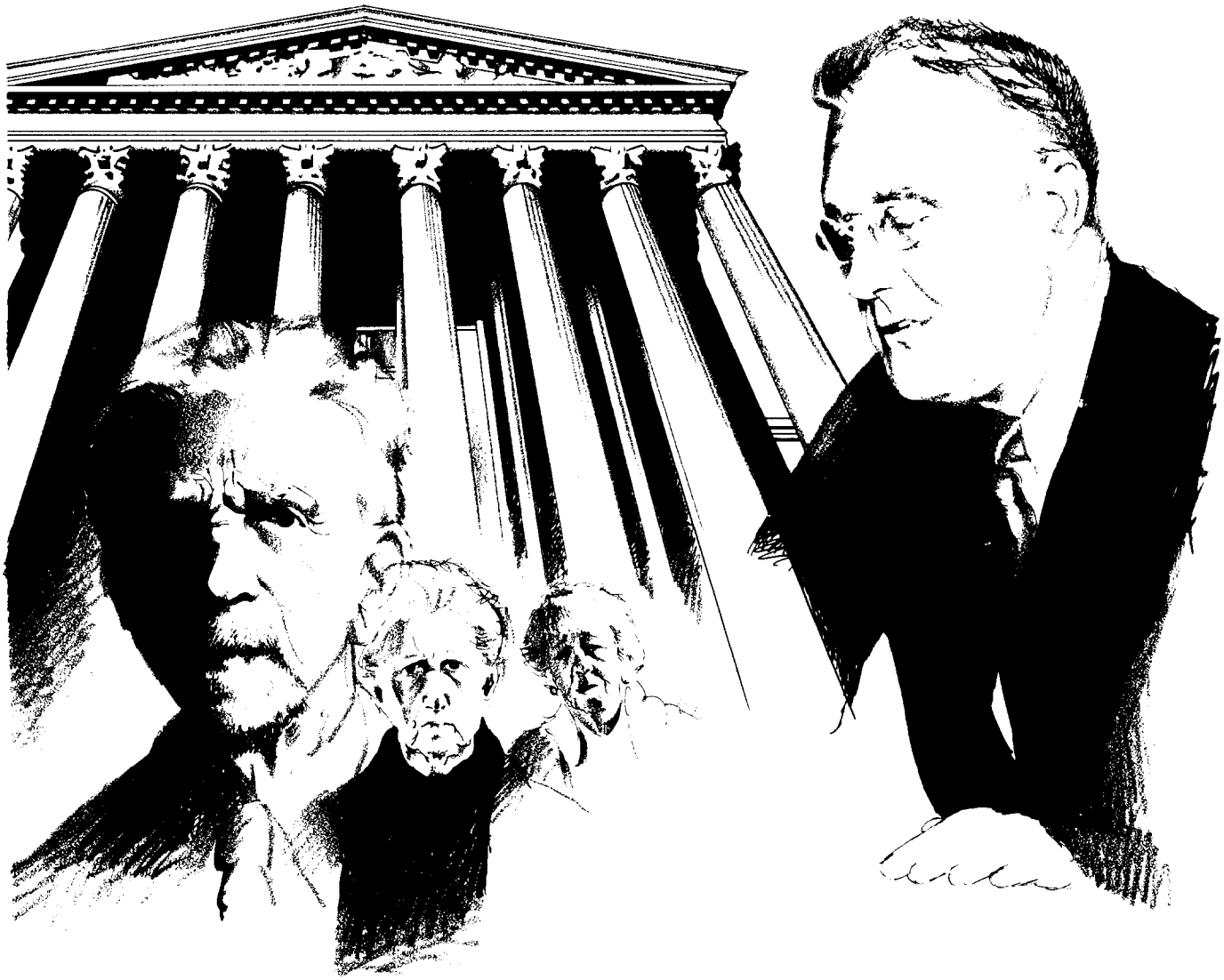

Constitutional Background to the Social Security Act of 1935

by Eduard A. Lopez *

When Franklin D. Roosevelt assumed the presidency in 1933, he introduced many New Deal initiatives to remedy the severe economic problems of the Nation. The Social Security Act contained provisions to help those persons most affected by the Great Depression—a national old-age insurance program for the elderly and a system of nationally uniform State unemployment programs for those without jobs. Although the Act was passed by overwhelming majorities in both Houses of Congress, there was concern that the Supreme Court would declare the programs unconstitutional. This article discusses the social security cases and the issues that preceded the Court's decision to uphold those provisions. It gives an overview of the constitutional background to the Social Security Act of 1935.

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Introduction

On August 14, 1935, President Franklin D. Roosevelt signed into law the Social Security Act of 1935.[1] The Act addressed the grave economic circumstances of the Nation's elderly and unemployed workers by establishing a national old-age insurance program and by making it easier for States to establish their own unemployment compensation programs.[2]

Before enactment of the legislation, there had been considerable doubt in the Roosevelt administration and in Congress about whether the Supreme Court would uphold such expansive Federal social regulation. Generally, the Court had for several decades subscribed to a view of constitutional federalism that involved a very narrow reading of the powers of Congress under the Constitution so that Federal legislation would not interfere with areas of regulation held to be the exclusive province of States. Under this view of federalism, the Supreme Court had invalidated the early attempts of the Congress at economic and social regulation in the late 19th and early 20th centuries,[3] and many feared that the Supreme Court would handle the major New Deal initiatives, including the Social Security Act, in the same manner.

The early signs were not encouraging. From 1935 to 1937, the Supreme Court invalidated a number of President Roosevelt's legislative programs, finding that the enactment of these programs exceeded Congress' limited powers and invaded the rights of States.[4] As a result, doubt about the constitutionality of the Social Security Act had turned to pessimism by early 1937, when the Supreme Court was scheduled to decide the question.

But in the spring of 1937, acceding perhaps to the sentiment exemplified by President Roosevelt's Court-packing plan,[5] the Court changed course in a liberalization of its constitutional doctrines, including its view on the scope of Federal power.[6] The Social Security Act was a beneficiary of this judicial change of heart, as the Court upheld both its unemployment compensation provisions and the old-age insurance program on May 24, 1937.[7]

Constitutional Federalism

One of the most fundamental issues in the history of constitutional litigation has been defining the respective powers of Federal and State government. Generally, the matter is not clearly defined in the Constitution but turns on one's interpretation of two constitutional provisions: The 10th amendment and the supremacy clause.

The 10th amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[8] The provision makes clear that the Federal Government derives its authority from those powers delegated to it by the States, and that its authority is limited to those powers. Under the supremacy clause, laws enacted by Congress pursuant to a delegated power are the supreme law of the land, preempting any and all inconsistent State law or action.[9]

Historically, there have been two general views of federalism based on differing interpretations of these two constitutional provisions. The first is that supreme Federal powers extend to all subjects within their natural scope, limited only by explicit constitutional restrictions, such as guarantees of due process and fundamental liberties. The 10th amendment, in this view, "states but a truism that all is retained which has not been surrendered."[10] Under this view, there is considerable overlap in the areas that may be regulated by both Federal and State government, and in these areas the Federal Government is supreme and the States subordinate. Characteristically, Federal powers are construed broadly by the supporters of this view of federalism.

The second view is that the 10th amendment reserves to States not only powers not delegated but also a sphere of influence that may not be infringed upon by the Federal Government. On this theory, Federal and State govern-

[1] Pub. L. No. 74–271, 49 Stat. 620, currently codified, as amended, at 42 USC 301–1397 (1982 & Supp. III).

[2] The Act contained other measures aimed at mitigating economic hardship, including grants-in-aid for old-age assistance, aid to the blind, and aid to dependent children. This article focuses on the old-age insurance and unemployment compensation provisions of the Act because these are the programs that faced serious constitutional obstacles.

For a discussion of the old-age assistance and aid to dependent children provisions of the 1935 Act, and subsequent amendments, see, respectively, Herman F. Grundmann, "Adult Assistance Programs Under the Social Security Act," and Jo Anne B. Ross, "Fifty Years of Service to Children and Their Families," in **Social Security Bulletin,** October 1985. For a thorough discussion of all the provisions of the 1935 Act, and their origins, see Edwin E. Witte, **The Development of the Social Security Act,** The University of Wisconsin Press, 1962.

[3] See, for example, **Kidd** v. **Pearson,** 128 U.S. 1 (1888); **United States** v. **E.C. Knight Co.,** 156 U.S. 1 (1895); **Adair** v. **United States,** 208 U.S. 161 (1908); and **Hammer** v. **Dagenhart,** 247 U.S. 251 (1918).

[4] **Railroad Retirement Board** v. **Alton Railroad Co.,** 295 U.S. 330 (1935) (Railroad Retirement Act of 1934); **Schechter Poultry Corp. v. United States,** 295 U.S. 495 (1935) (National Industrial Recovery Act of 1933); **Carter** v. **Carter Coal Co.,** 298 U.S. 238 (1936) (Bituminous Coal Conservation Act of 1935); and **United States** v. **Butler,** 297 U.S. 1 (1936) (Agricultural Adjustment Act of 1933).

[5] See Robert Jackson, **The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics,** Alfred A. Knopf, 1941, pages 176–196, and Robert Stern, "The Commerce Clause and the National Economy, 1933–1946," 59 **Harv. L. Rev.** 645–693 (pt. 1), 883–947 (pt. 2) (1946).

[6] See **National Labor Relations Board v. Jones and Laughlin Steel Corp.,** 301 U.S. 1 (1937); **West Coast Hotel Co. v. Parrish,** 300 U.S. 379 (1937); **Steward Machine Co. v. Davis,** 301 U.S. 548 (1937); **Helvering v. Davis,** 301 U.S. 619 (1937); and **Carmichael v. Southern Coal and Coke Co.,** 301 U.S. 495 (1937).

[7] **Steward Machine Co. v. Davis,** 301 U.S. 548 (1937) and **Helvering v. Davis,** 301 U.S. 619 (1937).

[8] U.S. Const. amend. X.

[9] U.S. Const. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[10] **United States** v. **Darby,** 312 U.S. 100, 124 (1941).

ments are coequal sovereigns, each supreme in its respective sphere. It follows that Federal powers are interpreted narrowly, to avoid conflict with State sovereignty.

Advocates of each view participated in the constitutional debates and have, at different times, constituted a majority on the Supreme Court. Generally, the first view was adopted by the early Court under Chief Justice John Marshall and is the view taken by the Court since the late 1930's. The second view enjoyed the support of a majority on the Supreme Court from the mid-19th century to 1937.[11]

Constitutional Obstacles to the Social Security Act of 1935

It was, then, against a judicial backdrop of coequal-sovereign federalism that Franklin Delano Roosevelt assumed the presidency in 1933 in the midst of the Great Depression. The new President thus faced not only the substantive challenge of developing swift and effective remedies to grave national problems, but also the institutional one of avoiding Supreme Court invalidation of Federal palliative measures.

From a constitutional perspective, the general problem was the same for many of the President's New Deal initiatives: Large-scale legislative remedies had to be formulated so as to fit within the scope of congressional powers narrowly construed by the Court. The framers of the Social Security Act were faced with the problem in the context of developing two legislative programs, a national old-age insurance program and a system of nationally uniform State unemployment compensation programs.

Old-Age Insurance Program

Old-age insurance posed the more difficult problem. Basically, there were two possible approaches. One was to style the program as an enactment under Congress' power to regulate interstate commerce,[12] since the problems addressed were economic ones. Historically, the commerce power was by far Congress' broadest source of authority, though the precedent establishing this was from the days of the early Court.[13] In its coequal-sovereign mood, the Court had substantially cut back the reach of this power, finding, for example, that the commerce power could not support child labor laws[14] or antitrust regulation of manufacturers,[15] since regulation of these areas was the exclusive province of States. Prospects for the Court upholding a Federal old-age insurance program under the commerce power thus seemed questionable at best.

The other option was to rely jointly on Congress' taxing power and its power to spend for the general welfare.[16] Under this approach, the program would have to be crafted so as to separate distinctly the taxing and spending provisions of the legislation. There were two problems here. One was the precedent that appeared to limit the use of the taxing power to raising revenue for Government programs that were valid exercises of other delegated powers.[17] This seemed to preclude using the taxing power to support a legislative program that was not completely and independently supported by another congressional power.

The other problem with the taxing-spending approach was the issue of whether the spending power was broad enough to support a Federal program that provided cash benefits for the elderly. On this issue, there was conflicting historical interpretation of the spending power. It had been the position of James Madison that the power to spend for the general welfare was only the power to appropriate money as an incident to the exercise of other enumerated powers.[18] Alexander Hamilton, on the other hand, had argued that the spending power conferred an independent, substantive power of appropriation limited only by the requirement that the power be exercised so as to provide for the general welfare of the United States.[19] The issue had yet to be resolved by the Supreme Court and thus was an open question.

Ultimately, the drafters of the old-age insurance program decided to take their chances with the taxing-spending option. The taxing and spending aspects of the program were carefully separated, with the revenue raising provisions put in title VIII of the Social Security Bill and the benefit provisions in title II. There were no references to contractual or earned rights to benefits.

Under title VIII, two taxes were established: An income tax on employees and an excise tax on employers. Neither tax was applicable to certain categories of employment, including agricultural labor, domestic service, employment in State or Federal government, and work performed by persons aged 65 or older. Both taxes were measured as a percentage of wages payable to the employee and were set at the same rate. For 1937 through 1939, the rate for each tax was set at 1 percent. Thereafter, the rate was scheduled to increase ½ of 1 percent every 3 years until reaching 3 percent. Wages

[11]See Edward Corwin, "The Passing of Dual Federalism," 36 **Va. L. Rev.** 1 (1950).

[12]U.S. Const. art. I, sec. 8, cl. 3 provides: "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...."

[13]See, for example, **Gibbons** v. **Ogden,** 22 U.S. (9 Wheat.) 1 (1824).

[14]**Hammer** v. **Dagenhart,** 247 U.S. 251 (1918).

[15]**United States** v. **E.C. Knight Co.,** 156 U.S. 1 (1895).

[16]U.S. Const. art. I, sec. 8, cl. 1 provides: "The Congress shall have Power to lay and collect Taxes ... to pay the Debts and provide for the common Defense and general Welfare of the United States...."

[17]**Bailey** v. **Drexel Furniture Co.,** 259 U.S. 20 (1922).

[18]Joseph Story, **Commentaries on the Constitution of the United States** (1833; reprint ed., DeCapo Press, 1970), vol. II, book III, sec. 972 **et seq.**

[19]**Ibid.**

in excess of $3,000 per year were not taxable. The revenues from the taxes were to be paid to the U.S. Treasury like revenue from other Federal taxes and were not earmarked in any way.

Title II established the Old-Age Reserve Account and eligibility criteria for benefits. The reserve account was created as an account of the U.S. Treasury, but no appropriation was made to the account; the statute merely authorized annual appropriations in the future.

The principal type of benefit created was a monthly pension payable to a person aged 65 or older who had worked for at least 1 day in each of at least 5 years after December 31, 1936, and who had earned at least $2,000 after that date. Benefit payments were to begin January 1, 1942. Benefit amounts were related to past wages according to a benefit formula that replaced a higher percentage of lower wages than higher wages. Benefits were not to exceed $85 per month and were payable from the Old-Age Reserve Account.

Unemployment Compensation Program

The unemployment compensation program posed a very different problem. The objective of the legislation was to induce all States to adopt nationally uniform unemployment compensation programs. States were reluctant to establish such programs because financing them involved imposing taxes on industry, which in turn discouraged industry from remaining or locating in States that imposed such taxes. The fundamental constitutional problem was that any Federal action taken pursuant to any congressional power that sought to make States create programs according to Federal specifications appeared to be the ultimate federalism violation. There was, however, an encouraging precedent.

In 1926, Congress had enacted a Federal estate tax, which provided that up to 80 percent of the tax would be forgiven by the Federal Government for amounts paid under State estate taxes. At the time, Florida had no estate tax and many elderly, wealthy individuals were buying property in the State and moving there. States that had estate taxes were reluctant to repeal them and had appealed to Congress to establish national uniformity and erode Florida's advantage. Congress responded with the Federal estate tax-and-offset device that was clearly designed to encourage States to establish estate taxes so as to equalize conditions among States. Florida challenged the scheme before the Supreme Court, arguing that the law constituted an invasion of the sovereign rights of the State and an effort on the part of Congress to coerce the State into imposing an inheritance tax. But the Court found that Florida had presented no justiciable claim and dismissed the case, thus upholding the Federal law.[20]

Based on this precedent, drafters of the unemployment compensation initiative decided to encourage States to create unemployment compensation programs through a similar approach. Under the scheme, a Federal payroll tax was imposed on employers of eight or more persons at a rate of 1 percent of total wages payable by the employer in 1936, rising to 2 percent for 1937, and 3 percent thereafter. An employer was entitled to a credit of up to 90 percent of the Federal tax for any contributions to a State unemployment fund that was certified to the Secretary of the Treasury by the Social Security Board as meeting Federal specifications. State funds were to be paid immediately to the Secretary of the Treasury to the credit of the Unemployment Trust Fund, to be managed by the Secretary, with payments made to State authorities upon proper requisitions. The Federal tax and credit together, of course, enabled a State to set up an unemployment compensation program without fear of competition from States that chose not to establish a program. The plan was drafted as title IX of the Social Security Bill.

There was uncertainty in the Roosevelt administration and in Congress as to whether the Supreme Court would uphold the Act, especially the old-age insurance provisions. But the President and Congress were of the strong conviction that the measures were necessary responses to the severe economic problems of the elderly and unemployed. The Social Security Act of 1935 was passed by overwhelming majorities in both Houses of Congress on August 8 and 9, 1935, and was signed into law by President Roosevelt on August 14, 1935.

Judicial Challenge to the New Deal

In the same year that the Social Security Act became law, the Court—in a 5–4 decision—struck down the Railroad Retirement Act of 1934 as unconstitutional.[21] The law had established a compulsory retirement pension plan for railroad workers pursuant to Congress' commerce clause authority. Justice Roberts' majority decision concluded that the law was "not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution."[22] Was it not "apparent," he asked, that the legislation was "really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such?"[23]

The decision, and others that soon followed, made it clear that the drafters of the Social Security Act had made the right decision in opting not to rely on the commerce power. Three weeks after the Railroad Retirement Act decision, the Court invalidated the National Industrial Recovery Act of 1933.[24] The Act authorized

[20] **Florida** v. **Mellon,** 273 U.S. 12 (1927).

[21] **Railroad Retirement Board** v. **Alton Railroad Co.,** 295 U.S. 330 (1935).

[22] 295 U.S. at 362.

[23] 295 U.S. at 368.

[24] **Schechter Poultry Corp.** v. **United States,** 295 U.S. 495 (1935).

the President to promulgate codes of fair competition for particular trades or industries upon the request of trade associations. The typical code contained provisions regarding unfair trade practices, minimum wages and prices, maximum hours, and collective bargaining. The Court held that the wages and hours of employees who worked only in commerce within a particular State were not subject to Federal control.

In 1936, the commerce clause basis for New Deal legislation failed again when the Bituminous Coal Conservation Act of 1935 was held unconstitutional.[25] Under the Act, coal producers and workers negotiated a national code that regulated maximum hours and minimum wages of coal workers and maximum and minimum prices for the sale of bituminous coal. The Court determined that coal mining was of a local character and thus was outside the scope of Congress' power to regulate interstate commerce.

Prospects for the Social Security Act dimmed when the Court struck down the Agricultural Adjustment Act of 1933, which had been enacted pursuant to Congress' powers to tax and to spend for the general welfare.[26] The Act sought to raise farm prices by curtailing agricultural production. It authorized the Secretary of Agriculture to make contracts with farmers to reduce their productive acreage in exchange for benefit payments. Payments were financed by a processing tax imposed on processors of agricultural commodities. The Government argued that the taxing power supported the tax and the payment provisions were a valid exercise of Congress' power to spend for the general welfare. The Court summarized its position as follows:

> The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.[27]

By the end of Roosevelt's first term, the Court had thus found unconstitutional several New Deal laws, and it appeared that others, including the Social Security Act, might well face a similar fate.

Reaction to the Court's Threat to the New Deal

The Supreme Court's treatment of Roosevelt's popular New Deal initiatives evoked a strong sentiment against the Court on the part of legal scholarship as well as Congress and the administration.[28] Also, Roosevelt's sweeping reelection victory in November 1936 suggested that the Court's stance on the New Deal was flying in the face of public opinion.[29] Further, the Court's action was sharply polarizing Members of the Court, and dissenting Justices such as Stone, Brandeis, and Cardozo became highly critical of the majority's decisions.[30]

This anti-Court sentiment was exemplified most strongly by President Roosevelt's infamous Court-packing plan. Shortly after his inauguration to a second term, Roosevelt announced his plan to reform the Supreme Court in a message to Congress on February 5, 1937. This was followed by a radio address on March 9, 1937, in which the President stated:

> The Court . . . has improperly set itself up as a third House of the Congress—a superlegislature . . . 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.[31]

Under Roosevelt's proposed bill, the President would have been given the authority to appoint an additional judge to any Federal court for each judge on such court who was over age 70 and had served on the Federal bench for at least 10 years, provided that the total number of Justices on the Supreme Court could not exceed 15.[32] In 1937, six Supreme Court Justices were over age 70 and had served on the Court for more than 10 years.[33]

The Senate Judiciary Committee held extensive hearings on the bill throughout the spring of 1937.[34] The President's proposal touched off a political debate that quickly became a raging national controversy.[35]

The Supreme Court Changes Course

In the spring of 1937, acceding perhaps to the sentiment

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

[26]**United States** v. **Butler,** 297 U.S. 1 (1936).

[27]297 U.S. at 68.

[28]See Robert Jackson, **op. cit.,** pages 176–196.

[29]See Joseph Alsop and Turner Catledge, **The 168 Days,** Doubleday, Doran, and Co., Inc., 1938, page 10.

[30]See, for example, **United States** v. **Butler,** 297 U.S. 1 (1936), in which the majority invalidated the Agricultural Adjustment Act of 1933. The dissenters characterized the majority's analysis as a "tortured construction of the Constitution . . . ." See 297 U.S. at 87 (Stone, J., joined by Brandeis and Cardozo, J.J., dissenting).

[31]S. Rept. 711, 75th Cong., 1st sess. (1937), Appendix D, pages 42–43.

[32]**Ibid.,** Appendix A, page 31.

[33]See Gerald Gunther, **Cases and Materials on Constitutional Law,** 11th edition, The Foundation Press, Inc., 1985, Appendix B, "Table of Justices."

[34]See S. Rept. 711, **op. cit.**

[35]For more detailed discussions of the Court-packing plan, see Leonard Baker, **Back to Back—The Duel Between FDR and the Supreme Court,** MacMillan, 1967; Joseph Alsop and Turner Catledge, **op. cit.**; and William Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing Plan,'" 1966 **Sup. Ct. Rev.** 347.

exemplified by Roosevelt's Court-packing plan, the Supreme Court handed down a number of decisions that represented marked liberalizations of its constitutional doctrines, including its theory of federalism.[36]

On March 29, 1937, the Supreme Court upheld the constitutionality of the Minimum Wage Act of the State of Washington.[37] The decision reflected a change of position on the question of State power to regulate in a fashion that adversely affects business interests, since just the year before the Court had struck down an almost identical New York law.[38] Each decision was 5–4, with Justice Roberts switching sides.[39] The 1937 decision essentially marked a retreat from the Court's theory of substantive due process and did not directly imply a change in its federalism doctrine. However, it was soon clear that the Court was abandoning its conservative doctrines generally in favor of more liberal ones.

On April 12, 1937, the Court upheld the National Labor Relations Act of 1935.[40] The Act created the National Labor Relations Board and empowered it to prevent unfair labor practices as defined in the Act. Congress enacted the statute under its commerce clause authority. Industry had argued that the Act was an attempt to regulate all industry, including local industry, and thus invaded the reserved powers of States. But the Court expanded its definition of the Federal commerce power to find the law constitutional. The decision was 5–4, with Justice Roberts again casting the swing vote.

On May 24, 1937, the Court handed down its decisions in the social security cases. The First Circuit Court of Appeals had, in two separate cases, struck down both the unemployment compensation and old-age insurance provisions of the Social Security Act as unconstitutional.[41]

The 5–4 decision in **Steward Machine Co. v. Davis**[42] sustained the unemployment compensation tax and credit of title IX. Justice Cardozo's majority opinion concluded that the program was "not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."[43]

Justice Cardozo found first that the tax was a valid excise tax that was uniform in application and raised revenues that were not earmarked for any particular purpose.[44] He then turned to the issue of whether the tax and credit in combination worked as weapons of coercion, destroying or impairing the autonomy of the States. Here Justice Cardozo paused to review the reason for the legislation:

> To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge.... During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve.[45]

Justice Cardozo went on to find the tax-credit combination had the aim of equalizing conditions among the States so as to allow the States the freedom to establish unemployment compensation programs, without fear of placing themselves at an economic disadvantage with respect to other States that chose not to set up a program. The Court observed that States were free to accept or reject the opportunity to establish their own programs according to Federal requirements and, moreover, that States could repeal their programs at any time. The Court concluded that the plan was not coercive in nature but rather represented a cooperative venture between States and the Nation to provide for the general welfare.[46]

Justice Cardozo also delivered the Court's opinion in **Helvering v. Davis,**[47] which upheld the old-age insurance program (or rather, the taxing and spending provisions of titles VIII and II) of the Social Security Act.

Of course, the thrust of the constitutional argument against the old-age insurance provisions had been that titles VIII and II really operated together to form a Federal insurance program that was beyond Congress' authority. Thus, the outcome of the case turned largely on whether the Court chose to examine the two titles together or separately. Justice Cardozo analyzed them separately.

[36]For the argument that the Court's sudden liberalization was a direct consequence of the Court-packing plan, see Robert Jackson, **op. cit.** Jackson served as Solicitor General and Attorney General in Roosevelt's second term. In Roosevelt's third term, Jackson was appointed to the Supreme Court.

[37]**West Coast Hotel Co.** v. **Parrish,** 300 U.S. 379 (1937).

[38]**Morehead** v. **New York ex rel. Tipaldo,** 298 U.S. 587 (1936).

[39]Justice Roberts' change in position was widely interpreted as a move to undercut political support for the Court-packing plan and became popularly known as "the switch in time that saved the Nine." But see Felix Frankfurter, "Mr. Justice Roberts," 104 **U. Pa. L. Rev.** 311 (1955). Frankfurter shows that a memorandum by Justice Roberts establishes that Roberts had reached his position in the Washington Minimum Wage Act case weeks before Roosevelt announced his Court-packing plan. (Frankfurter was appointed by Roosevelt to the Supreme Court in 1939.)

[40]**National Labor Relations Board** v. **Jones and Laughlin Steel Corp.,** 301 U.S. 1 (1937).

[41]**Davis** v. **Boston and Maine R. R. Co.,** 89 F.2d 368 (1st Cir. 1937); and **Davis** v. **Edison Electric Illuminating Co.,** 89 F.2d 393 (1st Cir. 1937).

[42]301 U.S. 548 (1937).

[43]**Ibid.,** at 585.

[44]**Ibid.,** at 578-585.

[45]**Ibid.,** at 586.

[46]In another 5–4 decision on the same day, the Court sustained the Unemployment Compensation Law enacted by Alabama to fit into the scheme of title IX of the Social Security Act. **Carmichael** v. **Southern Coal and Coke Co.,** 301 U.S. 495 (1937).

[47]301 U.S. 619 (1937).

The title VIII taxing provisions were upheld with very little discussion. Since the taxes were applied uniformly and the revenues were not set aside for any particular purpose, title VIII encountered no constitutional obstacles.[48]

Most of Justice Cardozo's opinion was devoted to the title II spending provisions. Here the Court adopted Hamilton's position on the spending power to establish as a matter of clear precedent that Congress possesses a substantive power of appropriation, independent of other delegated powers, limited only by the requirement that it be exercised for the general welfare of the Nation. Further, the Court found that the determination of what is in the general welfare is a determination for Congress to make, and not the courts. Judicial review of Congress' use of the spending power was restricted to ensuring that the congressional determination of what is in the general welfare is not arbitrary. Justice Cardozo found that a wealth of evidence supported Congress' finding that Federal old-age benefits would advance the general welfare of the country:

> The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.
>
> Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act.... More and more our population is becoming urban and industrial instead of rural and agricultural. The evidence is impressive that among industrial workers the younger men and women are preferred over the older. In times of retrenchment the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reemployment.... With the loss of savings inevitable in periods of idleness, the fate of workers over 65, when thrown out of work, is little less than desperate....
>
> The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief.... Only a power that is national can serve the interests of all.[49]

[48]**Ibid.**, at 645.

[49]**Ibid.**, at 641–644. (Original source footnotes omitted.)

Having thus found that Congress had the authority to spend for the general welfare of the country, and that Congress' decision that old-age benefits would serve the general welfare was not arbitrary, the Court sustained the spending provisions of title II. The vote was 7–2.

Summary

In June 1937, the Senate Judiciary Committee reported unfavorably on Roosevelt's Court-packing plan and the bill was effectively killed.[50]

In the same month, Justice Van Devanter retired and gave Roosevelt his first opportunity to make an appointment to the Supreme Court.[51] Over the following 6 years, Roosevelt made seven more appointments to the Court, and in the years that followed the Court continued in the direction boldly advanced in the spring of 1937.[52]

A residual effect of the taxing-spending construction of the old-age insurance provisions of the Social Security Act of 1935 has been the Court's continued adherence to the view that social security programs consist of separate taxing and spending provisions and are not, constitutionally speaking, social insurance programs. The issue has arisen in both a due process context[53] and an equal protection context.[54] But it is unlikely that the decisions reached in these contexts would have been different had the old-age insurance program been drafted as an earned-benefits program pursuant to the commerce power.

Of course, the Court's decisions in the social security cases represented a significant constitutional development in establishing the breadth of Congress' powers to tax and spend for the general welfare. The decisions not only cleared the way for other general welfare programs, but more fundamentally provided the Federal Government with the substantive power and institutional flexibility to respond to the changing needs of the Nation.

[50]S. Rept. 711, **op. cit.**

[51]Roosevelt appointed Hugo Black to fill this vacancy.

[52]These seven appointments were Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, Robert Jackson, and Wiley Rutledge. Roosevelt also promoted Justice Harlan Stone to Chief Justice. Roosevelt had more appointments to the Supreme Court than any other President to date except George Washington, who had 10. (The original Court had only six Justices, but Washington, in two terms, had more than one appointment to some slots.) See Gerald Gunther, **op. cit.**

[53]**Flemming** v. **Nestor,** 363 U.S. 603 (1960).

[54]**Califano v. Goldfarb,** 430 U.S. 199 (1977). For a discussion of the rather interesting way in which this issue divided the Court in **Goldfarb,** see Edmund Donovan and Eduard Lopez, "**Goldfarb** and **Matthews:** Legal Challenges to the Dependency Test for Spouse's Benefits," **Social Security Bulletin,** December 1984, pages 23–25.