As he took the oath of office Jan. 20, 1937, President Franklin Roosevelt said later he felt like telling Chief Justice Charles Evans Hughes that he would preserve, protect and defend the Constitution "as I understand it, flexible enough to meet any new problem of democracy -- not the kind of Constitution your (Supreme) Court has raised up as a barrier to progress and democracy."

Furious that the court's conservative majority had struck down his key New Deal reforms, the president launched a surprise attack Feb. 5, 1937, asking Congress to authorize him to appoint an additional justice for every justice who declined to retire at 70. These changes were necessary, he explained, disingenuously, to clear the court's crowded dockets.

In "Supreme Power," Jeff Shesol, a former speechwriter for President Bill Clinton, provides a richly detailed, beautifully written and, well, judicious account of the court-packing plan and the ferocious fight over it.

Acknowledging that Roosevelt became more reckless after his re-election landslide in 1936, Mr. Shesol claims that hubris does not fully explain the president's behavior.

While he was unwise to ignore Congress or prepare the public before launching the plan, "it was not irrational for him to expect that both, in the end, would support it," the author believes.

Nor was it irrational, he suggests, somewhat less persuasively, for the president to refuse to back down after the court reversed course and upheld minimum wage laws and the National Labor Relations Act.

Justice Owen Roberts' "switch in time that saved nine," provided a slim 5-4 majority, a shaky foundation for the expansive definition of federal power under the Constitution's interstate commerce clause on which so much New Deal legislation rested.

In the end, however, as Roosevelt should have known, the court-packing plan went down in flames. The president antagonized many members of his party who opposed it as a dangerous violation of the separation of powers and the New Deal coalition began to come apart.

Nonetheless, thanks to a generous pension plan, Roosevelt did get to pack the Supreme Court. By 1942, he had appointed all but two of the sitting justices. Without this change in personnel, Mr. Shesol observes, the transformation in constitutional interpretation would not have been as sweeping.

Discarding the doctrinal legacies of laissez-faire economics, the Roosevelt Court declared that there were virtually no limits to Congress' power to regulate commerce.
Are we now, as "strict constructionists" complain, a nation governed by people and not laws? Mr. Shesol thinks the question poses a false dichotomy. Like most judges, he writes, the Nine Old Men of the 1930s were motivated by an ethic of impartiality, and constrained by precedent, procedure, the language of the Constitution and the facts of the cases before them.

And yet, the nation's highest court did not, does not and cannot operate in a vacuum. Whether they are conservatives or liberals, the justices must be alert as well to "life outside their chambers," whether it involves debates about the Great Depression or President Barack Obama's health care plan.

Justice Roberts, who knew better than anyone that Supreme Court justices aren't oracles of revealed truth, once asked, half kiddingly, "Who knows what causes a judge to decide what he does? Maybe the breakfast he had has something to do with it."

Much more importantly, we might add, with Franklin Roosevelt, it's inevitable, and good, that the Constitution be "great enough and broad enough to throw off the control of dead hands and march forth in step with the progress of mankind."

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