

JUDICIAL INDEPENDENCE AND JUDICIAL LEGITIMACY:
LESSONS FROM PRESIDENT ROOSEVELT AND
CHIEF JUSTICE HUGHES

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In 1937, Franklin Delano Roosevelt began his second term as President, armed with what remains the greatest electoral landslide in U.S. history, and attempting to launch a bevy of New Deal programs to combat the greatest economic and social crisis our nation has ever faced. Charles Evans Hughes was then Chief Justice of the United States Supreme Court, which had stymied the New Deal in case after case. At the height of his political power, President Roosevelt proposed legislation that would have allowed him to appoint up to six additional Justices. President Roosevelt's motivation was clear—he wanted to shift the ideological balance of the Court so that he could legislate the nation out of the Great Depression. His plan threw the nation into a constitutional crisis. What can we learn from Charles Evans Hughes's role in resisting President Roosevelt's court packing plan, and what can that historical episode teach us today and in the future about judicial independence and judicial legitimacy?

On January 20, 1937, Chief Justice Charles Evans Hughes stood in the rain on the East Portico of the United States Capitol Building and administered the oath of office to President Franklin Delano Roosevelt. Raindrops tapped on the microphone as President Roosevelt swore to “preserve, protect, and defend the Constitution of the United States” as he began his second term.¹ Breaking precedent, Roosevelt recited the full oath of office, rather

¹ AP ARCHIVE, *President Roosevelt Inaugurated for Second Term*, YOUTUBE (Jul. 21, 2015), <https://www.youtube.com/watch?v=pmN00j-TZVY>.

than simply stating, “I do.”² He later confided in his aide that on the inaugural podium he felt like saying something even more untraditional. What he wanted to say was:

Yes, but it’s the Constitution as *I* understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution *your* Court has raised up as a barrier to progress and democracy.³

Roosevelt’s version of the oath was likely born both out of confidence—he had won the 1936 election in an unprecedented, and to date still unmatched, landslide—and also out of sheer frustration: the second inauguration fell amid pitched tensions between the President and the Supreme Court, led by Chief Justice Hughes, over the President’s New Deal agenda, tensions that would ultimately result in the President’s efforts to “pack” the Supreme Court, which began just two weeks after they stood together at that rainy inaugural podium.

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The seeds of the 1937 court packing constitutional crisis had been planted decades before.

Franklin Roosevelt began his political career in 1910—just as his cousin, Teddy Roosevelt, began his own campaign for a third term as President.⁴ Teddy Roosevelt routinely criticized judges and called for measures that would significantly compromise the judiciary’s independence, including the ability to recall unpopular judges. In February 1912, Teddy Roosevelt said on the campaign trail:

² FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBRARY & MUSEUM, ACTION, AND ACTION NOW: FDR’S FIRST 100 DAYS 3 (Mar. 4, 2008), <https://www.fdrlibrary.org/documents/356632/390886/actionguide.pdf/07370301-a5c1-4a08-aa63-e611f9d12c34>.

³ Richard D. Friedman, *Chief Justice Hughes’ Letter on Court Packing*, 22 J. SUP. CT. HIST. 76, 76 (1997).

⁴ GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, *Teddy Roosevelt campaigns for a third term, 1912* (last visited Oct. 22, 2025), <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/teddy-roosevelt-campaigns-third-term-1912>.

[E]ither the recall will have to be adopted or else it will have to be made much easier than it now is to get rid, not merely of a bad Judge, but of a Judge who, however virtuous, has grown so out of touch with social needs and facts that he is unfit longer to render good service on the bench. It is nonsense to say that impeachment meets the difficulty. . . . A quicker, a more summary, [and drastic] remedy is needed

When a Judge decides a Constitutional question, when he decides what the people as a whole can or can not do, the people should have the right to recall that decision if they think it wrong. We should hold the judiciary in all respect, but it is both absurd and degrading to make a fetish of a Judge⁵

No such mechanism was put in place, but Franklin Roosevelt came of age politically while his cousin Teddy publicly and ferociously lambasted the judiciary for standing in the way of progress.

The 1920s saw rising animus toward the Supreme Court—whose Chief Justice was former President William Howard Taft—over its continued invalidation of state and federal laws, many of which sought to regulate business or protect workers’ rights amid Gilded Age industrial abuses.⁶ In 1924, the Progressive Party Platform called for empowering Congress with the ability to override the Supreme Court’s constitutional decisions. A party statement read:

The usurpation in recent years by the federal courts of the power to nullify laws duly enacted by the legislative branch of the government is a plain violation of the Constitution. . . . The Constitution specifically vests all legislative power in the Congress, giving that body power and authority to override the veto of the president. The federal courts are given no authority under the Constitution to veto acts of Congress. Since the federal courts have assumed to exercise such veto power, it is essential

⁵ *ROOSEVELT INDORSES RECALL OF JUDGES*, N.Y. TIMES, Feb. 22, 1912, at 5.

⁶ ROBERT POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930*, at 685 (2023).

that the Constitution shall give the Congress the right to override such judicial veto, otherwise the Court will make itself master over the other coordinate branches of the government.⁷

By 1932, Franklin Roosevelt was the Democratic candidate for President. In a campaign speech, he impugned the impartiality of the Supreme Court, saying: “After March 4, 1929, the Republican Party was in complete control of all branches of the Government—Executive, Senate, and House, and I may add, for good measure, in order to make it complete, the Supreme Court as well.”⁸ His rival, the incumbent President, Herbert Hoover, shot back: “Does [Roosevelt] express an intention to attempt to reduce the tribunal to an instrument of party policy and political action for sustaining such doctrines as he may bring with him?”⁹

Promising Americans a “New Deal,” Roosevelt soundly defeated Hoover, with 57 percent of the popular vote, and an electoral vote of 472 to 59.¹⁰ As he took the inaugural podium on March 4, 1933, one in four Americans were out of work; the stock market was down 75 percent from 1929; four thousand banks had been forced to close in the previous two months, costing millions their life savings; and the nation’s suicide rate had tripled.¹¹ In his first inaugural address, President Roosevelt previewed his vision for “broad Executive power” and a malleable Constitution that would allow him to “wage a war” against the crisis America was facing.¹² He proclaimed: “Our Constitution is so simple and practical that it

⁷ U.C. SANTA BARBARA: THE AMERICAN PRESIDENCY PROJECT, *Progressive Party Platform of 1924* (Nov. 4, 1924), <https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924>.

⁸ *Roosevelt Charged with Court Design in 1932*, N.Y. TIMES, Feb. 11, 1937, at 22.

⁹ *Id.*

¹⁰ *United States presidential election of 1932*, ENCYCLOPEDIA BRITANNICA (last updated Feb. 4, 2025), <https://www.britannica.com/event/United-States-presidential-election-of-1932>.

¹¹ ACTION, AND ACTION NOW, *supra* note 2, at 3, 6.

¹² Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933).

is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”¹³

The now-famous first “hundred days” of Roosevelt’s first presidential term were a period of intense executive and legislative activity. Roosevelt issued a steady stream of executive orders and, at his urging, a compliant, Democrat-controlled Congress passed 16 major bills that laid the foundation for the New Deal.¹⁴ The legislation was focused on the “three Rs”: relief for the unemployed, recovery for the economy, and reform of the financial system. This sweeping action vaulted the federal government into a dominant role in matters that had been previously left to state and local control, forever altered the balance of federal-state power in the United States, and created the regulatory state as we now know it.

It would be two years before the first New Deal litigation came before the Supreme Court, in part because the Attorney General had sought to delay review for as long as possible.¹⁵ But on January 7, 1935, Chief Justice Hughes delivered the 8-1 decision of the Court in *Panama Refining Co. v. Ryan*.¹⁶ The Court held that section 9(c) of the National Industrial Recovery Act was an unconstitutional delegation of legislative power to the President to prohibit interstate transportation of “hot oil”—that is, petroleum that exceeded state production quotas. Justice Benjamin Cardozo, the former Chief Judge of the New York State Court of Appeals, was the lone dissenter.¹⁷ *Panama Refining* was the first Supreme Court case that turned on non-delegation doctrine, and it was the first case to invalidate President Roosevelt’s New Deal legislation, albeit a small section of it.

By the end of 1935, the Supreme Court had struck down the Railroad Retirement Act,¹⁸ the National Industrial Recovery Act,¹⁹

¹³ *Id.*

¹⁴ ACTION, AND ACTION NOW, *supra* note 2, at 13.

¹⁵ MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR 27 (2002).

¹⁶ 293 U.S. 388 (1935).

¹⁷ *Id.* at 435 (Cardozo, J., dissenting).

¹⁸ R.R. Retirement Bd. v. Alton R. Co., 295 U.S. 330 (1935).

¹⁹ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

and the Frazier-Lemke Farm Bankruptcy Act,²⁰ and had also invalidated the President's politically motivated firing of FTC Commissioner William Humphrey.²¹ In one of his sole public comments on the Supreme Court during his first term in office, the President attacked the Court's decision in *Schechter Poultry*, which had invalidated several portions of the National Industrial Recovery Act, as "relegat[ing]" the country to "the horse-and-buggy definition of interstate commerce."²² At the same time, the Department of Justice circulated internal memos considering whether the Supreme Court could be stripped of most or all of its appellate jurisdiction, and whether Congress could enact legislation that would divest the Supreme Court of the power to review the constitutionality of its legislation.²³

The following year, 1936, the Supreme Court, still under the leadership of Chief Justice Hughes, maintained its course. In opinions that, for the most part, were sharply divided, the Court invalidated the Agricultural Adjustment Act,²⁴ the Guffey Coal Act,²⁵ the Municipal Bankruptcy Act,²⁶ and a New York State minimum-wage law.²⁷ Still, the President maintained his public silence on those stinging defeats. He and his team at the Department of Justice had still not settled on the best legal mechanism through which to neutralize the Supreme Court, and he did not want to give his opponents a talking point in a campaign year. At least as a political calculation, their strategy worked. That November, he achieved the greatest landslide victory in the nation's history, winning by an electoral vote of 523 to 8 (only Maine and Vermont

²⁰ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

²¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

²² William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 357 [hereinafter Leuchtenburg, *Origins*].

²³ *Id.* at 361–62.

²⁴ *United States v. Butler*, 297 U.S. 1 (1936).

²⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²⁶ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

²⁷ *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

did not vote for him), and leading the Democratic Party to overwhelming majorities in the House and Senate.²⁸

Fresh off his staggering victory, and having faced repeated calls for action against the Supreme Court, President Roosevelt had several options before him. Those options included a constitutional amendment either enlarging Congress's ability to legislate on matters related to interstate commerce, or giving Congress the power to override the Supreme Court's invalidation of legislation;²⁹ the legislative withdrawal of the Court's jurisdiction to consider the constitutionality of federal legislation;³⁰ a legislative requirement of more than a simple majority of Justices to invalidate a statute;³¹ a statutory provision for overruling a Court decision of invalidity by a two-thirds vote of the succeeding Congress;³² authorizing retirement at full pay;³³ or the appointment of one additional Justice for each member of the Court over the age of seventy.

Of course, President Roosevelt could also just wait for a vacancy to occur on the Court: five of the Justices were in their 70s, Justice Brandeis was 81, and changing just one vote would have made a difference in a significant number of cases from the past two years. But that last strategy had not worked well so far—President Roosevelt's entire first term passed without a vacancy.

Although the President and his advisers had originally preferred the idea of amending the Constitution, they ultimately rejected that path. Amending the Constitution is difficult; President Roosevelt felt it would take too much time to get two-thirds of both Houses of Congress to agree on the language of an amendment, and then get the amendment ratified by three-fourths of State legislatures against well-resourced opposition. In addition, President Roosevelt feared that enlarging Congressional power to legislate on matters

²⁸ Leuchtenburg, *Origins*, *supra* note 22, at 380.

²⁹ *Id.* at 361.

³⁰ *Id.* at 386–87.

³¹ Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 23 (1967).

³² *Id.* at 22–23.

³³ Philip B. Kurland, *A Phoenix Too Frequent: Court Packing Revisited*, 35 U. CHI. L. REV. 376, 380 (1968).

related to interstate commerce via a constitutional amendment would look like a concession that “he had been wrong and the Supreme Court right in their dispute over the constitutionality of New Deal measures.”³⁴ He wanted to ensure that any solution he championed highlighted that the infirmity lay with the Court, not with him or his view of the Constitution.

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We all know which solution he chose. On February 5, 1937, just 16 days after his second inauguration, President Roosevelt asked Congress to empower him to appoint an additional judge for any member of the federal judiciary over age 70 who refused to retire. The proposed “Judicial Procedures Reform Bill of 1937” would allow him to name as many as six additional Supreme Court justices, as well as up to 44 judges to the lower federal courts. President Roosevelt justified his request with no mention of the New Deal litigation, but by asserting that a shortage of able judges had resulted in delays to litigants and overburdened federal court dockets. He used arrestingly blunt language in his request:

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion. In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. . . . A lower mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.³⁵

President Roosevelt justified his court-packing plan with a rationale that debased the stature of the Court and was silent as to

³⁴ Leuchtenburg, *Origins*, *supra* note 22, at 386.

³⁵ Larry DeWitt, *The 1937 Supreme Court Rulings on the Social Security Act* (1999), <https://www.ssa.gov/history/courtrulings.html>.

the substance of the Constitution—revealing, perhaps, that he was motivated not only by the professional desire to have the New Deal succeed, but by a personal desire to embarrass and rebuke the Court. Perhaps aware that his disingenuousness was palpable, he switched tactics during a March 9 fireside chat. While discussing a case in which the Supreme Court upheld the federal government’s efforts to curb deflation by recalling all privately held gold, he said:

[The] constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. . . . We must find a way to take an appeal from the Supreme Court to the Constitution itself.³⁶

During that same fireside chat, he also baited Chief Justice Hughes. He said: “We are under a Constitution, but the Constitution is what the judges say it is”—a statement Chief Justice Hughes uttered in 1907 during his first year as Governor of New York.³⁷ But where Governor Hughes meant it to emphasize the primacy of the judiciary in constitutional interpretation, President Roosevelt delivered it to impugn, rather than to uphold, traditional separation-of-powers values.

Up to that point, Chief Justice Hughes had not reacted publicly to the President’s court-packing plan. Privately, he had said that the bill “would destroy the Court as an institution.”³⁸ But as a matter of principle, he felt he could not wage a public political battle

³⁶ Franklin D. Roosevelt, *March 9, 1937: Fireside Chat 9 on “Court-Packing,” Presidential Speeches*, UNIVERSITY OF VIRGINIA, MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing> (last visited Oct. 22, 2025).

³⁷ Friedman, *supra* note 3, at 78.

³⁸ *Id.*

against the President, as such conduct could only diminish the integrity of the institution he was charged with stewarding.³⁹

Charles Evans Hughes was an institutionalist. In addition to his time on the Supreme Court, he served as Governor of New York (1907-1910), the Republican presidential nominee in the 1916 election who came within a few thousand votes of the White House,⁴⁰ Secretary of State under Presidents Harding and Coolidge (1921-1925), and a Judge of the Permanent Court of International Justice (1929-1930).

His time serving on the Supreme Court was marked by two distinct tenures. In 1910, President Taft nominated him to serve as an Associate Justice, a position he held until he was named the Republican party presidential nominee in 1916. Perhaps influenced by his experience as Governor of New York, Hughes's jurisprudence as an Associate Justice was characterized by upholding state and federal regulatory powers⁴¹ and drawing the curtain on *Lochner's* era of laissez-faire constitutionalism by recognizing that "freedom of contract is a qualified, and not an absolute, right."⁴² In recognizing States' police power to protect the health and safety of the community, and by helping to redefine contractual principles, he helped shift the Court's jurisprudence to one that emphasized not only "private" freedom but "public" freedoms as well.⁴³

In 1930, President Hoover nominated Hughes to be the eleventh Chief Justice, and his second tenure on the Supreme Court began. Along with Owen Roberts, another Hoover appointee, Hughes found himself in the ideological center of the Court. To his left were Oliver Wendell Holmes (replaced by Benjamin Cardozo in 1932), Louis Brandeis, and Harlan Fiske Stone, who, in general, supported the expansion of federal authority and of state regulatory

³⁹ *Id.*

⁴⁰ William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1188 (2005) [hereinafter Leuchtenburg, *Center Holds*].

⁴¹ E.g., *Minnesota Rate Cases*, 230 U.S. 352 (1913) (upholding state power to set intrastate railroad rates provided they do not directly burden interstate commerce).

⁴² *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911).

⁴³ James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 L. & HIST. REV. 115, 139–41 (2006).

legislation. To his right were Willis Van Devanter, James McReynolds, Pierce Butler, and George Sutherland—known as the “Four Horsemen”—who “began from laissez-faire premises and accepted New Liberal reforms only with reluctance.”⁴⁴ Roberts’s and Hughes’s votes were often the decisive ones, and the litigation over New Deal legislation was no exception. Legal scholars characterize Hughes’s jurisprudence as Chief Justice as continuing to embrace his long-held views on civil rights and regulatory issues, while also demonstrating reluctance to embrace New Deal nationalism and welfare reforms.⁴⁵ Above all, as Chief Justice he was devoted to protecting the image and integrity of the Court, which he did by attempting to “control the evolution of [the Court’s] doctrine” amid “sharp ideological divisions among the [J]ustices.”⁴⁶

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Let’s go back to 1937. The day after Roosevelt’s March 9 fireside chat, about one month after he announced the court-packing bill, the Senate Judiciary Committee began hearings on the bill. A bipartisan group of Senators leading the testimony against the bill asked Chief Justice Hughes to testify at a hearing the following week. Hughes was willing to appear, but Brandeis, the most senior member of the Court and a member of the Court’s progressive bloc, was strongly against the Justices testifying “on a matter affecting their own integrity.”⁴⁷ So, Chief Justice Hughes told the Senators that the Court could not enter the controversy “in any direct or even indirect way,” but that should the Committee request information about the Court, “of course we will be glad to give the facts.”⁴⁸

Due to political exigencies, however, Hughes ended up writing a letter to the Committee the weekend before the hearing, without receiving any request for enumerated information from the Committee. He reviewed the letter with Justices Brandeis and Van Devanter before turning it over to the Committee, but not the other Justices, despite many of them living within walking distance of his

⁴⁴ *Id.* at 149.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Friedman, *supra* note 3, at 79.

⁴⁸ *Id.*

house on R Street.⁴⁹ The letter he wrote was a masterclass in understated, fact-based persuasion. Here is an excerpt:

My Dear Senator Wheeler,

In response to your inquiries, I have the honor of presenting the following statement with respect to the work of the Supreme Court.

1. The Supreme Court is fully abreast of its work. When we rose on March 15 (for the present recess) we had heard argument in cases in which certiorari had been granted only four weeks before, Feb. 15.

During the current term . . . we have heard argument on the merits in 150 cases . . . and we have 28 cases . . . awaiting argument. We shall be able to hear all these cases, and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.

This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard.⁵⁰

After explaining the Court's certiorari power, how it serves both the rule of law and the efficient functioning of the Court, and how "if any error is made in dealing with [the certiorari petitions] it is on the side of [granting them too liberally],"⁵¹ Chief Justice Hughes went on:

An increase in the number of justices of the Supreme Court . . . would not promote the efficiency of the court. . . . [I]t would impair that efficiency so long as the court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.

⁴⁹ *Id.*

⁵⁰ *HUGHES AGAINST COURT PLAN; WHEELER SAYS IT ORIGINATED WITH 'YOUNG MEN' LAST YEAR*, N.Y. TIMES, Mar. 23, 1937, at 1, 19.

⁵¹ *Id.*

...

I understand that it has been suggested that with more justices the court could hear cases in divisions. It is believed that such a plan would be impracticable. A large portion of the cases we hear are important and a decision by a part of the court would be unsatisfactory.

I may also call attention to the provision of Article III, Section 1, of the Constitution that the judicial power of the United States shall be vested “in one Supreme Court” and in such inferior courts as the Congress may from time to time ordain and establish. The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.

On account of the shortness of time I have not been able to consult with the members of the court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

I have the honor to remain respectfully yours,

Charles E. Hughes

Chief Justice of the United States⁵²

Although scholars debate the effect of Chief Justice Hughes’s letter, Robert Jackson, then an Assistant Attorney General in the Department of Justice but later, of course, a Supreme Court Justice himself, said that Hughes’s letter “did more than any one thing to turn the tide of the Court struggle.”⁵³

As we all know, President Roosevelt’s court-packing proposal failed. It collapsed under a series of converging events, which include: Hughes’s letter of March 22; the so-called “switch

⁵² *Id.*

⁵³ Leuchtenburg, *Center Holds*, *supra* note 40, at 1198.

in time that saved nine”—that is, the Court’s March 29 decision in *West Coast Hotel Co. v. Parrish* that upheld the constitutionality of a Washington State minimum wage law even though the Court had, months earlier, invalidated a similar New York State minimum wage law;⁵⁴ the April 12 decision in *NLRB v. Jones & Laughlin Steel Corp.* that upheld the National Labor Relations, or Wagner, Act;⁵⁵ and Justice Van Devanter’s May 18 announcement that he would retire, effective June 2,⁵⁶ which finally gave President Roosevelt the opportunity to replace one of the four conservative Justices with a jurist of his choosing.

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What are we to take from these decades-old historical events?

It is heartening to remember today that the balance of power among the three co-equal branches of the federal government withstood the massive pressure the President exerted on it. When he introduced the court-packing plan, Roosevelt had just won the presidential election by the greatest electoral vote landslide our country had ever seen, and his political party controlled both the House and Senate by comfortable margins. And, in the eyes of the public, both the popularity and credibility of the Supreme Court were in decline because of its continued invalidation of popular New Deal measures. When President Roosevelt proposed the court-packing plan on February 5, its success seemed inevitable. So, what happened?

Roosevelt’s decision to pitch the plan as an ad-hominem attack on the “nine old men” at the Supreme Court contributed to its failure. To start, that framing threatened Roosevelt’s credibility—the press and ordinary citizens could readily see that the President had motives unrelated to judicial efficiency. Indeed, public support for court-packing grew after Roosevelt came clean to the public

⁵⁴ 300 U.S. 379 (1937).

⁵⁵ 301 U.S. 1 (1937).

⁵⁶ *Court Change: A Justice Retires*, N.Y. TIMES, May 23, 1937, at 59.

about his true rationale in the March 9 fireside chat.⁵⁷ Further, allowing personal vendettas to drive political action reflects weakness both in the actor and in the outcome sought; institutional reforms must be creative acts born of consensus, not destructive ones born of ego, if they are to endure.

The Framers viewed self-interest and partisanship as inherent and permanent aspects of human nature. They feared the influence of factions and fleeting political majorities, the formation of which they saw as a threat to stable government and, in turn, liberty. As James Madison explained in Federalist Paper 10:

The latent causes of faction are thus sown in the nature of man A zeal for different opinions . . . concerning government . . . ; an attachment to different leaders contending for pre-eminence and power; . . . [have] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.⁵⁸

Were it merely a sufficient safeguard for “ambition to counteract ambition,” the Framers might have settled on two branches of government, both of which are not short of ambitious characters. But as Madison wrote in Federalist Paper 51, ambition “must be connected with the constitutional rights of the place.”⁵⁹ As we all know, the solution the Framers built into the Constitution gave each of our three co-equal branches of government an emergency brake designed to stop or slow the ability of government to move rapidly, in the hope that precipitous governmental action can be avoided. The faction feared by the Framers infects the political branches more rapidly than it does the judiciary, and when those political branches are infected by faction, the Constitution expects that the judiciary’s commitment to the “rights of the place”—that is, the rule of law, will check the other branches.

⁵⁷ Anwen Hao, *Evolution over Revolution: How Judicial Adaptation Undermined Roosevelt’s Court-Packing Plan*, SCH. REV. J., Summer 2025, at 6.

⁵⁸ THE FEDERALIST NO. 10 (James Madison).

⁵⁹ THE FEDERALIST NO. 51 (James Madison).

That is precisely what happened in 1937. Indeed, the most permanent and principled way to have effected a judicial reorganization would have been through a constitutional amendment, a path that President Roosevelt eschewed specifically because it would have taken too long, and because too much power over any amendment's success would lie with the States, beyond the scope of his influence—again, just as the Framers designed it.

Beyond the formal structures the Framers baked into our constitutional government, the court-packing episode demonstrates the immense power of informal norms.⁶⁰ The Constitution does not specify the number of Supreme Court Justices; although the number has remained fixed at nine since 1869, the bench has ranged from six to 10 at various times during earlier periods of U.S. history.⁶¹ In addition, the Constitution does not expressly limit the power of the Executive or Congress to set the size of the Supreme Court. But even though Roosevelt's plan did not violate any express constitutional provision, it came into deep tension with the ingrained national sensibility that, as one scholar put it, "the Court's size should not be manipulated for merely political purposes, and, particularly, simply to guarantee that a reconstituted Court would reach politically desirable results."⁶²

In addition to the court-packing episode, which remains a major stain on his extraordinary legacy, President Roosevelt's tenure is even more notable for the deeply ingrained norm that he not only attempted to break, but broke. In 1940, President Roosevelt ran for and won a third term in office, discarding the tradition of the two-term presidency that George Washington set in 1796, in response to the tyrannical power wielded by the British crown. The New York Times Editorial Board, which had endorsed Roosevelt in 1932 and 1936, endorsed Wendell Wilkie instead. It wrote:

We give our own support to Mr. Willkie . . . because we believe that at a time when the traditional

⁶⁰ See Mark V. Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523 (2004).

⁶¹ Walter Shapiro, BRENNAN CTR., *The Case Against Court-Packing* (June 24, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing?>.

⁶² Tushnet, *supra* note 60, at 545.

safeguards of democracy are falling everywhere it is particularly important to honor and preserve the American tradition against vesting the enormous powers of the Presidency in the hands of any man for three consecutive terms of office.

...

As the situation created by the war developed, the President came to regard his own personal leadership as indispensable and to believe that there was no other member of his party . . . who could safely take his place. The doctrine of one man's indispensability is a new doctrine for this country. It is a doctrine which less scrupulous men in Europe have used to root themselves in power. It is a doctrine which we in the United States have good reason to question, particularly when we consider how the powers of the Presidency have grown, what immense patronage, what gigantic expenditures, what enormous power to perpetuate himself in office is now within the grasp of any President of the United States. These considerations are especially relevant when the particular President . . . has shown himself so impatient of constitutional restraints that he was willing to circumvent the Supreme Court itself by adding enough members to it to give his own opinions a majority. In the defeat of Mr. Roosevelt and the election of Mr. Willkie there is an opportunity to safeguard a tradition with the wisdom of long experience behind it.⁶³

Roosevelt went on to win a fourth term too. His opponent in that election, former Governor Thomas E. Dewey of New York, maintained that "four terms, or sixteen years is the most dangerous threat to our freedom ever proposed."⁶⁴ Shortly thereafter, a bipartisan vote in both Houses of Congress sent the Twenty-Second Amendment to the States, which ratified it in less than four years, transforming an honor-bound principle into constitutional commandment.

⁶³ Editorial Board, *The Choice of a Candidate*, N.Y. TIMES, Sept. 19, 1940, at 22.

⁶⁴ NAT'L CONST. CTR., *FDR's Third-Term Election and the 22nd Amendment* (Nov. 5, 2020), <https://constitutioncenter.org/blog/fdrs-third-term-decision-and-the-22nd-amendment>.

Chief Justice Hughes also relied on informal levers to relieve pressure on the Court. His letter to the Senate Judiciary Committee did not explicitly oppose the plan but rather marshalled the facts to demonstrate that the Court was in firm control of its docket. It was a precisely calibrated single shot across the bow; apart from the letter, Hughes maintained public silence on the issue, fostering an image of professionalism and neutrality, not partisanship.

Many have criticized Chief Justice Hughes as having bent to the storm. He was criticized for writing at the end of his letter that “[t]he Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts”—an extra-judicial opinion on an open constitutional question. He was criticized for not consulting the full Court before sending his letter to the Committee; Justice Stone wrote in his personal correspondence: “I did not see the Chief Justice’s letter, or know of it until I read it in the papers. I certainly would not have joined in that part of it which undertakes to suggest, what is and what is not constitutional.”⁶⁵ Above all, he was accused of facilitating the “switch in time that saved nine”—that is, he forced an unprincipled, results-oriented shift in the Court’s constitutional doctrine.

Legal historians have persuasively challenged that last point. Even before 1937, the Court’s decisions had been trending in a direction more favorable to an interventionist role for the federal government. On “Black Monday” in 1935, the three rulings that came down invalidating legislation executive action were all unanimous—they were not close calls.⁶⁶ The early New Deal statutes, like the National Industrial Recovery Act and Agricultural Adjustment Act, had been drafted mostly by politicians and lobbyists. Later legislation, like the Wagner Act, was drafted by lawyers seeking to avoid the sloppy drafting and constitutional infirmities of the earlier legislation.⁶⁷ Further, in *West Coast*

⁶⁵ Alpheus T. Mason, *Charles E Charles Evans Hughes: An Appeal to the Bar of History*, 6 VANDERBILT L. REV. 1, 12 (1952).

⁶⁶ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

⁶⁷ Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 139 (1992).

Hotel v. Parrish—the purported “switch in time” case—eight of the Court’s members, including Justice Roberts, had conferenced and voted on the case on December 19, 1936, six weeks before Roosevelt announced the court-packing plan.⁶⁸ Hughes had delayed releasing the decision to accommodate Justice Stone, who was ill and unable to participate in the Court’s work for much of that winter.⁶⁹ Thus, the timeline does not bear out the accusation that Justice Roberts switched his vote in the face of pressure from Chief Justice Hughes as a way to thwart the court-packing plan.

Even if Chief Justice Hughes came close to the outer boundary of judicial restraint in his letter to the Senate Judiciary Committee—by appearing to weigh in on a constitutional question, and by failing to consult the full Court—his intervention is best understood as an act of institutional self-preservation—an ambition connected directly to the “rights of the place.” Faced with a frontal attack on the Court’s legitimacy and independence, he sought to safeguard the judiciary’s institutional integrity. The idea of the Supreme Court sitting in panels was already in the water and, in fact, had already been addressed by Chief Justice Taft in 1922, his second year as Chief Justice. In a hearing before the House Judiciary Committee on the Jurisdiction of the Circuit Courts of Appeal and the United States Supreme Court, Chief Justice Taft testified that Congress “could not adopt” the panel approach because, in Taft’s words, “our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts.”⁷⁰ If both Chief Justice Hughes and President Roosevelt bent norms, they did so in opposite directions: Hughes to preserve the constitutional order, Roosevelt to circumvent it.

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⁶⁸ Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PENN. L. REV. 1891, 1949–50 (1994).

⁶⁹ *Id.*

⁷⁰ PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 89 (Dec. 2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf.

In 1951, little more than a decade after the court-packing crisis concluded, Appellate Division Justice Bernard Sheintag delivered the second Charles Evans Hughes Memorial Lecture and quoted from a speech Hughes delivered to the Harvard Alumni Association in 1920:

The pressing problem is how we are to adapt government to imperative needs and yet remain free. . . . Adaptation according to democratic principles, the growth and development in which democratic progress consists, must ever be the concern of those who know how to distinguish between what is vital and what is merely incidental and temporary.⁷¹

The need to “adapt government to imperative needs and yet remain free” captures a dilemma that challenges American democracy today. We have no shortage of imperative needs—institutional mistrust, disruptive technological change, rampant economic and housing inequality, extreme weather, partisan constitutional hardball—and we face mounting pressure to ensure our institutions are able to meet these new challenges. Yet, as Hughes warned, genuine democratic progress requires distinguishing between what is *vital*—the rule of law, separation of powers, and electoral legitimacy—and what is *incidental and temporary*, such as partisan advantage or ideological dominance. Chief Justice Hughes urges us to remember that adaptation must not come at the expense of liberty: to preserve freedom, reform must be guided by constitutional principle rather than political expedience. Times change, power ebbs. But the Constitution abides.

⁷¹ Hon. Bernard L. Shientag, *The Stream of Progress in the Law*, 43–44 (Oct. 31, 1951) (on file with author).