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HEADLINE: Comes a Horseman - The early New Deal Court was right about FDR's overreach

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BODY:

Franklin Roosevelt's clash with the Supreme Court is one of history's greatest legal dramas, but it has generated an unfair and misleading mythology. In this legend, the Court greeted the New Deal with a blast of reactionary decisions in 1935 and 1936 -- invalidating, among other things, the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA) -- to which Roosevelt retaliated by threatening to pack the Court with a new, more loyal majority of justices. The judiciary avoided the embarrassment of an expanded, politically neutered Court when Justice Owen Roberts switched sides in 1937, leading to a series of decisions upholding the New Deal.

This account further holds that the justices opposing Roosevelt -- the "Four Horsemen": George Sutherland, Willis Van Devanter, James McReynolds, and Pierce Butler -- were wedded to the cruel, sink-or-swim philosophy of Social Darwinism; "thoroughly deluded," in the words of Harvard's Robert McCloskey; and clinging to "the brave old world of their youth." To legal historian Peter Irons, they "recognized only the 'liberty' of powerful corporations and sweat shop owners," and to UCLA's Kenneth Karst they used "constitutional legerdemain" to impose a "root-hog-or-die theory of capitalist enterprise" on the Constitution. Others portray the Horsemen as motivated more by personal hostility to Roosevelt than by ideology. Jeff Shesol's new book, Supreme Power: Franklin Roosevelt vs. The Supreme Court, for example, barely glances at the legal arguments the justices found persuasive, instead painting the entire affair as a political clash between compassionate idealists and icy reactionaries. His adjectives are telling. Justice Sutherland was "stalwart," "harsh," and "devastating," unable to "contain himself" -- while liberal darling Louis Brandeis was a "strenuous[]" champion of "social reform and social justice" who, "battling injustice and corruption . . . stood above reproach" and even bore a "likeness to Lincoln."

All this is tame compared with the rhetoric of the time. Howard Lee McBain, the Columbia professor who coined the term "living Constitution," described the anti-New Deal decisions in 1936 as "judicial supremacy at its worst." Harvard professor Thomas Reed Powell thought the Court was "pick[ing] new, strange clubs out of the air to swat anything that it doesn't like." The deeply partisan Felix Frankfurter called its decisions "intellectual frivolity" that "reinforced" his doubts about "the capacity of [the] Court and the Constitution to satisfy the needs of our national life." Irving Brant, whose 1936 Storm Over the Constitution featured a foreword by future vice president Henry Wallace, argued that the Court's lack of "sympathy" with "the striving of the people for well being" made it "a stimulus to fascist or communist revolt." He proposed appointing a new liberal majority of justices, although he facetiously distanced himself from the court-packing threat in a footnote that recommended against expanding the Court, "even though

Lincoln did it."

Such language only caricatures what was actually a complex series of legal crises. Attorney Dean Alfange came closer to the truth when he wrote in 1937 that the New Deal's "one guiding principle" was "wholesale and pervasive governmental interference with all branches of private business," which required a "readjustment of constitutional values." That "readjustment" meant bending the Constitution, whose authors tried to hamper government's expansion, to accommodate a spectrum of initiatives that often stifled economic recovery, destroyed crucial resources, and favored the same "economic royalists" Roosevelt excoriated. These schemes were executed by a horde of new bureaucracies, each brandishing unprecedented power to redistribute wealth, confiscate property, and dictate industrial production. The 1935 decisions invalidating them were firmly grounded in precedent and in the text and history of the Constitution. The judiciary's eventual capitulation was the final act in a decades-long shift in political philosophy, generating a new federal government unlike anything the Founders contemplated.

One factor the mythology overlooks is that two of the era's most important decisions -- Home Building & Loan Association v. Blaisdell and Nebbia v. New York -- came in 1934, years before the court-packing plan was proposed. These cases remade American constitutional law, abandoning longstanding doctrines that had been reaffirmed only a few years earlier.

In 1923, Justice George Sutherland authored the decision in Adkins v. Children's Hospital, which concerned a law that forced employers to pay women $71.50 per month. Because this law applied only to women, businesses hastened to replace them with less expensive men. Indeed, such laws were championed by male-dominated unions hoping to block competition for jobs. Washington, D.C., elevator operator Willie Lyons made only $35 a month, but she liked her job, and when the law threatened her with termination, she challenged it in court. She faced an uphill battle, thanks to a 1908 precedent, Muller v. Oregon, which upheld similar laws on the theory that women were incapable of negotiating with male bosses about pay and hours, and needed government "protection."

Sutherland and his colleagues essentially overruled Muller. The "great -- not to say revolutionary -- changes which have taken place" since 1908 -- particularly the Nineteenth Amendment -- had reduced such differences "almost, if not quite, to the vanishing point." Women "are legally as capable of contracting for themselves as men," and to abridge that liberty arbitrarily was to deprive Lyons of due process of law. Acknowledging that "the liberty of the individual to do as he pleases, even in innocent matters, is not absolute," Sutherland held that "freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

Incensed progressives accused Sutherland of ignoring the "realities" of capitalist oppression, but more significant were the words of Thomas Reed Powell, who condemned the notion that freedom is the rule and restraint the exception. "No such doctrine is stated in the Constitution," he insisted. Restrictions had "long since become the rule, and freedom the exception." Progressives regarded this point as critical, because requiring government to demonstrate "exceptional circumstances" to justify restricting economic choices would hamper its ability to restructure the economy and redistribute wealth.

Nine years later, Sutherland authored another decision that enraged progressives. In New State Ice Co. v. Liebmann, the Court invalidated an Oklahoma law that prohibited selling ice without first getting permission from a committee of representatives from the state's existing ice companies. The restriction did not protect consumers -- ice selling was "an ordinary business," and there was no evidence that ice sellers exploited or defrauded customers. Instead, the rule protected established companies against fair competition -- unconstitutionally restricting entrepreneurs' liberty and erecting a "monopoly . . . against, rather than in aid of, the interest of the consuming public."

In one of his most famous dissents, Justice Brandeis likened states to laboratories that should be allowed to "remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." But Sutherland replied that whatever "experimental" latitude states enjoyed, "there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments." Government could not use "the theory of experimentation" to censor newspapers or persecute citizens on the basis of religion, and the right of entrepreneurs to go into the ice business was "no less entitled to protection."

These cases obstructed two of progressivism's main goals. Adkins held that government must have good reasons before limiting personal freedom, while Liebmann barred social-engineering experiments that violated individual rights. These decisions were rooted in the due-process clause, which since the Founding era had been interpreted as barring arbitrary legislative acts, or legislation that simply favored one group over another without actually promoting the public welfare. This understanding of the due-process clause was most famously expressed in Daniel Webster's 1818 argument in Dartmouth College v. Woodward, in a passage that courts quoted repeatedly throughout the next century. "Everything which may pass under the form of an enactment," argued Webster, "is not, therefore, to be considered the law of the land."

Quoting the 18th-century jurist William Blackstone, he explained that a law "is a rule: not a transient sudden order from a superior, to, or concerning a particular person; but something permanent, uniform, and universal." Legislation confiscating an individual's property or merely benefiting one group of lobbyists over another "does not enter into the idea of municipal law: for the operation of this act is spent [on one person or class] only, and has no relation to the community in general." For a legislature to exert power in this way -- for the personal benefit of the lawmaker or his allies -- would be to act arbitrarily; to exert its mere will. But the due-process-of-law clause allows states to act only pursuant to law -- that is, general rules serving the public good. In 1874, less than a decade after the Fourteenth Amendment added a new "due process of law" clause to the Constitution, the Court held that states could not take property from some citizens to benefit others because such legislation was not "law," but "a decree under legislative forms." Legislation restricting freedom only to enrich a particular faction, or lacking any basis other than legislative say-so, abridges liberty without due process of law.

Progressive-era lawyers recognized that this legal doctrine was among the most serious obstacles to redistributive legislation. They therefore formulated a theory that the due-process clause required only fair procedures, and that the constitutional prohibition on legislative arbitrariness -- which they derisively labeled "substantive due process" -- had been concocted by "activist" judges who merely enforced their individual political views from the bench. The judges of a previous generation would have been stunned by this accusation, but by the 1930s, it had become common in the legal academy and among younger lawyers. The clash between the two interpretations of the due-process clause would form one of the central dramas of the New Deal decade.

Two years after Liebmann, Sutherland and his colleagues watched as the Court reversed course. The case involved a law that restricted banks' ability to recover property from those who defaulted on their mortgages. When the Depression hit Minnesota, defaults were so numerous that foreclosure sales drove down land values, leaving debtors owing large amounts even after their land was auctioned. Angry mobs disrupted sales and marched menacingly on the capital. Socialist governor Floyd Olson threatened that if the legislature did not "make ample provision for the sufferers in this state," he would "declare martial law" and send "provost guards" to arrest "a lot of people who are now fighting the [debtor-relief] measures because they happen to possess considerable wealth."

Soon after, the legislature unanimously approved a law allowing judges to add a year to the period during which residents could redeem mortgaged property. The law also let judges void a foreclosure sale and order a new one if the price was "inadequate."

But the Constitution explicitly bars states from "impairing the obligation of contracts," a prohibition adopted in response to uprisings like the 1786 Shays's Rebellion, in which farmers mobbed foreclosure sales, closed courts, and demanded "debtor stay laws" like that enacted in Minnesota. Laws limiting lenders' ability to recover from defaulting borrowers dry up credit and stifle economic expansion, which is why James Madison described them as "wicked" and "contrary to the first principles of the social compact." Even law professor William Prosser, who helped Minnesota legislators write the law, confessed in 1934 that the contracts clause "was inserted in the Constitution for the purpose of preventing precisely [this] type of legislation."

When a bank foreclosed on the Blaisdell family's boarding house, they sought to extend the redemption period. The judge refused, finding the law unconstitutional, but the Blaisdells appealed, and the Supreme Court upheld the law in a 5-4 decision. Admitting it could not be reconciled with the Constitution, Chief Justice Charles Evans Hughes nevertheless held that the law was justified by the economic "emergency." It was "no answer," he claimed, "to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time." To say "that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them" simply "carrie[d] its own refutation."

This was fallacious: The theory is not self-refuting, and Hughes's assertion was no argument to the contrary. It hardly answered Sutherland's dissenting observation that "if the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered . . . because of an economic or financial emergency, it is but to state the obvious to say that it means the same now." Claiming that this "carries its own refutation" ignored the need for serious analysis; it really meant the Court would ignore the Constitution's words and let states impair contracts so long as their actions were "reasonable."

Blaisdell permanently crippled enforcement of the contracts clause. Only six years later, the Court allowed states to alter contracts even in non-emergency situations. After all, "the weakness in the financial system brought to light by that emergency remains." To this day, states enjoy broad power to rewrite contracts whenever their actions are "reasonable," which essentially means, whenever legislators think doing so would be a good idea.

Nebbia was even more extreme. In 1933, the New York legislature responded to falling milk prices by making it a crime to charge less than nine cents per quart. Rochester grocer Leo Nebbia was convicted of selling two quarts of milk and a loaf of bread for 18 cents. Arguing that states had no authority to set milk prices, he appealed, relying on the 1877 case of Munn v. Illinois, which allowed states to dictate prices only in special types of industries. But the Court overrode Munn and declared that from then on states could "adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."

This was the birth of the "rational-basis test," the legal standard courts still use to evaluate laws limiting economic freedom or property rights. Under this test, such restrictions are presumed constitutional, meaning that a plaintiff challenging them must prove there is no "reasonably conceivable state of facts" to support them. This alone is absurd, since it is impossible to prove a negative. But it gets worse: Courts don't require the law to accomplish the legislature's purpose, or even that there be any factual basis for the law. Legislative speculation suffices. As a federal judge once wrote, this test "invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute." It's no wonder laws virtually never fail it.

The theory behind such extreme leniency is that legislatures are competent to regulate economic affairs, and anyone objecting to such regulations should lobby the legislature rather than seek judicial protection. But when a law abridges a person's freedoms of speech or religion, he isn't forced to ask lawmakers to repeal it; he can rely on constitutional protections. Nebbia denied similar protections to those wishing to exercise economic liberty, even though they have no better chance of persuading legislators than do political or religious minorities. Minimum-price rules, occupational-licensing requirements, and similar laws benefit politically influential companies that invest billions in obtaining legislation that blocks competition from politically disadvantaged entrepreneurs. Nebbia ignores this reality, and works like a ratchet by which legislatures continually tighten controls over private economic decisions -- and courts refuse to loosen them.

Nothing illustrates the boundless power Nebbia gives legislatures more clearly than the law challenged in that case -- a law that forbade grocers to lower prices during the Depression's dreariest days. If such laws are rational, it's hard to imagine what would be irrational. Indeed, a dissenting Justice McReynolds likened the minimum-price rule to a law requiring homeowners "to pour oil on their roofs as a means of curbing the spread of fire." By forcing judges to blind themselves to economic realities, the newfangled "rational basis" theory actually meant legislatures could act irrationally.

Nor, McReynolds observed, was this temporary. If cheaper milk -- the natural consequence of supply's outstripping demand -- qualified as an "emergency" that justified the expansion of government power, then "whenever there is too much or too little of an essential thing -- whether of milk or grain or pork or coal or shoes or clothes -- constitutional provisions may be declared inoperative." Thus the judicial abdication represented by the rational-basis test would obliterate constitutional limits on state power, leaving Nebbia and his customers unprotected against legislatures that could restrict their freedom for irrational or self-interested reasons, or no reason at all.

Nebbia and Blaisdell reoriented constitutional law along long-rejected progressive lines. It's little wonder the conservative justices were distressed. Despite their reputation as cold Social Darwinists, their views had nothing to do with Darwin; they were drawn from the tradition of Founding-era classical liberalism. Yet progressives contended -- as political scientist Alpheus Mason wrote in 1933 -- that the "eighteenth century individualistic philosophy of rights and property is no longer a creed adequate for modern life." Blaisdell and Nebbia seemed to ratify the new, collectivist future.

But progressive celebrations didn't last long. Only a year later, the Court made another about-face. The case was Schechter Poultry v. United States, and it involved a New York slaughtering company charged with violating the National Industrial Recovery Act. A centerpiece of the New Deal, the NIRA aimed to transform American industry into a collection of cartels, allowing bureaucrats to plan the economy and, supposedly, prevent unforeseen downturns. Business leaders were invited to draft "Codes of Fair Competition," fixing prices, restricting output, and excluding unapproved competitors. The Codes were then promulgated by the president without congressional oversight.

Merchants were soon being prosecuted for lowering prices. Jacob Maged of Jersey City was jailed for charging 35 cents for pressing pants, when the Cleaners and Dyers Code dictated a price of 40 cents. Pennsylvania battery manufacturer Fred Perkins was sentenced for paying his employees 20 cents per hour when the law required a wage of 40 cents. Cleveland dry cleaners Sam and Rose Markowitz were jailed for offering customers five-cent discounts.

The poultry industry's code required chicken farmers, among other things, to implement a policy called "straight killing," which blocked shoppers from choosing which bird to buy. Roosevelt's "Brains Trust" believed that freedom of choice -- which they called "selective buying" -- often left butchers holding scrawny chickens nobody wanted. If customers were instead forced to pay a flat rate and take a randomly selected chicken, impoverished farmers would be subsidized and "overproduction" would fall.

In Schechter, the Court unanimously concluded that the NIRA unconstitutionally gave the president legislative power because the vague term "fair competition" was defined solely by his decrees, each bearing the force of law. The NIRA also exceeded Congress's commerce-clause authority. The Schechter brothers stored and sold their chickens within New York's borders, and the fact that the chickens were shipped from out of state did not bring them within federal jurisdiction. "Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power," the Court held. "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people."

Eight months later, the Court decided United States v. Butler, striking down the Agricultural Adjustment Act. That act taxed agriculture businesses and redistributed the proceeds to farmers who agreed to plant less, the idea being that when farmers planted less, prices would go up. This time, Roosevelt's lawyers did not rely on the commerce clause; they pointed to Congress's taxing power instead. This, too, the Court rejected. Taxes were for raising revenue, not for the mere "expropriation of money from one group for the benefit of another." The Constitution limited Congress's power to national matters, but if it could exploit the taxing power to regulate local activities, then it could regulate "all industry throughout the United States."

That November, Roosevelt was reelected in America's largest landslide, which simultaneously evicted all but a tiny minority of Republicans from Congress. Within weeks, he unveiled his court-packing plan.

It was not popular, even with Democrats. Columnist Walter Lippmann spoke for many when he warned that New Dealers "will make the greatest mistake of their lives if, while they are in power, they destroy the defenses they will desperately need when in the course of human events the people turn once more the other way." FDR pressed on, but the controversy was suddenly rendered moot when on March 29, 1937, the Court decided West Coast Hotel v. Parrish, overruling Adkins and upholding a minimum-wage law for women. "Liberty under the Constitution" is "necessarily subject to the restraints of due process," wrote Chief Justice Hughes, "and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." The decision gave lawmakers immense discretion to prevent "the exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage."

Unsurprisingly, Sutherland dissented. The minimum-wage law did not protect the public from fraud or accidents; it was "simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men." The restriction deprived women of liberty, not for their benefit -- "the ability to make a fair bargain, as everyone knows, does not depend upon sex" -- but for the benefit of a privately interested faction, and was thus an arbitrary breach of the due process of law promised by the Constitution. If government could enact such legislation, then "the right to make any contract in respect of wages will have been completely abrogated," and politicians could set pay rates at will. Seven decades later, Washington prescribes not only minimum wages, but even the sick leave, parking spaces, and types of chairs that workplaces must provide.

A month after Parrish, the Court pushed Congress's commerce-clause power far past the line drawn in Schechter. In N.L.R.B. v. Jones & Laughlin Steel, it upheld the National Labor Relations Act, which restricts businesses' freedom to hire and fire workers, even in industries operating only within state boundaries. Congress could regulate such local matters to prevent "industrial strife," which was "a matter of the most urgent national concern." Justice McReynolds would have none of it. If the commerce clause meant this, he warned, Congress could control even trivial activities that might have some indirect economic effect. "Almost anything -- marriage, birth, death -- may in some fashion affect commerce." He suggested some absurd potential consequences: "If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? . . . May arson of a factory be made a Federal offense whenever this would interfere with [the flow of commerce]?" The enactment of federal labor and anti-arson laws in the following decades answered McReynolds's rhetorical questions.

Justice Van Devanter resigned that June, and by the time the most famous New Deal case, United States v. Carolene Products, ordered courts to uphold "legislation affecting ordinary commercial transactions" in all but the rarest cases, the revolution was essentially over. The judiciary had yielded to a new jurisprudence that expanded Congress's commerce-clause powers and diluted the due-process clause's prohibition against legislative arbitrariness -- at least where economic matters were concerned.

Historians still debate whether the Court surrendered to FDR's court-packing threat or the 1936 election, or the legislation that replaced the NIRA and AAA was simply more restrained. But it's clear that, however dramatic, the era's constitutional transformation was not unforeseen. Nor was it simply the pragmatic resolution of a political tussle between compassionate liberals and heartless conservatives. The Four Horsemen drew from a long line of precedent -- some quite fresh -- that correctly restrained government power and protected economic freedom in ways incompatible with Roosevelt's plans. Moreover, their forebodings proved justified: The theories the Court embraced in 1937 sapped state autonomy, fostered a federal bureaucracy totally alien to the Founders' vision, and abandoned individual liberty to the arbitrary will of legislatures. Today, government limits economic freedom in countless anti-competitive ways -- requiring even florists and interior decorators to undergo years of expensive education and confiscating property virtually without restraint. Indeed, when the Court ruled in 2005 that states could condemn homes and give the land to private developers, it drew straight from the New Deal cases: Courts review eminent domain under a "deferential standard," wrote Justice Anthony Kennedy, that "echoes the rational-basis test used to review economic regulation."

Justice Sutherland and colleagues warned that, while ignoring or loosening constitutional limits might seem profitable in the short run, every lapse furnished a precedent for further expansion, and that the bureaucratic machinery created during the 1930s would eventually entangle every aspect of economic life. It's sad their warnings went unheeded.

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