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## COURT PACKING

The Great Depression, the most devastating economic crisis in American history, prompted government at all levels to respond with bold economic reform policies, yet the Supreme Court's invalidation of numerous such laws on questionable grounds sparked the constitutional crisis of 1935–37 between itself and the elected branches of the government. In 1937, President Franklin Delano Roosevelt responded by proposing the Judiciary Reorganization bill, dubbed by its opponents as a “court packing” plan. Had it become law, the bill would have created a suggested retirement age of 70 for all federal judges, including justices of the Supreme Court, and empowered the president to appoint an additional judge for each not so retiring. Decried by some as an attack on the independence of the Supreme Court, the legislation died in mid-1937 after the Court switched course and began sustaining liberal statutes of the sort it had been overturning. The number of justices has remained at nine ever since. The defeat of the plan helped to forge an emerging anti-New Deal coalition among congressional conservatives of both parties, and New Deal liberals were unable to press their legislative agenda as successfully thereafter.

### Constitutional Background and History

Although Article III of the Constitution vests the “judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress”

may establish, the Constitution does not specify how many justices are to serve on the Supreme Court, nor even what inferior courts (if any) should be established. The Constitution empowers the political branches—Congress and the President—to determine by legislation both the number of justices and the structure of the federal judiciary. Indeed, the only explicit constitutional provisions for the independence of the federal judiciary are the life tenure of federal judges and the fact that “one supreme Court” must be established.

Since 1789, the number of Supreme Court justices has varied from as few as five to as many as ten, sometimes because of political considerations, especially at times of national crisis. In early 1801, the crisis of the first change in power from one party to another prompted the Federalist Congress to reduce by attrition the number of Supreme Court justices from six to five, hoping to reduce incoming Democratic-Republican President Thomas Jefferson's opportunities to appoint new justices. Between 1863 and 1869, the crises of Civil War and Reconstruction led to three more such changes. In 1863, the Republican Congress increased the number of justices from nine to ten to ensure a strongly pro-Union Court, yet in 1866 reduced the number to seven to deny President Andrew Johnson any appointments, and in 1869 increased the number to nine to allow President Ulysses S. Grant to appoint two justices. Thus, as of 1937, the number of justices had been set by statute at nine for 68 years.

### The Supreme Court vs. the New Deal

Between 1933 and 1936, in response to the economic crisis of the Great Depression, President Roosevelt and the Democratic Congress enacted sweeping new laws as part of the New Deal, such as the National Industrial Recovery Act (NIRA), the Agricultural Adjustment Act (AAA), the National Labor Relations Act (NLRA), and the Social Security Act. In general, these New Deal laws granted the federal government new powers to regulate the national economy in order to restore prosperity, more closely regulate business, and distribute the nation's wealth more equitably. Many states also enacted economic reform legislation, especially debtor relief, business regulation, and wage and hours standards for workers. While business leaders denounced these liberal laws, popular support ratified the New Deal in the 1934 elections, when Democrats added nine seats to their majorities in both the House and the Senate – one of only three times in the twentieth century (along with 1902 and 1998) that the party controlling the White House gained seats in an off-year election.

The Supreme Court, however, was dominated by a bloc of four conservative justices, Willis Van Devanter, Pierce Butler, George Sutherland, and James McReynolds, popularly known as the “Four Horsemen,” after the agents of doom described in Revelations 6:2-8. Committed to a very narrow view of Congress's power to regulate interstate commerce, an expansive sympathy for contract and property rights, and a belief in laissez faire economic policy, the Four Horsemen consistently voted to overturn economic reform legislation. They were often, but not always, joined by one or both of the Court's two centrists, Chief Justice Charles Evans Hughes and Justice Owen Roberts. Finally, three liberal justices, Louis Brandeis, Benjamin Cardozo, and Harlan F. Stone, opposed the conservative judicial activism of the Four Horsemen and urged deference to legislative decisions on economic issues.

In 1935 and 1936 the conservative bloc succeeded in striking down several economic reform laws, including the NIRA in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Railroad Retirement Act in *Railroad Retirement*

*Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), the AAA in *United States v. Butler*, 297 U.S. 1 (1936), and state minimum wage legislation in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). These decisions and others like them were extremely unpopular, and critics of the Court pointedly noted that the average age of the Court (approximately 72) was higher than ever before. A best-selling book entitled *The Nine Old Men* popularized that phrase as a caustic nickname for the Court. In short, the Court had precipitated a constitutional crisis because it, an unelected body, had chosen to invalidate popular economic legislation at a time of economic emergency.

Though Roosevelt said very little about the Court during his 1936 re-election campaign, the issue was the subject of frequent comment and debate among other politicians, the press, and the public. Republican presidential candidate Alf Landon ran against the New Deal, warning that Roosevelt posed a threat to the Court and the Constitution. Nevertheless, FDR and the Democratic Party won an overwhelming electoral victory. Democrats elected twelve more representatives and seven more senators, pushing Democratic majorities in the House and Senate to the unprecedented levels of 331-89 and 76-16, respectively. Roosevelt carried every state in the Union except Maine and Vermont, won 523 electoral votes to Landon's 8, and garnered 60.8 percent of the popular vote. Though the Supreme Court played no direct role in the election, the voters had clearly chosen the New Deal policies of Roosevelt over the laissez faire policies of the Court, and the stage was set for FDR to try to resolve the constitutional crisis and save the cause of economic reform.

### The Crises Comes to a Head

During 1935 and 1936, FDR and his advisors discussed various ways to achieve a positive resolution of the crisis. Suggestions included limiting the appellate jurisdiction of the Court, amending the Constitution to enlarge the power of Congress to regulate interstate commerce or to allow Congress to override Court decisions holding laws unconstitutional, enlarging the Court with additional members, and others. Congress, too, was considering

action. Between 1935 and 1937, 37 bills were introduced to curb the Court's power—one more such bill than had been proposed during the previous 65 years.

Finally, in December 1936, FDR concluded that constitutional amendments were unnecessary because the problem was the Court and not the Constitution. With several important New Deal statutes on the Court's upcoming docket—including the NLRA and the Social Security Act—Roosevelt was also convinced that any solution had to take effect more quickly than the time-consuming amendment process. Finally, FDR was influenced by Ninth Circuit Court judge William Denman, a childhood friend who was vocally advocating expansion of the federal judiciary to alleviate crowded dockets and lengthy delays in federal litigation. By presenting his plan as, in part, a remedy to judicial inefficiency, FDR hoped to blunt the expected criticism that he was attempting to “pack” the Court.

FDR accepted the advice of his attorney general, Homer Cummings, who fused suggestions from law professor Edwin S. Corwin and a long-forgotten proposal of James McReynolds to legislate a suggested retirement age of 70 for federal judges, including Supreme Court justices, and to allow the President to appoint a new judge for each who did not retire at 70. The proposal would have allowed the Supreme Court, at the time limited by statute to nine justices, to grow to as large as fifteen.

FDR formulated the plan in great secrecy and announced it on February 5, 1937. Though public support was initially strong, conservative legislators of both parties immediately attacked it. Even FDR's own vice president, John Nance Garner, disavowed the proposal. Though public support for the plan grew slowly during February and March, two events in April and May caused the bottom to drop out. First, in the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), decided on April 12, the Court upheld the constitutionality of the National Labor Relations Act by reversing course and finally approving a more expansive interpretation of Congress's power to regulate interstate commerce. Known as the “switch in time that saved nine,” the votes of Chief Justice Hughes and Justice Roberts were contrary to their prior rulings, but helped doom FDR's court

packing plan. Though the two had actually voted on the case in December 1936, before the plan was announced, it is highly probable that FDR's huge election victory, coupled with persistent rumors that he would soon take some action regarding the Court, strongly influenced their change of mind. Second, on May 18, Justice Van Devanter announced his retirement, thus giving FDR the opportunity to make his first Supreme Court appointment. At this point, public support dropped precipitously, for the goal of achieving a Court more in tune with modern economic ideas and policies had been achieved. Though defeat in Congress did not come until July, FDR's plan really stood no chance of success after May.

### Conclusion

It has been said of the court packing episode that FDR lost the battle but won the war, because although the plan was defeated the Supreme Court acquiesced in the liberal constitutional doctrines necessary to sustain his programs. Further, in the years thereafter, FDR appointed eight justices, more than any other President, and constitutional law on the key issues of interstate commerce and liberty of contract has never returned to the laissez faire doctrines of the Four Horsemen. At the same time, however, FDR's stubborn refusal to drop the plan, even after the McReynolds retirement, damaged his popularity and helped strengthen a conservative coalition in Congress that often frustrated liberal initiatives. Like other presidents who have won second terms, FDR found that the political capital amassed in electoral victories can prove illusory, especially when spent on projects that can be portrayed as attacks on venerable institutions. Though FDR's proposal was clearly constitutional, it was at least arguable

### RELATED ENTRIES

#### THIS VOLUME (1921-1945)

Agricultural Adjustment Acts; Election of 1932; Great Depression; Hughes, Charles Evans; National Labor Relations Board v. Jones and Laughlin; National Recovery Administration; New Deal; Relief and Recovery Programs; Roosevelt, Franklin D.; Stone, Harlan Fiske; Supreme Court and the Judiciary

#### OTHER VOLUMES

Supreme Court and the Judiciary (v. 2-7)

that its success could have set a dangerous precedent allowing future presidents or Congresses to pack the Court in the wake of unpopular decisions, and might thus have undermined the independence of the Court and the ability of American constitutional law to restrain the will of the majority.

### Bibliography and Further Readings

- Ackerman, Bruce. *We The People: Transformations*. Cambridge, Massachusetts: Harvard University Press, 1998.
- Brinkley, Alan. *The End of Reform: New Deal Liberalism in Recession and War*. New York, New York: Random House, 1995.
- Caldeira, Gregory A. "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan" *American Political Science Review* 81 (Dec. 1987): 1139-53.
- Kennedy, David M. *Freedom From Fear: The American People in Depression and War, 1929-1945*. New York, New York: Oxford University Press, 1999.
- Leuchtenburg, William. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. New York, New York: Oxford University Press, 1995.
- McKenna, Marian C. *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937*. New York, New York: Fordham University Press, 2002.
- Shaw, Stephen K., William D. Pederson, and Frank J. Williams, eds. *Franklin D. Roosevelt and the Transformation of the Supreme Court*. Armonk, New York: M.E. Sharpe, 2004.

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## HUGHES, CHARLES EVANS

1862–1948

Chief Justice of the United States

The political career of Charles Evans Hughes, spanning the Progressive Era through the New Deal, exemplifies the continuities and contrasts between Progressive-era reform and New Deal liberalism. Although this volume focuses on the period 1921 to 1945, Hughes's career in that period cannot be understood without an examination of his earlier

activities, when he was a Progressive reformer, governor, Supreme Court justice, and presidential candidate. As secretary of state from 1921 to 1925, he advocated positions that were more internationalist than the presidents he served. As chief justice from 1930 to 1941, he was unable to reconcile himself completely to the constitutional changes necessitated by the crisis of the Great Depression and advocated by President Franklin Roosevelt and other liberals. The erstwhile Progressive had become a centrist.

### From Progressive Reformer to Associate Justice of the Supreme Court

Charles Evans Hughes's political career began suddenly and unexpectedly in 1905, when his masterful investigations of New York City's public utility monopoly and of New York's life insurance industry transformed the successful New York City attorney into a celebrated Progressive reformer. Both investigations, undertaken as counsel for special state legislative committees, revealed price-gouging, political corruption, financial manipulation, and other illegal and predatory practices common in that era of nearly unregulated laissez faire capitalism. As a result, the state legislature enacted a host of regulatory reforms that Hughes proposed.

Although Hughes had once responded to a suggestion that he run for a judgeship by stating that "I don't want a judgeship or any other office" (Pusey, I, 109), Republican President Theodore Roosevelt, long critical of the conservative culture of corruption in Albany, intervened in state party politics to ensure Hughes's nomination for governor in 1906. As governor, he successfully pushed for new utility regulatory commissions, stricter banking regulations, a path-breaking worker's compensation act, and other labor reforms. A failed effort to achieve ballot reform and direct primaries, coupled with his aloofness from intra-party politics, spelled the end of his political fortunes in New York. In 1910, near the end of his second two-year gubernatorial term, Hughes gratefully accepted Republican President William Howard Taft's nomination to the U.S. Supreme Court.

As an associate justice, Hughes compiled a progressive record. In *Frank v. Mangum*, 237 U.S. 309