



Written by [Steve Byas](#) on May 21, 2021

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## When FDR Tried to Pack the Court

“It is wrong to think of the [Supreme] Court as another political institution,” Supreme Court Associate Justice Stephen Breyer said recently, in reaction to contemporary calls to “pack” the U.S. Supreme Court with additional members so as to ensure that Democratic Party efforts to pass unconstitutional legislation will not be frustrated by decisions of the current justices. Advocates of increasing the present number of justices, such as Senate Majority Leader Chuck Schumer of New York, argue that President Donald Trump’s addition of three justices — Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett — has shifted the ideological balance of the court, and adding more justices will shift it back.



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The desire to “pack” the Supreme Court with additional justices in order to pass a progressive agenda is not a new idea. In 1937, fresh from winning reelection by sweeping 46 of 48 states, President Franklin Delano Roosevelt likewise saw the Constitution — and any effort by the Supreme Court of his day to adhere to it in opposition to his unconstitutional schemes — as a roadblock to increasing his own power and that of the federal government.

To “remedy” the situation, Roosevelt asked — demanded, actually — that Congress increase the membership of the Supreme Court from nine members to 15. Naturally, he would then nominate six members more compliant with his views, and a compliant Democrat-dominated Senate would confirm them. Then, any legislation that FDR could dream up would face no resistance from the Supreme Court.

### The Intent of the Founders

The role of the Supreme Court, as envisioned by the Founders, is largely misunderstood today, even by many “conservatives.” Alexander Hamilton assured those concerned about its establishment that it would be the “least dangerous branch.” It was not to be a *political* institution, as Justice Breyer rightly said. Rather, it was intended to hear cases arising under the Constitution and federal law, and render decisions that would constitute the law for a particular case and would be binding on the parties of the case. The Supreme Court was never meant to make general law from the bench, and its rulings were not “the law of the land,” but instead the “law of the case.”



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**President or dictator?** Having won reelection in 1936, President Franklin D. Roosevelt believed the Supreme Court should use his interpretation of the Constitution instead of its own. When the court didn't play ball, he tried to remake the court in his own image. *(Photo credit: AP Images)*

The Supreme Court's 1803 decision in *Marbury v. Madison* is often cited as the origin of the Supreme Court's "power" of judicial review — the power to review acts of Congress and the Executive Branch as to their constitutionality. In reality, Chief Justice John Marshall, who wrote the unanimous opinion for the case, never claimed the Court had the "power" of judicial review, but rather a "duty" to determine how the law applied to the case before them. Marshall wrote that Supreme Court justices had taken an oath to apply the Constitution to cases before them; that is, if the justices had a case before them, they were to apply the Constitution as superior to any act passed by Congress. Otherwise, there would be no point to having a written Constitution.

But such logic did not get in the way of enterprising progressive politicians such as FDR.

## The New Deal's War on the Constitution

As a compliant Congress passed law after law as desired by FDR, ostensibly to "fight the Depression," persons adversely affected by these "laws" challenged them in federal court. As these cases reached the Supreme Court, the justices were required by their oaths to rule guided by the Constitution, not the whims and wishes of President Roosevelt. Seven New Deal laws thus had been declared unconstitutional by the Court, and Roosevelt was furious. He accused the Court of adhering to the principles of a bygone "horse-and-buggy" era instead of adjusting to the new progressive reality. "A dead hand was being laid upon this whole program of progress," he declared. Of course, that hand was the Supreme Court.

Perhaps the most serious blow to Roosevelt's efforts was the Supreme Court's 1935 opinion in *Schechter Poultry Corp. v. United States* that, in effect, declared his National Industrial Recovery Act (NIRA) of 1933 unconstitutional. Modeled after a program used in Fascist Italy by dictator Benito Mussolini, the NIRA established the National Recovery Administration (NRA). Under its provisions, each industry would establish codes of competition regulating hours, wages, prices, and working conditions. This would have been the death knell for the American free-enterprise system, which had allowed the United States to emerge as the greatest economy in the world by about 1900.



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The *Schechter* case involved some Hungarian Jews who had come to America, believing it was the land of liberty and opportunity. They opened a kosher chicken business in New York, Schechter Poultry, and began living the American dream, at least until they ran afoul of NRA regulations mandating inspections of their poultry and rules governing how they sold chickens to customers.

All nine justices of the Supreme Court agreed that the Constitution did not allow the federal government to exercise such regulatory power over a local business, and ruled in favor of the Schechters. Chief Justice Charles Evans Hughes declared, “We think that the code-making authority thus conferred [on the president] is an unconstitutional delegation of legislative power.”

The ruling effectively crippled the NRA’s dictatorial edicts. The New Deal was running into the brick wall of the Constitution and its defenders on the Supreme Court. In Roosevelt’s mind, the solution was to add progressive members to the Court to make it compliant to his wishes.

## **FDR Orders Congress to Pack the Court**

Roosevelt summoned congressional leaders to the White House and essentially demanded that they pass a new law, the Judicial Procedures Reform Bill of 1937, that would permit him to nominate a new judge for each judge presently on the Supreme Court who was 70 years of age or older. This would add six new Supreme Court justice positions, to be filled by FDR and a compliant Senate, which had 76 Democrats and a mere 16 Republicans. That way, the legislation that the Court had blocked in his first term could then be re-passed in his second term, along with whatever new laws he could dream up.

The congressional leaders were not asked for their opinions on the proposals. John T. Flynn described the scene in his book *The Roosevelt Myth*. “The clerk put on the table in front of each person several documents. The President looked at his watch and said he would not have very much time.” He told them he had the draft of a bill that proposed “a reorganization of the Supreme Court.” The bill was necessary, Roosevelt explained, due to the advanced age of several judges, which had caused them to fall behind in their work. After a few minutes, he looked at his watch again, and said he had a press conference to attend, and abruptly left the room. Flynn commented, “It was an imperial order by a man who had become confused about his true place in the general scheme of things.” Not only were the congressional leaders excluded from offering any adverse opinions to the plan, but Roosevelt had not even consulted Vice President John Nance Garner of Texas for his input.

As the congressmen were leaving the White House, one of them — House Judiciary Committee Chairman Hatton W. Sumners of Texas — turned to his colleagues and said, “Boys, this is where I cash in my chips,” stating that although he had loyally supported Roosevelt thus far, he could not support this proposal. As Rosalie Gordon wrote in *Nine Men Against America*, Roosevelt “thought he had Congress in the palm of his hand, but his plan was too much” even for a progressive Congress that had been little more than a rubber stamp throughout most of his first term.

In Roosevelt’s view, the authority to add justices to the Supreme Court stemmed from the fact that the Constitution did not establish a set number justices for the Court. At first, the Court consisted of five members, and this number had fluctuated until the Judiciary Act of 1869 stated that the Supreme Court would consist of a chief justice and eight associate justices. The Framers apparently had not foreseen that the Executive Branch would seek to add more members to the bench in order to advance a legislative agenda. They did not envision that the federal government would attempt to dictate policies



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the Constitution had clearly left to the states to decide. And they had no reason to believe that the president, the Congress, and the courts would so callously disregard their oaths to uphold the Constitution.

Roosevelt evidently believed he could charm the American public and the Congress into ignoring the Constitution. A month after the legislation was revealed, FDR devoted his ninth Fireside Chat to the subject of the Supreme Court. “Can it be said that full justice is achieved when a court is forced by the sheer necessity of business to decline, without even an explanation, to hear 87 percent of the cases presented by private litigants?” By insinuating that he really just wanted to help the Court with its heavy workload, Roosevelt obscured his true motive — making sure his New Deal proposals were not blocked by a recalcitrant Supreme Court, which still considered the Constitution relevant to the cases before them.

## Congress Balks at FDR’s Court-packing Scheme

At first, it appeared that Congress might meekly submit to Roosevelt’s will, as they had been doing for over four years. House polling indicated that FDR’s power grab had a victory margin of about 100 members were it to come to a vote, but Chairman Sumners refused to hold hearings on the bill. Other Democratic leaders, including Senate Appropriations Committee Chairman Carter Glass (D-Va.), joined in condemning the proposal. Senator Glass said it was “destitute of all moral understanding.” Senators Harry Byrd (D-Va.), Millard Tydings (D-Md.), and Burton Wheeler (D-Mont.) joined in denouncing the scheme at a meeting of Democratic Party critics.

The men decided to submit the bill first to the Senate, where Senator Wheeler took the lead in opposition. First, to rebut FDR’s claim that the purpose of the bill was simply to help elderly justices with their work, he read a letter from Chief Justice Hughes stating that, contrary to Roosevelt’s assertions, the Supreme Court was up to date on its docket — for the first time in years. Hughes said, “There is no congestion of cases on our calendar. When we rose March 15 we had heard arguments in cases in which cert had been granted only four weeks before. This gratifying situation has obtained for several years.”



**Just doing their job:** All U.S. public officials take an oath to follow the Constitution. The “court packing” scheme now being pushed by the Left is an attack upon judges who would follow the



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Constitution in their rulings, rather than the progressive idea of unlimited governmental power. (*Photo credit: mphillips007/GettyImagesPlus*)

One of Roosevelt's advisors suggested a change in strategy: "This is a plan to pack the Court. You have to say so frankly to the people. Until you do that, you cannot advance the real arguments which you have for the plan."

Even if it was necessary to tell the truth, Roosevelt believed he could still prevail. He turned to one of his advisors, Jim Farley, and boasted, "All we have to do is to let the flood of mail settle on Congress. You just wait. All I have to do is to deliver a better speech and the opposition will be beating a path to the White House door."

But Wheeler adopted a strategy of calling *liberal* critics to testify against the bill. As the small Republican minority largely decided to keep silent, a steady stream of liberals paraded before the Senate Judiciary Committee, warning that FDR's proposal threatened the very system of government established by the Constitution. This message began to spread across the country, and rather than the offices of Senate members being flooded with letters supporting the bill, the opposite began to happen.

The overwhelmingly Democratic-run Senate Judiciary Committee declared, "we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a court that, out of fear or a sense of obligation to the appointing power, or factional passion, approves any measure we may enact." The declaration added, "We are not above the Constitution."

Some Roosevelt advisors suggested that he compromise, but Roosevelt refused. Then, one of his Senate supporters most critical of the proposed bill, Senate Majority Leader Joe Robinson, died suddenly of a heart attack. As Democratic senators made their way to Arkansas to attend the funeral, the train carrying them became a Democratic caucus seething with anger at the unpopular court-packing plan Roosevelt was making them push.

Vice President Garner had publicly denounced the plan, causing FDR to denounce his own vice president. When the two met at the White House, Garner advised Roosevelt that the plan was dead. He suggested that Roosevelt enter into talks with Wheeler on some sort of compromise. Roosevelt agreed, and asked Garner to negotiate with Wheeler. When Garner asked Wheeler what his terms were, Wheeler replied, "Unconditional surrender."

When a vote was finally taken on the Senate floor, the Senate voted 70-20 to send it back to committee with instructions to strip it of the court-packing language. Roosevelt was dealt a humiliating defeat in a body that contained 76 members of his own political party.

In 1937, although Congress was filled with Democrats, and many were political liberals, most still had respect for the rule of law and the U.S. Constitution. Today, in contrast, it is very obvious that the Constitution is seen by most members of Congress — of both parties — as a mere relic of a bygone era, or as FDR famously put it, a "horse-and-buggy" time.

We cannot count on any branch of the federal government to follow the Constitution, but rather it is incumbent on the people themselves to insist that the Constitution be followed and our liberties be respected.



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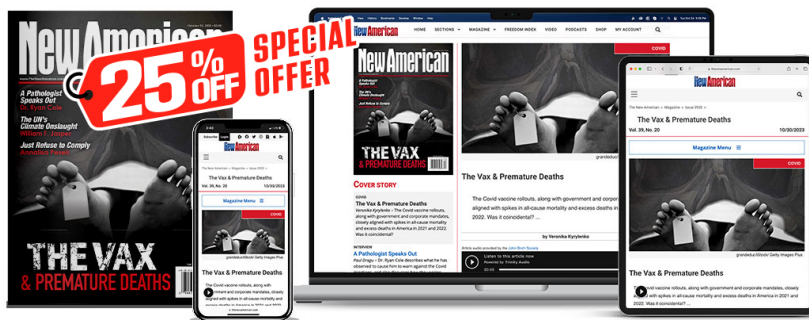
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