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FDR vs. the Supreme Court: The Battle for the Meaning of the American Constitution

Athena Kuhelj Bugaric '24
Commonwealth School
Massachusetts, USA

Abstract

New Deal constitutionalism faced strong opposition from business elites, the Republicans, and a conservative Supreme Court, striking down many pieces of legislation during FDR's first term in office. Trying to avoid a confrontation with the Court, FDR challenged the Court with judicial reform, commonly known as the court-packing plan. The Court self-reversed its opposition to the New Deal and ended the confrontation with FDR. Unlike traditional interpretations of this conflict arguing that though FDR won the battle with the Court, he eventually lost the political war with his opponents, this essay offers a different conclusion. FDR's New Deal constitutionalism represents a long-lasting contribution to American constitutionalism, far too important to be judged solely because of FDR's "failed" court-packing plan. New Deal progressives developed a democratically more inclusive form of "popular" constitutionalism, giving ordinary citizens the key role in constitutional decision-making. The New Deal "economic constitutionalism," with its emphasis on economic equality and strong social rights, provided a necessary framework for FDR's economic reforms that helped the country survive the worst economic crisis in its history. The New Deal constitutionalism created a new constitutional regime that lasted until the 1980s when it was overturned by Ronald Reagan's neoliberal revolution.

Introduction

Despite the surge of economic legislation during Franklin Delano Roosevelt's (FDR) first term in office, the country had not yet fully recovered from the worst economic depression in its history. A friend of FDR told the president that he would be judged as America's "greatest or worst president depending on whether he restored prosperity."[1] Consequently, FDR's most immediate political priority of putting people back to work also informed his constitutional thinking. His decisive victory in the 1936 election reaffirmed his belief in New Deal constitutionalism as the most appropriate response to the economic crisis. Speaking to his party delegates at the 1936 Democratic National Convention in Philadelphia, FDR put the issues of economic inequality and the vast concentration of wealth and power in the hands of the elite at the front of his constitutional agenda.[2] FDR continued that this "almost complete control over other people's property, other people's money, other people's labor" destroyed political freedom.[3] His solution was his reading of the Constitution as an "economic constitutional order," giving the federal government broad regulatory powers and a corresponding duty to create economic rights to protect the people against economic inequality and exploitation.[4] FDR was firmly convinced that the text of the Constitution as such supported his reading of the Constitution.[5] Furthermore, FDR's more fundamental claim was that his "economic constitutional order" of economic equality and "democracy of opportunity" was the only appropriate response to an increasing concentration of wealth and power, threatening to undermine the very foundations of the American republic.[6]

New Deal constitutionalism was opposed by a formidable alliance of business elites and Republicans, and a conservative and activist Supreme Court, striking down twelve pieces of legislation during

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[1] Iwan Morgan, *FDR: Transforming the Presidency and Renewing America* (London, New York, Oxford, New Delhi, Sydney: Bloomsbury Academic, 2022), 2.
[2] Franklin D. Roosevelt, "Acceptance Speech for the Re-Nomination for the Presidency," Philadelphia, Pennsylvania, June 27, 1936. Available online via *The American Presidency Project,* http://www.presidency.ucsb.edu/ws/?pid=15314.
[3] Ibid.
[4] Franklin D. Roosevelt, "Campaign Address on Progressive Government at the Commonwealth Club in San Francisco," September 23, 1932. California Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/289312.
[5] Franklin D. Roosevelt, "First Inaugural Address," March 4, 1933. Available at https://www.archives.gov/education/lessons/fdr-inaugural.
[6] Joseph Fishkin, William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Cambridge, Massachusetts, London, England: Harvard University Press, 2022), 252.

FDR's first term in office.[7] For New Dealers, this represented a radical break with the past, when the Court had done so only exceptionally.[8] For most of FDR's opponents, New Deal constitutionalism, with its expansive reading of federal authority, represented a direct threat to traditional American values, such as individual liberty and limited government. Because of their emphasis on the absolute protection of property rights and a very narrow reading of federal legislative powers, FDR referred to his opponents as representatives of "entrenched greed."[9] The New Dealers were thus confronted with the constitutional philosophy that in the name of limited government and 'true' American values prioritized the interests of the economic elite and, according to FDR, "paid little attention to the commitment of government to help the unemployed, to make work, to aid people in keeping their homes."[10] Despite the Court's often repeated rhetoric that it protected the rights of individuals and workers, FDR considered it essential to demonstrate to the American public that the opposite was true.

FDR's political opponents found a strong ally in the conservative Supreme Court. During FDR's first term, the Supreme Court struck down twelve pieces of the New Deal legislation, invoking similar principles to those defended by the political opponents of the New Deal. The Court invoked an extremely narrow reading of the property and commerce clauses of the Constitution to declare unconstitutional some of the key pieces of the New Deal legislation.[11] So, despite FDR's landslide victory, clearly signaling the people's endorsement of his New Deal constitutionalism, the fate of the New Deal was decided by the following battle between FDR and the Supreme Court over the meaning of the Constitution.

Instead of directly challenging the Court, FDR decided to use a less antagonistic method. FDR had many legal options on the table, ranging from the most obvious one, a constitutional amendment, to a statute allowing the president to add more Justices to the Court.[12] In the

[7] Laura Kalman, *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism* (Oxford: Oxford University Press, 2022), 63.
[8] Ibid.
[9] Franklin D. Roosevelt, "Annual Message to Congress," Jan.3, 1936. Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/208916.
[10] "Roosevelt Twits Liberty League as Lover of Property," *N.Y.Times*, Aug. 25, 1934, 2; Jared A. Goldstein, "The American Liberty League and the Rise of Constitutional Nationalism," *Temple Law Review* 86 (Winter 2014), 307-308.
[11] Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), *United States v. Butler*, 297 U.S. 1 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Company, 298 U.S. 238 (1936).
[12] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 276.

end, he resorted to the last option, the so-called 'court-packing plan.'[13] Even though the 'court-packing plan' was never enacted, FDR won the battle with the Court.[14] After the Court reversed its stance on New Deal constitutionalism and with Justice Van Devanter's retirement, the Congressional support for the 'court-packing plan' receded and the bill was eventually defeated.[15] Nevertheless, with the "new" majority on the Court on his side, FDR ultimately prevailed as he could proceed with his New Deal agenda without being obstructed by the Court.

The interpretations of FDR's victory remain sharply divided. The traditional account claims that FDR's victory over the Court was futile,[16] contributing to the demise of his future New Deal reforms. The main proponent of this account, historian William Leuchtenburg, argues that court-packing undermined support for the New Deal and divided Democrats, eventually leading to a new coalition between Southern Democrats and Republicans that later launched a "constitutional counterrevolution" against the New Deal.[17] Fishkin and Forbath, on the other hand, claim that the New Deal progressives developed a democratically more inclusive form of "popular" constitutionalism. FDR compared the Constitution to the Protestant Bible, which was "a layman's document" and could be interpreted directly by the people themselves.[18] As Fishkin and Forbath add to FDR's observation, in this "popular" form of constitutionalism no "priesthood or legal elite enjoyed a monopoly of interpretive authority."[19] Ackerman goes even further and argues that New Deal constitutionalism presented an example of a constitutional "moment," a rare episode of a "successful moment of mobilized popular renewal" that leads to a fundamental transformation of the meaning of the American Constitution.[20] The key feature of popular constitutionalism is that the people ultimately control the interpretation of constitutional law. In this respect, the New Deal constitutionalism represented one of such constitutional moments in American history.

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[13] Kalman, *FDR's Gambit*, 97.
[14] Laura Kalman, "The Constitution, the Supreme Court, and the New Deal," *American Historical Review* 110, no.4 (2005): 1057.
[15] Kalman, *FDR's Gambit*, 166-170, 198-199.
[16] Kalman, "The Constitution, the Supreme Court, and the New Deal," 1057.
[17] Kalman, Ibid.; Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 319.
[18] Franklin D. Roosevelt, "Address on Constitution Day," Washington, D.C, September 17, 1937. Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/208747; Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 288.
[19] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 288.
[20] Bruce Ackerman, *We the People 2: Transformations* (Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 1998), 5, 309, 346.

The first two sections describe the key features of the New Deal constitutionalism and contrast it with the constitutional theory of its most forceful opponents, the defenders of the conservative and libertarian reading of the Constitution. The next section offers an account of how the tension between the two constitutional narratives led to a conflict that was eventually resolved by the Supreme Court's self-reversal following FDR's court-packing threat.

The New Deal's Opponents: On Libertarian and Conservative Reading of the Constitution

New Deal constitutionalism was strongly opposed by its adversaries, best exemplified by the conservative Supreme Court frequently ruling against FDR's New Deal legislation. The Supreme Court justices were described as "the nine old men" in one of the most popular books of the time.[21] Their core constitutional ideal was an almost absolute protection of property rights and freedom of contract, and an extremely narrow reading of the powers of the federal government. In several decisions, the Court objected to a sweeping delegation of legislative "commerce powers" to the federal government as proposed by the New Dealers to redistribute economic power and wealth in a crisis-ridden America. In the spring of 1935, the Court declared in *Railroad Retirement Board vs. Alton Railroad Company* the provisions of the Railroad Retirement Act establishing a compulsory retirement and pension system unconstitutional because it amounted to a taking of property without due process as well as to an unreasonable regulation of commerce. According to Justice Roberts, who wrote for the majority, the Act's appropriation of workers' payrolls for a pension fund amounted to a "naked appropriation of private property" for the benefit of workers.[22] Roberts also disputed the connection between the welfare of tailored workers and the safety of interstate travel, depriving the Act of a proper basis for the legitimate exercise of regulation of interstate commerce. Chief Justice Hughes, joined by Brandeis, Cardozo, and Stone dissented. For "shocked" Hughes, the Court's decision placed "an unwarranted limitation upon the commerce clause of the Constitution" and "denied wholly and forever the power of Congress to enact any social welfare scheme."[23] As Forbath and Fishkin argue, the Court showed an open contempt for FDR's idea of old-age security.[24] According to the Court, only a private employer could provide a

[21] Kalman, *FDR's Gambit,* 1-5.
[22] Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935).
[23] Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935); Leonard W. Levy, *The Encyclopedia of the American Constitution* (New York: Macmillan, 1986).
[24] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 304.

pension, not the "legislative largesse." Alton clearly showed how insurmountable the difference between the Court's and FDR's interpretation of social welfare rights was.

The same month the Court dealt another blow to FDR's flagship piece of legislation, the National Industrial Recovery Act (NIRA). In *Schechter*, the Court unanimously agreed that the NIRA contained too broad a delegation of powers to the executive branch to implement the NIRA. In explaining the decision of the Court, Chief Justice Hughes concluded that "the code-making authority this conferred is an unconstitutional delegation of legislative power."[25] The Court invoked what is today known as the "non-delegation doctrine," requiring Congress to establish reasonably clear and general standards to guide the executive's enforcement of specific rules and policies preserved in the legislation.[26] The ultimate goal of this doctrine was to prevent the executive agencies, established by legislation, from having unchecked powers. The Court also held that NIRA violated the commerce clause by giving Congress too broad a power to regulate the poultry industry, which, according to the Court, was a state issue. Critical of the Supreme Court's "horse-and-buggy"[27] definition of inter-state commerce, which the Court often used to strike down the New Deal legislation, FDR offered a vision of a "changing," "living" Constitution, attuned to the needs of modern industrialized America.[28] With the 'horse-and-buggy' parable, referring to a one-horse carriage used in the 18th and 19th centuries, FDR wanted to point out that the Court was out of step with the times. Namely, the Court interpreted many commercial activities, such as mining, manufacturing, and growing crops, as not "commerce" but "essentially local" activities, outside of the reach of the Commerce Clause that only allowed regulation of interstate commerce by the Congress.[29] With their radical repudiation of core elements of New Deal legislation, *Alton* and *Schechter* significantly contributed to the constitutional crisis of 1937.

In *Carter v. Carter Coal Company*, the Court used a similar reading of the commerce clause to strike down the power of Congress to regulate the coal mining industry, which, according to the Court, was

[25] "A. L. A. Schechter Poultry Corporation v. United States." *Oyez*, www.oyez.org/cases/1900-1940/295us495. Accessed 10 Apr. 2023.
[26] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 271.
[27] Kalman, *FDR's Gambit*, 35.
[28] William E. Forbath, "The New Deal Constitution in Exile," *Duke Law Journal* 51, no.1 (2001): 176-177.
[29] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 273.

also a state issue.[30] In *Butler*, while affirming that Congress has broad spending and taxing powers, the Court ruled that these powers could be used only for areas exclusively reserved for federal regulation, and not for agricultural production, an area purportedly reserved for the states, according to Courts' reading of the Tenth Amendment.[31] All these cases were based on a very restricted reading of federal regulatory powers when it comes to redistributive issues. The Court's reading of the commerce clause, of spending and taxing powers, and of the property clause drastically limited the government's power to enact social welfare legislation and regulate property.

As a result, these rulings "created major obstacles for carrying out Roosevelt's plans and raised grave doubts about their wisdom and validity."[32] Moreover, as reported by a journalist of the prominent liberal magazine, The New Republic, "[the] one thing which haunts the secret thoughts of this administration … is the horrid suspicion that all it is doing is unconstitutional, and null and void."[33] Together with two other rulings that the Court issued on the so-called Black Friday, May 27th, 1935, *Schechter* amounted to "a judicial declaration of war on his [FDR] presidency."[34] The differences between the Court's and FDR's interpretation of the Constitution were, in other words, insurmountable.

FDR's reading of the Constitution was not only opposed by the Supreme Court but he was also confronted with powerful political opposition. Most of the Republicans perceived FDR's New Deal as a departure from traditional American constitutional values. In the 1936 election campaign, a group of the most influential and prominent business owners, known as the American Liberty League (ALL), launched an aggressive campaign to defeat FDR.[35] Like the Supreme Court, they promoted quite a different reading of the Constitution than FDR. Their conservative vision of constitutionalism promoted the ideas of limited government, property rights, individualism, and self-reliance, all identified as core values of the American Constitution.[36] Their core theme was a defense of 'traditional' American constitutionalism, based on the premises of the Founding Fathers and advocating extremely limited government whose core aim should be to protect property,

[30] "Carter v. Carter Coal Company." *Oyez,* www.oyez.org/cases/1900-1940/298us238. Accessed 19 Apr. 2023.
[31] "United States v. Butler." *Oyez,* www.oyez.org/cases/1900-1940/297us1. Accessed 19 Apr. 2023.
[32] Goldstein, "The American Liberty League," 305.
[33] Kalman, *FDR's Gambit,* 18.
[34] Morgan, FDR, 128.
[35] Goldstein, "The American Liberty League," 290.
[36] Ibid., 289.

contracts, and economic freedom. Their campaign was supported by many members of the Republican Party and the media critical of FDR and the New Deal. However, because they were too close to the representatives of the 'entrenched greed,' FDR easily defeated their campaign and won the presidency. Instead of fighting with the Supreme Court, which had just invalidated key pieces of the New Deal, FDR decided to accept the ALL's challenge and made a defense of his constitutionalism against the ALL's attack a key theme of his 1936 presidential campaign. Cautioned by his friend and future justice of the Court, Felix Frankfurter, FDR understood that it would be unwise to attack the Court, one of the most reputable institutions in the country.[37] FDR's team of advisors convinced FDR to pick up the fight with ALL because it was an easier opponent to discredit than the Supreme Court.[38]

New Deal Constitutionalism

Contrary to the Supreme Court reading of the Constitution, FDR believed that the New Deal "economic constitution" protected the people against the representatives of 'entrenched greed' and their economic exploitation. The ultimate objective of FDR's "economic constitution" was to "save capitalism and the Constitution from their conservative guardians."[39] In his ninth Fireside Chat, when discussing the court-packing plan, FDR confirmed his principled belief that the Constitution as such was not the problem. The problem was the Supreme Court and its interpretation of the text. Hence, FDR argued, "[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."[40] Comparing it to the Bible, FDR urged his fellow Americans to "read it again and again."[41] FDR's main argument here was that the people did not need legal "priests" to understand it. This optimistic belief that the Constitution does not need to be changed but only correctly interpreted was an integral part of FDR's constitutional philosophy. He clearly outlined it already in his first inaugural address, where he explained that "our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."[42] He used every opportunity to explain why his substantive reading of the Constitution as

[37] Ibid., 306.
[38] Ibid.
[39] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 251.
[40] Franklin D. Roosevelt, "Fireside Chat on Reorganization of the Judiciary," March 9, 1937. Online by Gerhard Peters and John T. Wooley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=15381.
[41] Ibid.
[42] Roosevelt, "First Inaugural Address."

an "economic constitution" was not only possible but also required for a correct understanding of the constitutional text.[43] As explained earlier, his constitutional theory emphasized a strong connection between economic and political freedoms.[44] Extreme economic inequality and concentration of wealth in the hands of few leads almost automatically lead to political unfreedom. Therefore, the solution was his New Deal constitutionalism, offering a variety of new economic and social rights, aiming to remedy the devastating effects of economic depression on the unequal distribution of wealth and power in 1930s America. Here, FDR's thinking was informed by the tradition of the Populists and Progressive antimonopoly movements, who understood that the concentration of economic and political power in the hands of the few was antithetical to American democracy.[45]

His understanding of the Constitution as a "lay-man's document," where reading the constitutional text was like reading the Bible, carried an important democratic message. In other words, his idea of "economic constitutionalism" was based on the interpretation that gave the people a key role in that process. FDR believed that constitutional interpretation was not an exclusive privilege of the Supreme Court and legal elites. Instead, he believed in the concept of "popular constitutionalism" where people in conversation with courts make and form constitutional arguments.[46] In his Fireside Chat, FDR compared the three branches of government with the team of three horses pulling the plow. Responding to criticism that he was trying to take control of another horse, the Court, FDR said that it "is the American people themselves who are in the driver's seat," "who want the furrow plowed" and who "expect the third horse to pull in unison with the other two."[47] FDR tried to articulate a collaborative constitutional relationship between the President, Congress, and the

[43] A direct textual support for this reading of FDR is in Article 1, Section 8, Clause 1 of the US Constitution. FDR argued that "[if], as our Constitution tells us, our Federal Government was established . . . 'to promote the general welfare,' it is our plain duty to provide for that security upon which welfare depends." Franklin D. Roosevelt, "Message to Congress on the Objectives and Accomplishments of the Administration," June 8, 1934. Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/208398.
[44] Fishkin, Forbath, *The Anti-Oligarchy Constitution,* 253.
[45] Ibid., 252.
[46] More about the concept, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review (*Oxford: Oxford University Press, 2004).
[47] Franklin D. Roosevelt, "Fireside Chat (Recovery Program)," July 24, 1933. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. https://www.presidency.ucsb.edu/node/209434.

Court.[48] He clearly rejected the idea that the courts should be subordinated to two other branches.[49]

FDR was a reformist who believed in the robustness of the American Constitution. He consistently rejected other more radical approaches in his party calling for a different, more socially oriented constitution. His reformist stance is evident from his sixth Fireside Chat, where he identified "a practice of taking action step by step, of regulating only to meet concrete needs, a practice of courageous recognition of change" as fitting "the American practice of government."[50] One of FDR's most prominent supporters who did not share his reformist view of the Constitution was William Y. Elliot, who argued that the Constitution of 1787 was not created for the circumstances of the 1930s era that required a different constitutional design, giving a strong executive more powers to run the economy.[51] Another scholar advocated a new form of constitution prioritizing social rather than individual rights.[52] Both dissenters believed that a more radical change was needed, including writing a new, more socially oriented constitution. Nevertheless, FDR resolutely resisted similar proposals for more radical reforms. Hence, when FDR's opponents criticized him for his "totalitarian" views,[53] they clearly exaggerated. As characterized by Fishkin and Forbath, the New Deal was essentially an American version of social democracy with strong liberal overtones[54] and not some version of an authoritarian state, as claimed by FDR's opponents.[55] While the New Deal constitutionalism represented a significant departure from more conservative constitutional thinking, exemplified by the Court and the ALL, it nevertheless remained firmly entrenched in the core values of the American republic.

The difference between FDR's and the conservative approach was in their treatment of economic issues vis-a-vis personal rights. For FDR, economic rights were an essential element of his economic constitutional order. The Court and the American Liberty League, on the other hand, argued that the Constitution gives priority to individual rights. They also objected to a sweeping delegation of legislative powers

[48] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 263.
[49] Kalman, *FDR's Gambit,* 143.
[50] Franklin D. Roosevelt, "FDR Fireside Chat 6: On Government and Capitalism," (September 30, 1934).
[51] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1987), 259.
[52] Ibid.
[53] Goldstein, "The American Liberty League," 299, 301.
[54] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 253.
[55] Goldstein, "The American Liberty League," 299, 301.

to Congress and the president, arguing that many such interventions violated different provisions of the Constitution. Despite FDR's sweeping electoral victory in 1936, the conflict between these two interpretations of the Constitution continued.

The Conflict Escalates: The Court-Packing Plan

The conflict between the Court and FDR's administration escalated after the Court decided the *Schechter* case, known also as the Sick Chicken case, on the so-called New Deal's Black Monday.[56] What was particularly troubling for Roosevelt was that the Court unanimously ruled against his National Industrial Recovery Act (NIRA).[57] The three liberals, Brandeis, Cardozo, and Stone, agreed with the majority that the National Industrial Recovery Act violated the principle of separation of powers, requiring that the Congressional delegation of legislative power be specific and clear enough to guide the executive action.[58] How damaging this case was for the New Dealers is clearly seen in Attorney General Cummings's note in his diary, explaining that "if this decision stands and is not met in some way, it is going to be impossible for the Government to devise any system which will effectively deal with the disorganized industries of the country…"[59] At the press conference after the *Schechter*, Roosevelt declared that the *Schechter* decision was "its worst – since *Dred Scott*,"[60] accused the Court of using the 'horse-and-buggy' definition of interstate commerce, and announced his plan to do something about the Court.[61] Comparing *Schechter* with the infamous *Dred Scott* (1857) decision, where the Court ruled that slavery was constitutional, FDR expressed his utmost dissatisfaction with the Court's decision.[62] For FDR, economic and political equality were the central elements of his New Deal constitutionalism. Attacking his New Deal was for FDR equally bad as denying basic constitutional freedom to African Americans almost a century ago.

Democrats were deeply engaged in various debates and initiatives about how to confront the Court and whether and how to change the Constitution. Rumors existed that FDR was thinking about a constitutional amendment drastically increasing the powers of the federal

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[56] "A. L. A. Schechter Poultry Corporation v. United States." *Oyez,* www.oyez.org/cases/1900-1940/295us495. Accessed 10 Apr. 2023.
[57] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 271.
[58] Ibid.
[59] Kalman, *FDR's Gambit*, 33.
[60] Ibid., 35.
[61] Roosevelt, "Press conference, May 31, 1935."
[62] "Dred Scott v. Sandford." *Oyez,* www.oyez.org/cases/1850-1900/60us393. Accessed 20 Apr. 2023.

government.[63] Both the Democratic and other circles considered and debated many proposals for constitutional amendments.[64] For example, both the Socialist and Communist parties favored a constitutional amendment that would limit the power of the Supreme Court.[65] When asked about these plans, FDR refused to comment.[66] He remained faithful to his belief that the Constitution as such was a perfectly adequate document and did not need any changes. His views were supported by one of the most important constitutional commentators of that time, Edward Corwin, who wrote a newspaper article titled "Constitution 'As Is' Sustains New Deal."[67] In his other article, "The Commerce Powers versus State Rights," Corwin argued that the Court's opinions rested on "a tortured construction of the Constitution," and explained that "the New Deal legislation could be sustained by the commerce power, used as it had been for much of the nineteenth century."[68] Nevertheless, FDR decided to keep his options open[69] Leaving more radical critique to others, FDR and the New Dealers "hoped to present themselves as keepers of the flame of judicial independence, rather than its extinguishers."[70] In other words, FDR remained faithful to his moderate reformist legal approach and refused any confrontation with the Supreme Court.

Although FDR did not entirely exclude the possibility of using the amendment procedure to confront the Court, he was deliberately ambiguous about it. One reason for that was that he was aware that the burdensome amendment procedure would take time and that it was politically risky.[71] Corwin raised a similar point, questioning the effectiveness of constitutional amendment, given that it would be the justices who would interpret the amendment.[72] FDR was warned by his Attorney General Homer Cummings that "the path to an amendment to the Constitution is a thorny one and would necessitate a delay of at least two years before anything tangible could be done."[73] Hence, neither

[63] Kalman, *FDR's Gambit*, 35.
[64] B.W.Patch, "New Deal aims and the Constitution," Editorial research reports 1936 (vol. II). http://library.cqpress.com/cqresearcher/cqresrre1936112700
[65] Kalman, *FDR's Gambit*, 53.
[66] Ibid., 35.
[67] Ibid., 64.
[68] Kammen, *A Machine That Would Go of Itself,* 275.
[69] Fishkin, Forbath, *The Anti-Oligarchy Constitution*, 276.
[70] Kalman, *FDR's Gambit*, 52.
[71] As Professor Richard Albert shows, the American Constitution is the world's most difficult constitution to amend. See, Richard Albert, "The World's Most Difficult Constitution to Amend," *California Law Review* 110, no.6 (2022): 2005-2022.
[72] Kalman, *FDR's Gambit,* 64.
[73] Ibid.

Cummings nor FDR had confidence in the amendment process[74] As pointed out earlier, in his sixth Fireside Talk, Roosevelt argued that the text of the Constitution already supported the New Deal, so there was no reason to change it.[75] Hence, he never explicitly endorsed any of the proposals for the constitutional amendment. He very well understood that the Court, together with the Constitution, enjoyed an almost sacred position in the imagination of American citizens. He agreed with Corwin, who argued that the importance of the Constitution for American political culture was so fundamental that it created a "cult of the Constitution."[76] The cult implies that the Constitution should be revered, almost as a religious text, and not easily changed.

Behaving strategically, FDR and New Dealers thus argued that the problem was not the Supreme Court as such but its wrong interpretation of the Constitution.[77] As a consequence, FDR tried to avoid a confrontation with the Court. Instead, influenced by an important memorandum prepared by a lawyer, Warner Gardner, working in the Justice Department, Roosevelt decided to use another option: a judicial reform, commonly known as the court-packing plan.[78]

The core idea of the court-packing plan was to present the aim of legislation as a reform of the entire judiciary, not only of the Supreme Court.[79] Such framing would make the bill look less like a frontal attack on the Court and more like an attempt to address several deficiencies that impeded the work of the courts.[80] The architects of the proposal also had an ulterior motive, which was to exert pressure on the Supreme Court forcing it to realign its interpretation with FDR's reading of the Constitution. In its initial form, the Judicial Procedures Reform Bill gave the president power to appoint an additional justice for every member of the Court older than 70 years who refused to retire. The maximum number of additional justices the President could appoint was six. Roosevelt presented his proposal in his ninth fireside chat on March 9, 1937.[81]

After describing the achievement of his administration, FDR identified the culprit for the current problems: "[the] Courts, however, have cast doubts on the ability of the elected Congress to protect us

[74] Ibid.
[75] Roosevelt, "FDR Fireside Chat 6: On Government and Capitalism."
[76] Kammen, *A Machine That Would Go of Itself*, xiv.
[77] Kalman, *FDR's Gambit*, 52.
[78] Kalman, *FDR's Gambit*, 65-70.
[79] Ibid.
[80] Ibid., 143.
[81] Roosevelt, "Fireside Chat on Reorganization of the Judiciary."

against catastrophe by meeting squarely our modern social and economic conditions."[82] He then went on accusing the Supreme Court of abusing its judicial power and behaving "as a third house of the Congress — a super-legislature, as one of the justices has called it — reading into the Constitution words and implications which are not there, and which were never intended to be there."[83] As explained earlier in the paper, the Court read into the Constitution "the old freedom-ensuring constitutional order" that was not able to respond to the challenges of the Great Depression.[84] FDR then continued and warned the nation about the high stakes in this debate and urged his fellow citizens to "take action to save the Constitution from the Court and the Court from itself."[85] He briefly described the key objectives of his reforms. Responding to those who accused him of trying to turn the independent Court into his puppet, he described his reform plan as an attempt "to infuse new blood into all our Courts."[86] His main objective here was to cast his reforms as aimed at improving the overall efficiency of the entire court system and to deflect the criticism that he was simply trying to exact revenge against the rebellious Court.

FDR's reform plan encountered strong opposition from the Republicans and the media. The critical media seized the moment by deliberately using the term "court-packing" as a disapproving title.[87] However, at the same time, FDR received continuous support for the plan from the citizens whom he met or through their letters. As Kalman reports, FDR had received more letters from citizens supporting his plan than from those who opposed it.[88] This reassured the president that most Americans supported his plan. The Gallup polling showed a slightly different picture: while 47 percent of voters supported FDR's reform, 53 percent opposed it. The strong support among Democrats (70 percent) was overshadowed by almost unanimous rejection among Republicans (92 percent).[89] The results were quickly picked up by the media and aggressively spread around the county.[90] The opinion among the bar and legal academy was divided. A new Harvard Law School dean,

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[82] Ibid.
[83] Ibid.
[84] Fishkin, Forbath, *The Anti-Oligarchy Constitution,* 253.
[85] Roosevelt, "Fireside Chat on Reorganization of the Judiciary."
[86] Ibid.
[87] Frank Gannet, an influential publisher and a conservative Republican, and Edward Rumley, another journalist, are credited as the authors of the "court-packing" epithet.
[88] Kalman, *FDR's Gambit*, 91-92.
[89] Lydia Saad, "Gallup Vault: A Supreme Court Power Play," February 26, 2016. Available at https://news.gallup.com/vault/189617/supreme-court-power-play-aspx
[90] Barry Cushman, "Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s," 50 *Buffalo Law Review*, no. 7 (2002).

James Landis, for example, supported the bill. The majority of the Yale law faculty was also reported to favor the plan. The ACLU (American Civil Liberties Union) and ABA (American Bar Association), on the other hand, were against the bill.[91] Despite the opposition from some of his Democrats, FDR continued to receive reassuring messages that the bill was likely to pass Congress. While the fierce debate over the bill in Congress continued, the Court itself helped to end this lengthy battle. Namely, the Court had issued several decisions in which it reversed its previous opposition to the New Deal legislation.

FDR Wins the War

Shortly after the Roosevelt fireside chat, conservative-leaning swing vote Justice Roberts joined the majority in West *Coast Hotel Co. v Parrish* (1937) that was supportive of New Deal legislation and upholding the minimum wage legislation, signaling the end of a confrontation with FDR.[92] The move has become known as a "switch in time that saved the nine"[93] because it ended the confrontation between the Court and FDR. Ultimately, FDR prevailed. But the *Parrish* decision was not the only factor that tipped the result. Namely, in 1936, the Court had decided a few other cases indicating a reversal of its opposition to the New Deal. Laura Kalman also shows that Roberts changed his opinion before FDR announced his reform plan.[94] However, this information does not change the fact that the Court's self-reversal eventually led to the defeat of FDR's court-packing plan. As explained by Kalman, "This flip-flop drained public and congressional support for Court packing. Indeed, the Court's behavior seemed calculated to undermine that support, since it became harder for FDR to claim that it needed additional justices to protect his program." Thus, Kalman concludes, "the Court had engaged in "self-salvation by self-reversal," realizing that if it "balked, the court bill would surely pass."[95] All this suggests that it is wrong to characterize FDR's court plan as a "wanton blunder." Instead, as Laura Kalman suggests, it was a "calculated risk" that helped FDR to achieve his result. As she concluded her study of the court plan, FDR won in the long run: he prevailed with his interpretation of the Constitution over his opponents.[96]

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[91] Kalman, *FDR's Gambit*, 105-106.
[92] "West Coast Hotel Company v. Parrish." *Oyez,* www.oyez.org/cases/1900-1940/300us379. Accessed 20 Apr. 2023.
[93] The switch in time phrase was coined by a newspaper columnist Call Tinney. See John Q. Barrett, Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine," *Oklahoma Law Review* 73, no.2 (2021): 28.
[94] Kalman, *FDR's Gambit*, 171.
[95] Laura Kalman, "The Constitution, the Supreme Court, and the New Deal," 1054.
[96] Kalman, *FDR's Gambit*, 265.

New Deal constitutionalism created a new political "regime" that shaped the key assumptions of political and legal thinking and that lasted until the 1980s.[97] As Jack Balkin explains, the regime was characterized by "increasing government regulation, higher taxes, the creation of major social insurance programs, protection of organized labor, and the civil rights and civil liberties revolutions."[98]

Conclusion

Unlike Leuchtenburg's influential interpretation of this battle arguing that though FDR won the battle for the New Deal, he eventually lost the war, this essay offers a different conclusion.[99] New Deal progressives developed a more inclusive form of "popular" constitutionalism that helped the country to survive its worst economic crisis,[100] and that fundamentally transformed the meaning of the American Constitution into a durable "regime," radically redistributing power between the financial elites and the rest of the population. The result was a new constitutional order that lasted until the 1980s when it was overturned by Ronald Reagan's neoliberal revolution.

On the most practical level, the New Deal "economic constitutionalism," with its emphasis on economic equality and strong social rights, provided a necessary framework for FDR's economic reforms that helped the country out of the worst economic crisis in its history.[101] By doing so, it also transformed classical American constitutionalism into a socially more inclusive version, similar to Western European social democracy. And finally, it revived the older American tradition of "popular constitutionalism," giving ordinary citizens the key role in constitutional decision-making.

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[97] I use the concept of governing regimes as developed by Stephen Skowronek, where a political regime means a period of dominance of one political party setting the key ideological assumptions of the politics of its time. See Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal*, 3rd edition (Kansas: The University Press of Kansas, 2020).

[98] Jack Balkin, *The Cycles of Constitutional Time* (Oxford: Oxford University Press, 2020), 13.

[99] My argument is based on the work of Fishkin and Forbath, *The Anti-Oligarchy Constitution*, 319-320, which argues that what broke the New Deal coalition was a more aggressive defense of racial inclusion from the New Dealers. Kalman makes a similar argument. See Kalman, *FDR's Gambit,* 265-266.

[100] On the economic record of the New Deal, see Morgan, FDR, 50, 68.

[101] As Laura Kalman argues, "By the early 1940s, it seemed clear that Congress and administrative agencies had nearly unlimited regulatory power over the economy in the name of promoting the public welfare, and the states did too, as long as they didn't interfere with interstate commerce." Kalman, *FDR'S Gambit*, 265.

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