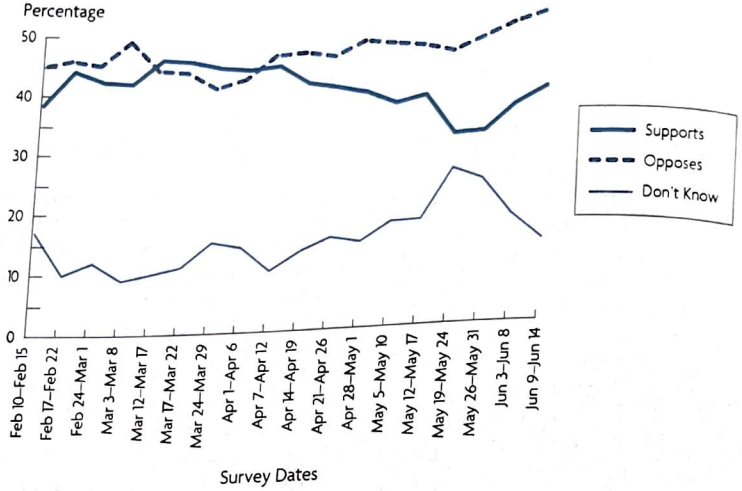
Figure 7-2 Public Support for Roosevelt's 1937 Court-Packing Plan



Source: Lee Epstein, Jeffrey A. Segal, Harold Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, 6th ed. (Thousand Oaks, CA: CQ Press, 2015), table 8-30.

justices called for the addition of younger, more-vigorous colleagues, everyone saw the plan for what it was—an attempt to pack the Court.

Reaction was not favorable.[11] Public opinion polls taken during the course of the debate over the plan reveal that at no time did a majority of Americans support Roosevelt's proposal *(see Figure 7-2)*. Members of the organized bar were overwhelmingly opposed. Even with large Democratic majorities in both houses of Congress, Roosevelt had difficulty selling his proposal to the legislature. Chief Justice Hughes wrote a public letter criticizing the proposal to Senator Burton Wheeler of Montana, a leader of Democrats opposing the president.[12] The press expressed sharp disapproval.

In spite of the general support the people gave Roosevelt and the New Deal, they did not appreciate his tampering with the structure of government to get his way. Roosevelt's response to this unexpected criticism was to go directly to the people to press his case, and in doing so he became a little more open about his objectives. In his radio broadcast the president explained his proposal and urged the American public to support it *(see Box 7-5)*.

The Switch in Time That Saved Nine

The battle in Congress over the president's plan was closely fought.[13] A continuation of the confrontation, however, was averted in large measure by the actions of the justices themselves. On March 29, 1937, just twenty

[11] See Gregory A. Caldeira, "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan," *American Political Science Review* 81 (December 1987): 1139–1153.

[12] The letter from Hughes to Wheeler, dated March 21, 1937, is reprinted in Joan Biskupic and Elder Witt, *Guide to the U.S. Supreme Court*, 3rd ed. (Washington, DC: Congressional Quarterly, 1997), 1039–1040.

[13] See William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," in *Supreme Court Review* 1966, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1966), 347–400; and Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963).

BOX 7-5

Excerpts from the White House Broadcast, March 9, 1937

TONIGHT, sitting at my desk in the White House, I make my first radio report to the people in my second term of office. . . .

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat.

It is the American people themselves who want the furrow plowed.

It is the American people themselves who expect the third horse to pull in unison with the other two. . . .

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws. . . .

The Court . . . has improperly set itself up 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.

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. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized. . . .

What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the Judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869. . . .

The statute would apply to all the Courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

(Continued)

(Continued)

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established.

What do they mean by the words "packing the Court"?

Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard THE law and would decide specific cases as I wished them to be decided, I make this answer—that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions—that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy—that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of Justices has been changed several times before—in the Administrations of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant. . . .

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make it dependent upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Judges and a few members of the Supreme Court. Until my first term practically every President of the United States had appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice—President Wilson three—President Harding four including a Chief Justice—President Coolidge one—President Hoover three including a Chief Justice.

Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal decision of individuals.

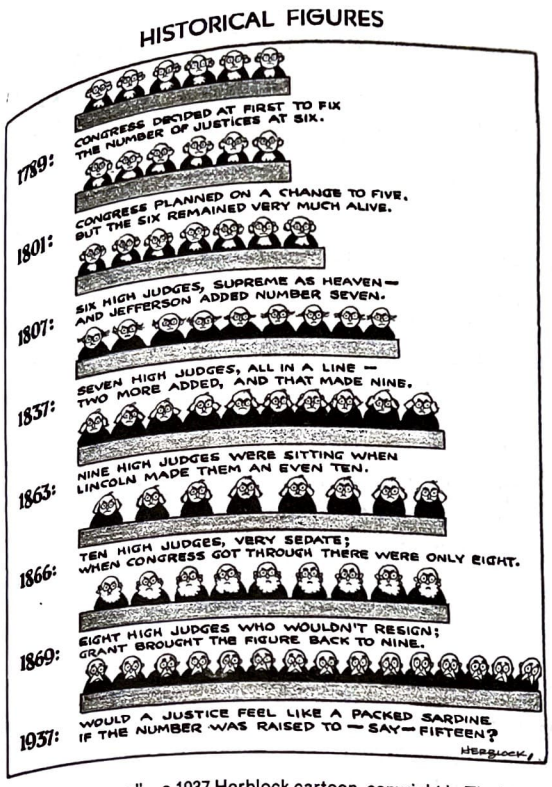
If such a law as I propose is regarded as establishing a new precedent—is it not a most desirable precedent?

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." . . .

During the past half century the balance of power between the three great branches of the Federal Government has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed.

Source: Fireside Chat, March 9, 1937.



"Historical Figures"—a 1937 Herblock cartoon, copyright by The Herb Block Foundation.

days after the president's broadcast, the Court signaled that changes were in the making. The first indication was the 5–4 decision in *West Coast Hotel v. Parrish* (1937) *(excerpted in Chapter 10)*, which upheld the validity of a Washington State law regulating wages and working conditions for women and children.

Although this case involved a state law rather than a federal statute and concerned issues of substantive due process rather than the commerce clause, it had great significance. Aside from the doctrinal importance of the case, discussed in Chapter 10, it signaled a change in the Court's voting coalitions. Justice Roberts, so long an ally of the Four Horsemen, deserted the conservatives and voted with the liberal bloc to approve the legislation. Just months earlier Roberts had voted with the conservatives in a 5–4 decision striking down a New York law that was nearly identical to the one he now approved.[14]

Two weeks later Roberts proved that his *West Coast Hotel* vote was not an aberration. On April 12 the Court issued its ruling in *National Labor Relations Board (NLRB) v. Jones & Laughlin Steel Corporation*. Once again Roberts joined Hughes, Brandeis, Cardozo, and Stone to form a majority, this time upholding a major piece of New Deal legislation. The decision may be the most important economic ruling of the twentieth century. In it the Court announced a break from the past and ushered in a new era in the constitutional relationship between the government and the economy.

[14] *Morehead v. New York ex rel. Tipaldo* (1936).

National Labor Relations Board v. Jones & Laughlin Steel Corporation

301 U.S. 1 (1937)
https://caselaw.findlaw.com/us-supreme-court/301/1.html
Vote: 5 (Brandeis, Cardozo, Hughes, Roberts, Stone)
4 (Butler, McReynolds, Sutherland, Van Devanter)
OPINION FOR THE COURT: *Hughes*
DISSENTING OPINION: *McReynolds*

FACTS:

In 1935 Congress passed the National Labor Relations Act, more commonly known as the Wagner Act. The purpose of the legislation was to help workers achieve gains in wages and working conditions through the collective bargaining process. The act's primary aim was to protect the rights of employees to organize and join labor unions and to provide a means for the enforcement of those rights. The law authorized the creation of the National Labor Relations Board (NLRB), which was empowered to hear complaints of unfair labor practices and impose certain corrective measures. The act was based on the power of Congress to regulate interstate commerce and on the assertion that labor unrest and strikes ("industrial strife") caused interruptions in such commerce that Congress had the right to prevent.

Jones & Laughlin was one of the nation's largest steel producers. Its operations were fully integrated, extending into many states and involving every aspect of steel production, from mining through production and distribution. Complaints were filed against the company for engaging in unfair labor practices at its plant in Aliquippa, Pennsylvania. The charges included discriminating against workers who wanted to join a labor union. The NLRB ruled against the company and ordered it to reinstate ten workers who had been dismissed because of their union activities. The company refused, claiming that the Wagner Act was unconstitutional. Steel production facilities, according to the company, were engaged in a manufacturing activity that had been declared by the