second Reconstruction that would challenge white supremacy. Roosevelt may have anticipated defections of that sort, but to his chagrin his Court-reform proposal also alienated many of his formerly reliable progressive allies like Montana's Senator Burton Wheeler. Though they shared Roosevelt's frustration with the current Court's conservatism, they objected on principle to any compromising of the judiciary's independence. In a surprising and major embarrassment to the president, many Democratic liberals also hotly denounced the Roosevelt plan. New York Democratic governor Herbert Lehman, whom FDR had once described as "my strong right arm," was among them. "Last week," a newsmagazine reported when Lehman announced his opposition to the Court plan, "the strong right arm gave [Roosevelt] a jolting blow between the eyes." As for Wheeler, he emerged as the Court plan's chief opponent in the Senate. During "the hysteria of the First World War," Wheeler claimed with some hyperbole, "I saw men strung up. Only the federal courts stood up at all, and the Supreme Court better than any of them." Republicans kept their peace, quietly savoring the Democratic fratricide.²²

Wheeler orchestrated a brilliant series of ripostes to the president's proposal. He produced a devastatingly cogent letter from Chief Justice Hughes, a venerable, bearded figure of imperturbable dignity and the object of iconic popular veneration as the spirit of the laws incarnate. Hughes conclusively rebutted Roosevelt's specious claims about judicial inefficiency. To the president's proposal to enlarge the bench, Hughes delivered a magisterial rebuke: "More judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide," said Hughes, hardly constituted a formula for more expeditious litigation.²³

By early March Roosevelt abandoned his arguments about ineffi-

21. James A. Farley, *Jim Farley's Story: The Roosevelt Years* (New York: McGraw-Hill, 1948), 84.

22. *Digest* 1, no. 3 (July 31, 1937): 5; Studs Terkel, *Hard Times: An Oral History of the Great Depression* (New York: Pantheon, 1970), 271.

23. Leuchtenburg, *Supreme Court Reborn*, 133.

18. *Literary Digest*, February 20, 1937, 3; George H. Gallup, *The Gallup Poll: Public Opinion, 1935-1971* (New York: Random House, 1972), 1:69.

19. Gallup, *Gallup Poll*, 1:50.

20. James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (Lexington: University of Kentucky Press, 1967), 87-92.