Introduction

Timothy S. Huebner

Efforts to reform or reign in the Supreme Court have a long history. This issue of the *Journal* largely focuses on the most famous and consequential of these efforts, President Franklin D. Roosevelt's ill-fated 1937 proposal to "pack the Court" after the justices invalidated New Deal legislation. In the decades since the episode, scholars of all persuasions have spilled a great deal of ink on the subject, as they have addressed the origins of FDR's controversial proposal, the reasons for its failure, and its impact on the justices and their opinions. It's a well-worn observation that Roosevelt lost the battle but won the war. That is, even though the plan to add up to six additional justices never even made it to a congressional vote, the Court changed its mind about the constitutionality of economic regulation, and a series of retirements gradually transformed the composition of the Court. Not only did the justices end up upholding Roosevelt's New Deal, eventually, during his three full terms in office, FDR appointed nine justices, more than any president since George Washington. The liberal legal order created during the New Deal era shaped the next several decades of American constitutional development.

This issue contains three articles that shed new light on the Court-packing episode. G. Edward White does so by telling us about the early career of Robert H. Jackson, from his 1934 arrival in Washington to his appointment by FDR as Associate Justice of the Supreme Court in 1941. During this time, Jackson authored a rarely investigated contemporary account of the Court-packing controversy, **The Struggle for Judicial Supremacy**, which White explores in depth, among other aspects of Jackson's pre-Court career. In chronicling Jackson's rise, White's article offers a fresh look at Court-packing through the biographical lens of an insider. White is David and Mary Harrison Distinguished Professor of Law at University of Virginia School of Law.

Barry Cushman takes a different approach. He devotes his attention to the robust discussion in the halls of Congress over Court reform. According to Cushman, during the first half of 1937, as the Court-packing crisis played out, members of Congress introduced approximately forty-eight resolutions, bills, or amendments proposing some type of reform. As Cushman observes, these alternative proposals—everything from allowing

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Congress to overturn a Supreme Court decision to placing limits on the Court's appellate jurisdiction—help demonstrate the depth of congressional opposition to the Court's pre-1937 decisions on economic regulation. Cushman is John P. Murphy Foundation Professor of Law, University of Notre Dame. Finally, Zach Jonas's piece focuses on yet another neglected aspect of the Court-packing story—its connection to Black politics. A former student at Georgetown University Law Center, Jonas argues that an intense debate within the Black press and civil rights organizations over Court-packing helped to shape the civil rights struggle in the decades that followed. All three of these absorbing essays add new layers of significance to this landmark episode in the history of American politics and the separation of powers.

Decades before the civil rights activists discussed by Jonas had developed a strategy for overcoming segregation, in 1865 John S. Rock of Boston broke the racial barrier by becoming the first African American admitted to the bar of the Supreme Court. Christopher Brooks' succinct and significant article tells the story of the relationship between Senator Charles Sumner and Rock, as well as Rock's persistence in striving for bar admission. Brooks is Professor of History at East Stroudsburg University. His essay is one of three pieces published in these pages in the past few years on the topic of Black advocates. For readers interested in learning more, the Society's website features a recently recorded panel discussion with all three of the authors of these groundbreaking articles, including Brooks. It's worth a look.

A century after Senator Sumner help Rock achieve admission to the Supreme Court bar, President Lyndon B. Johnson appointed his friend Abe Fortas as Associate Justice of the Court. Fortas's 1965 confirmation proved easy and uneventful, but his 1968 nomination for the chief justiceship quickly went sour. Questions about the ethics and propriety of Fortas's relationships—not only with President Johnson but also with a former client indicted for illegal stock manipulation—seemed to doom the nomination from the start. The controversy dragged on, and Fortas eventually resigned his seat on the Court in May 1969. In carefully describing both nominations, Michael Nelson argues that the failed attempt to elevate Fortas to the chief justiceship marked the beginning of our modern, polarized nomination process, in which public Senate hearings and media attention dominate. Nelson is the Fulmer Professor of Political Science at my institution, Rhodes College, and Senior Fellow at University of Virginia's Miller Center.

The *Journal* occasionally features reviews of important new books, and this issue concludes with a review of Brad Snyder's landmark biography, **Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment.** Brad mined the archives in his comprehensive examination of Frankfurter, the cantankerous and contrarian advocate of judicial restraint, and William Domnarski offers a playful, provocative take on the book. Domnarski is a lawyer and mediator who has written extensively on federal judges and the federal courts. At a time when we continue to debate the appropriate role of the Court in American life, Brad's book—and Domnarski's review—contributes to an important larger discussion.

This issue of the *Journal* again demonstrates the diversity and vitality of the field of Supreme Court History. It also shows, I hope, our continued commitment to providing our readers with compelling stories—deeply researched and well told—by both established and emerging scholars. Each of the articles in this issue, most important, demonstrates the enduring importance of the Supreme Court and the rule of law, even in the midst of the raucous public debates that have always defined our republic. Thanks for reading.

Senator Charles Sumner and the Admission of John S. Rock to the Supreme Court Bar

Christopher Brooks

Between 1862 and 1865, as the Union Army began to turn the tide in the American Civil War and emancipation increasingly became a reality, African American attorney John S. Rock set his sights on admission to the bar of the Supreme Court of the United States. On at least nine occasions, Rock wrote to Senator Charles Sumner on the topic. Rock, a constituent of Sumner's from Massachusetts, proved persistent in seeking admission, and Sumner would figure prominently in lending him support. Eventually, on February 1, 1865, the justices admitted Rock, thus making him the first African American to gain admission to the Supreme Court bar. Rock's efforts validated his claim, announced in February 1862 before the Massachusetts Anti-Slavery Society, that "free people of color have succeeded in spite of everything, every hurdle, every obstacle set before them."[1] This essay captures Rock's persistent struggle to overcome these obstacles.

Rock's life embodied this staunch, clear statement of self-sufficiency despite the odds. Born free in 1825 in Salem County, New Jersey, Rock achieved remarkable success. He became a schoolteacher at age nineteen, schoolmaster at twenty, dentist at age twenty-two, and a physician at twenty-seven. Well-educated and well-traveled, Rock received medical treatment for tuberculosis-related issues while in France, where the surgeons who treated him advised that he abandon the practice of medicine. Indefatigable in his efforts and diverse in his interests, Rock turned his attention to the law, and in 1861 he passed the Massachusetts bar at age thirty-six, thus beginning a legal practice in his home state.

Whatever ambitions Rock may have entertained about attaining admission to the bar of the U.S. Supreme Court when he became a lawyer, the justices seemed to have erected an insurmountable barrier. In 1857, the Court held in *Dred Scott v. Sandford* that

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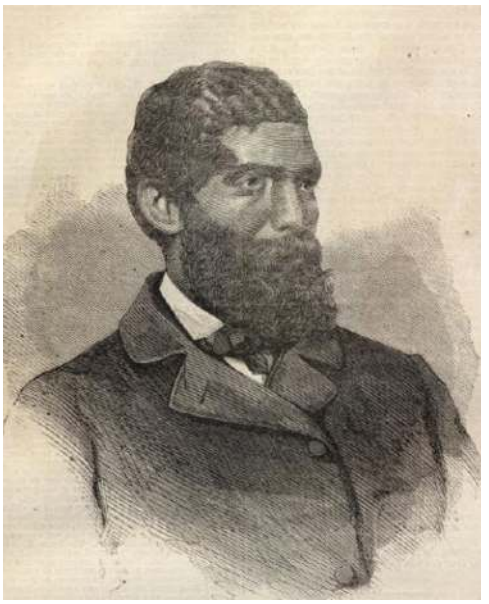


Massachusetts lawyer John S. Rock was persistent in seeking admission to the Supreme Court bar. He enlisted the help of his Senator, Charles Sumner, who was the leader of the anti-slavery coalition in Congress.

Black people, whether enslaved or free, had no rights. In the infamous words of Chief Justice Roger B. Taney, American Blacks

> had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.[2]

The 7-2 pro-slavery decision elicited strong opposition from the free Black community throughout the North. In Massachusetts, a hotbed of abolitionism, one anti-slavery activist lamented the "darkness" of the Court's ruling.[3]

Written in 1862, in the midst of war, Rock's first few letters to Sumner expressed the harsh realities of racism and commended the senator for his commitment to abolitionist principles. Rock's first known letter to Sumner, dated June 1862, criticized the legal requirement of the freedom pass, a document free Blacks had to carry when travelling in the South. Rock especially took issue with the fact that the practice continued in the nation's capital, even after federal law had ended slavery there a few months earlier. As Rock put it: "Is it not a shame that even in Washington[,] now when the District [of Columbia] is free[,] a man is still obliged to get some responsible person to vouch for his freedom or to go his security?"[4] In another letter a few weeks later, Rock commended Sumner for his principled stance against slavery: during the course of the debate over the future of slavery in Kansas in 1856 Sumner had labelled slavery a "harlot" on the floor of the Senate. Indeed, his "Crime Against Kansas" speech had become famous for the reaction it provoked, as South Carolina Congressman Preston Brooks subsequently had beaten Sumner over the head with his cane, rendering him unconscious. Rock praised Sumner for not treating African Americans "in the spirit of the Dred Scott decision," which the rest of the Republican Party, he argued, "appear[ed] determined" to do.[5]

To be fair to the Republican leadership of the day, they had been placed in a terrible corner with *Dred Scott*. They could either agree to honor the decision or refuse to respect it. Honoring it would infer their acceptance of slavery; not doing so would contravene the age-old support for the common law and the Supreme Court's role of establishing law through precedent. As a compromise, Republicans would derogate the opinion without entirely desecrating the newly founded southern jurisprudential Holy Grail. The Republicans reasoned that Taney declaring the Missouri Compromise unconstitutional was not law because he had held that Scott had no standing in federal court in the first place, thus making anything else he

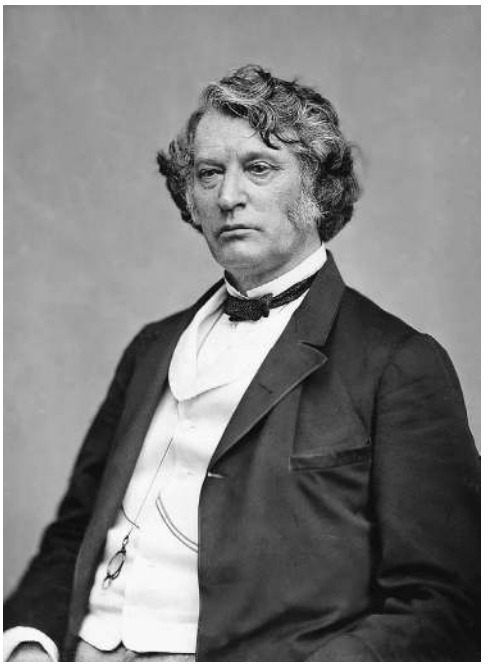
said *obiter dictum*. This may have satisfied many Republicans at the time, but Rock and other Blacks saw this as a cop out.

Accordingly, Rock attempted to put the Republicans on notice: this 1862 letter is the first known, written account in which Rock formally asked to be permitted to argue before the U.S. Supreme Court, a clear defiance of Taney's ruling in *Dred Scott*.

Rock's next letter to Sumner, written December 30, 1863, further pressed the issue of his admission. The letter indicates that Rock and Sumner at some point had discussed the issue of Rock's admission to the Supreme Court bar at Sumner's home. Further, the letter seems to have been written from either Philadelphia or Washington City.[6] After noting that he had been admitted to the Massachusetts bar on September 14, 1861, Rock continued: "If it is possible to be admitted to the S. Ct. U.S. I should prefer to have it come now before I return to Boston."[7] Apparently, Sumner never replied to this query. With persistence, Rock wrote again on February 9, 1864: "Will you let me hear from you soon?"[8] Why did Sumner hesitate? Taney, who was still chief justice, would certainly not have granted Rock's request to join the Supreme Court bar, nor would he have encouraged his colleagues to do so. The only actual requirements for admission were that the applicant have been admitted to practice in the highest court of his state for at least three years before applying, as well as be of sound moral character. But it would take the support of the chief justice before the matter could even come before the justices. Taney's presence on the Court, where he had been serving since 1836, certainly frustrated Rock. According to historian Benjamin Quarles, Rock wrote of Taney to a friend that, "the old man lives out of spite."[9]

Taney's death at age eighty-seven on October 12, 1864 prompted celebration in the North and immediately opened the door to the possibility of Rock being admitted. "Providence has given us a victory in the death of Chief Justice Taney," wrote Sumner to President Abraham Lincoln that same day. "It is a victory for liberty and the Constitution." In the same note to Lincoln, Sumner advocated the appointment of Salmon P. Chase to succeed Taney.[10] Chase, Lincoln's Secretary of the Treasury until his resignation in summer 1864, had first made his name during the late 1830s for his legal and political work on behalf of the antislavery cause in Ohio.[11] On December 6, 1864, Lincoln nominated Chase, and the Senate confirmed him the same day. Knowing that Chase was of a different ilk than his predecessor, Rock wrote Sumner once again on December 17, 1864. In that missive, Rock noted that the Court has a "great and good man for our Chief Justice," expressly underlining the complimentary adjectives for emphasis.[12] Here Rock not only once more asked Sumner "the favour of" the Senator's "influence on my behalf;" he also attached two additional pages detailing his credentials, which included mention of his bar admittance in Suffolk County, Massachusetts.[13]

Perhaps unknown to Rock, Sumner had already requested that Rock be admitted to the Supreme Court bar. On December 21, Sumner had written to Chase that, "Mr. Rock is an estimable lawyer who is . . . daily recommended by [Massachusetts] Governor Andrew and others in the public service." He continued: "I know not how far the Dred Scott decision may stand in the way." Sumner also pointed out that he himself had worked with "one of these colored lawyers" while arguing before the Massachusetts Supreme Court and that the attorney "was well received by" the court. Here Sumner alluded to *Roberts v. Boston* (Mass. 1849), a case pertaining to school segregation in Boston, in which Sumner's co-counsel before the Massachusetts Supreme Court was Robert Morris, the nation's second African American attorney and the man under whom Rock may have read law.[14]



Senator Sumner (above) wrote to Chief Justice Salmon P. Chase that, "Mr. Rock is an estimable lawyer who is . . . daily recommended by [Massachusetts] Governor Andrew and others in the public service." But, he continued: "I know not how far the Dred Scott decision may stand in the way."

Though Chief Justice Chase replied to Sumner's December 21 note the same day, stating that Saturday was conference day and that he foresaw "no serious objections," no action was taken.[15] It is unclear how, but Rock apparently received word of this development, as he wrote December 24 to Sumner that he had received his "very kind letter" upon his arrival in Philadelphia the day before. Rock continued, "Many thanks to you for your kind intercession on my behalf. I shall leave it all to you. I feel it to be a great personal favour as well as a great triumph to succed [sic] in this effort."[16] Rock continued by explaining his intention to remain in Philadelphia until he received a reply from Sumner, as he had already traversed more than half the distance between Boston and Washington.

In the weeks that followed, Rock remained patient. It appears that he did not stay in Philadelphia, however. Against Sumner's advice, at some point in late December 1864, Rock went to Washington anyway. Unfortunately, he was not afforded the opportunity to be sworn in as a member of the Supreme Court bar at that time. Rock's haste did not please Chief Justice Chase either, who wrote to Sumner that, "advice to Mr. Rock to wait until he heard definitely from you was advice he should have regarded."[17] Despite what appears to have been a frustrating turn of events, there are no sources indicating Rock's displeasure. He commented in a January 9, 1865 letter only that he needed to head to Philadelphia because he could not "remain longer from home without material disadvantage to myself and others," but that he had been very thankful to Senator Sumner for his support to that point. As difficult as it must have been for Rock to remain patient, he appears to have tolerated the wait. This is especially impressive in light of the long trip for naught and his not actually meeting any of the justices—just the enrolling officer at the Court.[18]

Sumner continued in his advocacy of Rock, and Chase eventually acted. On January 15, 1865, Sumner wrote a concise note to Chief Justice Chase: "In re John S. Rock, Counsellor at Law, Massachusetts. What say you?" On the same slip of paper, Chase replied, "Nothing at present, -except not forgotten."[19] For Chase's part, perhaps sensing that enough time had passed, he did swiftly thereafter bring up in conference to the other justices Rock's admittance to the Supreme Court bar. According to Chase's notes of January 15, 1865, he "mentioned that" he had been "informed that motion for admission [to bar] of a colored lawyer from Massachusetts w[oul] d be made and asked advice." Apparently "no one inclining to speak," Chase stated that he "would take silence as indicating willingness to leave the matter" to his "discretion as Ch. Justice, intimating that I sh[oul]d admit without hesitation." This was followed by "nearly all" justices, "one after another" expressing "the opinion that the rule must govern &

that in it there was no disqualification on the ground of color." Chase shared that at least one justice did allude to *Dred Scott*, asking about "citizenship & I said I w[ould] direct the motion to be made for admission & [h]ave it argued: but this not being insisted on, we adj[ourne]d. with the understanding that colored men qualified could be adm[itte]d. without regard to complexion." This, wrote Chase, marked "progress!"[20]

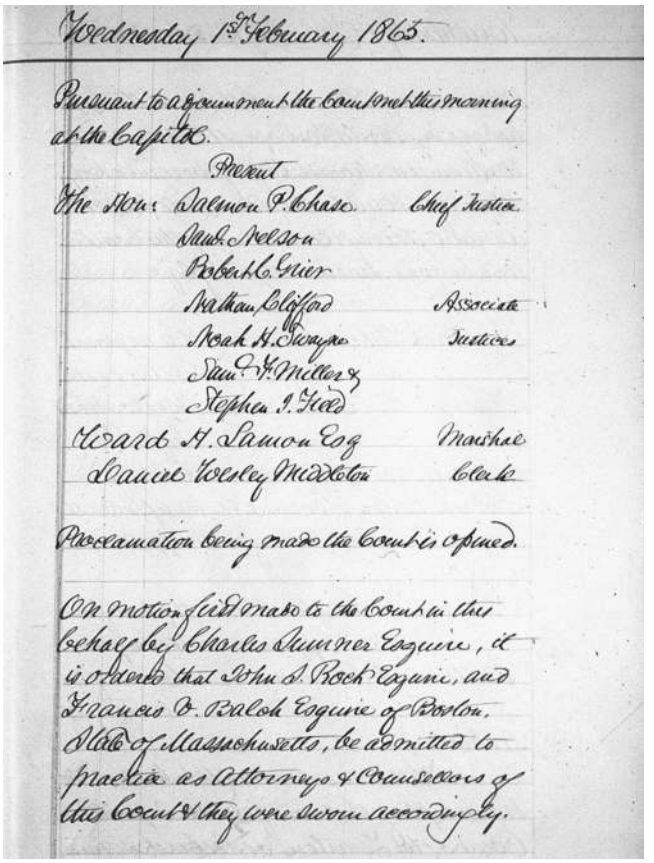
The "progress" to which Chief Justice Chase referred deserves highlighting. Composed of ten justices during the brief period between 1863 and 1865, Justices John Catron of Tennessee, Robert C. Grier of Pennsylvania, James M. Wayne of Georgia, and Samuel Nelson of New York had all concurred or agreed fully with Taney in *Dred Scott*. As for the men not on the Court at the time of the *Dred Scott* decision, Nathan Clifford was considered a doughface, a northerner with southern sympathies. Justice David Davis, too, would have been a hard sell. Indeed, Davis wrote to a friend soon after Rock's bar admission that a "negro can never be elevated to social and political rights in this country, and all wise statesmen know it."[21] That left four justices—Chase, as well as Justices Noah Swayne, Samuel F. Miller, and Stephen J. Field—as plausible supporters. All four were Lincoln appointees. We will never know what was said in conference, but based on what we do know, Chase's task to convince his fellow justices to support Sumner's motion on behalf of Rock could not have been an easy one.

To underscore this challenge, consider John Catron.[22] As a slave owner, Catron had sided with the state sovereignty argument in *Dred Scott*, a case that had originated in Catron's circuit. Catron had concurred with Taney that Scott remained a slave because the Missouri Compromise of 1820 was unconstitutional. In an 1833 Tennessee case over the ownership of a slave whilst Catron was chief judge of that state's supreme court, he argued that the "mutual feelings of dependence, affection and humanity, existing between master and slave, have no cash price and cannot be compensated in money."[23] Catron's statement leaves little doubt how deep the institution of slavery and defenses for it were.

On January 23, 1865, Chase decided it was time to move forward. He wrote to Sumner: "You can make your motion for Mr. Rock's admission at any time which suits your convenience."[24] In a letter dated three days later, Rock confirmed his receipt of the good news, leaving one to reason that Sumner was prompt with his letter to Rock after the chief justice had indicated that the time was right to put Rock's name forward. Rock wrote that he would head back to Washington, D.C. so "that the motion may be made Thursday next," which would have been February 2, 1865. This presumably allowed some time for the motion to be filed. As it turned out, it was more than enough time. He further promised not to tell anyone about the news, though some were likely anticipating it. Rock shared that he had been questioned about what he would do if he "was not to be admitted," to which he replied, "I might apply sometime when I [have] more time." Rock added with regard to himself and Sumner, "We will take them by surprise after all."[25]

The next day, Rock wrote that he might arrive in Washington a day later, but that did not prove to be a hurdle. Apparently, Rock got there in due time to be admitted on February 1, 1865, the same day President Abraham Lincoln submitted to state legislatures the proposed Thirteenth Amendment officially ending slavery in the United States. In Charles Sumner's words:

> As soon as the judges had taken their seats, Mr. Sumner rose, and, with Mr. Rock standing by his side, said: —
>
> 'May It Please The Court, —
>
> 'I ASK leave to present John S. Rock, Esq., a Counsellor at Law of



Wednesday 1st February 1865.

Pursuant to adjournment the Court met this morning at the Capitol.

Present

The Hon: Salmon P. Chase — Chief Justice
Saml. Nelson
Robert C. Grier
Nathan Clifford — Associate
Noah H. Swayne — Justices
Saml. F. Miller
Stephen J. Field
Edward A. Lamon Esq — Marshal
Daniel Wesley Middleton — Clerk

Proclamation being made the Court is opened.

On motion said made to the Court in this behalf by Charles Sumner Esquire, it is ordered that John S. Rock Esquire, and Francis D. Ralch Esquire of Boston, State of Massachusetts, be admitted to practice as Attorneys & Counsellors of this Court & they were sworn accordingly.

The record of Rock's historic admission to the Supreme Court bar on February 1, 1865. President Abraham Lincoln submitted to state legislatures the proposed Thirteenth Amendment officially ending slavery in the United States on the same day.

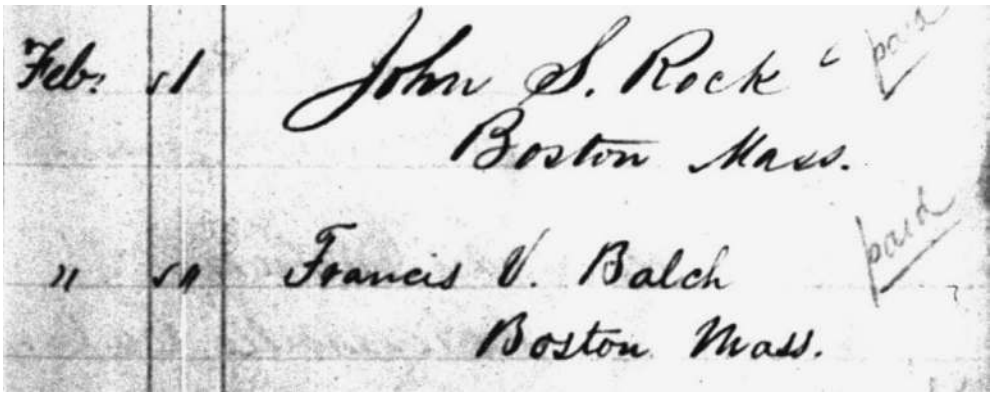
> the Supreme Court of Massachusetts, and now move that he be admitted as a Counsellor of this Court.

As Charles Warren conveyed in his history of the Court, "[t]he grave to bury the *Dred Scott* decision was in that one sentence dug; and it yawned there, wide open, under the very eyes of some of the Judges who had participated in the judicial crime against Democracy and humanity."[26] Indeed, Rock's admission to the Supreme Court bar represented a "shadow docket" overruling of *Dred Scott*. The proceeding continued:

> The Chief Justice bowed, and said: —
>
> 'Let him come forward and take the oath.'
>
> The oath was then administered by Mr. [D.W.] Middleton, Clerk of the Court. . . .

Rock's admission marked a critical stage in the battle for civil rights, and it was widely noticed both at home and abroad.[27] Also noticed was the symbolism of the House of Representatives' final passage of the Thirteenth Amendment and Rock's admittance being the same day. A correspondent for the *Boston Journal* remarked about the association of the two events:

> The Slave Power, which received its constitutional death-blow yesterday in Congress, writhes this morning on account of the admission of



Rock's signature on the attorney rolls. Sumner moved his admission as well as that of Francis V. Balch, the Senator's private secretary.

> a colored lawyer, John S. Rock, of Boston, as a member of the bar of the Supreme Court of the United States. The rage depicted in the countenances of some of the old Hunkers present at this invasion of their citadel beggars [sic] description.[28]

Rock showed his thanks to the chief justice for his support. The day after the February 1 ceremony, he wrote to Chase that he had "received a copy of" his bar admission "certificate with the rules." He closed, sharing his "many thanks for" Chief Justice Chase's "unceasing kindness."[29] Rock also mentioned that he accepted the invitation from Rep. John Baldwin of Massachusetts to be received on the House floor and noted he had had "the congratulations of several members of that body."

And so it happened. Sumner, a prominent Massachusetts Senator, found cause to promote a man Boston's German-language newspaper *Der Pionier* termed a "*woolhaarige Neger*"—a wooly-haired Negro—to practice before the U.S. Supreme Court.[30] Rock's persistence paid off for him, and indeed for all Americans of African heritage of his day. One might wonder whether Sumner's intention to support John Rock's admission to the Supreme Court was merely ameliorative in nature. Or, was it the juristic skill and intellectual acumen of Dr. Rock that gained the attention of and came to be so respected by Senator Sumner? Or, was it Sumner seeking a token?

American Civil War historian James McPherson wondered if "radical" Republicans were true, non-apologetic abolitionists, those who called for the immediate end of the peculiar institution. It seems that Sumner was in this camp, and he nearly had his brains bashed in by the South Carolinian Brooks on the Senate floor to prove his commitment to the movement.[31] Indeed, Sumner's support of Rock—even prior to Chief Justice Taney's death in 1864—is evidence of the Senator's genuine support of the antislavery cause. He was a committed abolitionist. That being the case, it is certainly feasible that Sumner's support was based as well on Rock's demonstrated ability and not mere tokenism. Sadly, Rock did not live long enough to find a way to bring a case before the Court he esteemed so much. That honor would go to Everett Waring twenty-five years later, in 1890.[32] Rock died December 3, 1866 of tuberculosis, after nearly a year of illness, before his premature death at forty years of age.[33]

Curiously, there is no record of other Black attorneys who had gained admission to the bar before Rock—namely Macon Bolling

Seven of the ten justices were sitting on the bench the day Rock was admitted. Clerk of Court D.W. Middleton (at left) swore him in. The following day Rock wrote to Chase (center) sharing his "many thanks for" the chief justice's "unceasing kindness."

Allen or Robert Morris—applying or soliciting support for applying to practice before the nation's highest court. This begs the question: why Rock and why not Morris, especially if Morris was the more experienced attorney? Scholarly investigation may eventually uncover an answer. Regardless, the resilience and tenacity of this famous first, John Stewart Rock, cannot go unnoticed.

ENDNOTES

[1] John Rock's Speech to the Massachusetts Anti-Slavery Society, February 1862 in William Wells Brown, **The Black Man, His Antecedents, His Genius, and His Achievements** (Boston, James Redpath, 1863), 269.

[2] *Scott v. Sanford* 60 U.S. 393, 407 (1856). On Dred Scott, see Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (New York, 1978).

[3] Timothy S. Huebner, "'In Defiance of Judge Taney': Black Constitutionalism and Resistance to *Dred Scott*," *Journal of Supreme Court History*; 45 (2020), 215–235; Francis Ellen Watkins, "Speech of Miss Francis Ellen Watkins," *National Anti-Slavery Standard*, May 22, 1858, available at http://research.udmercy.edu/find/special_collections/digital/baa/item.php?record_id=206&collectionCode=baa (accessed May 11, 2012).

[4] Charles Sumner, "John Rock to Charles Sumner," June 5, 1862, **Papers of Charles Sumner**, Penn State University, reel 20.

[5] Charles Sumner, "John Rock to Charles Sumner," June 16, 1862, *ibid*.

[6] Charles Sumner, "John Rock to Charles Sumner," December 30, 1863, *ibid*., reel 25.

[7] Rock was in Philadelphia at the time, presumably visiting his wife's family for the holidays.

[8] Charles Sumner, "John Rock to Charles Sumner," December 30, 1863, **Papers of Charles Sumner**, reel 25; "John Rock to Charles Sumner," **Papers of Charles Sumner**, February 9, 1864, Reel 30.

[9] Benjamin Quarles, **The Negro in the Civil War** (New York: Da Capo Press, 1989), 101.

[10] Charles Sumner to Abraham Lincoln, October 12, 1864. Letter. From Library of Congress. Abraham Lincoln Paper. http:memory.loc.gov/ammem/alhtml/malhome.html.

[11] Cf. Stephen E. Maizlish, "Salmon P. Chase: The Roots of Ambition and the Origins of Reform," *Journal of the Early Republic* 18, no. 1 (1998): 47–70, 62–63, 65; Louis S. Gerteis, "Salmon P. Chase, Radicalism, and the Politics of Emancipation, 1861–1864," *The Journal of American History* 60, no. 1 (1973): 42–62 (*passim*).

[12] Charles Sumner, "John Rock to Charles Sumner," December 17, 1864, **Papers of Charles Sumner**, reel 30.

[13] Salmon P. Chase to Charles Sumner, December 21, 1864, **Papers of Charles Sumner**, reel 30. In whose hand(s) these credentials were written remains unclear. It looks somewhat consistent with Rock's cursive, but not precisely.

[14] Salmon P. Chase to Charles Sumner, December 21, 1864, **Papers of Charles Sumner**, reel 30; *Roberts v. Boston*, 5 Cush. 198 (1849). See also Charles Fairman, **History of the Supreme Court of the United States, vol. 6: Reconstruction and Reunion, 1864–1888, Part One**, (New York, Macmillan, 1971), 59–60. This author is still pursuing empirical evidence of Morris taking Rock as an apprentice, but none has been unearthed to date. This presumption stems from the association that Rock had with Morris though their mutual abolitionist activities in Boston and a comment made by William C. Nell. See William Cooper Nell and Constance Porter Uzelnac, **Nineteenth-Century African American Abolitionist, Historian, Integrationist: Selected Writings 1832–1874** (Baltimore: Black Classic Press, 2002); James Oliver Horton and Lois E. Horton, **Black Bostonians** (New York: Holmes & Meier, 1999), 77–81.

[15] Charles Sumner, Salmon P. Chase to Charles Sumner, December 21, 1864, **Papers of Charles Sumner**, reel 30.

[16] Charles Sumner, "John Rock to Charles Sumner," December 24, 1864, **Papers of Charles Sumner**, reel 30.

[17] "Salmon P. Chase to Charles Sumner," January 6, 1865 in John Niven, ed., **The Salmon P. Chase Papers** (5 vols.; Kent, Ohio: Kent State University Press, 1993–1998), 11:519;

[18] "John Rock to Charles Sumner," January 9, 1865, **Papers of Charles Sumner**, reel 32.

[19] "Charles Sumner to Salmon P. Chase," January 15, 1865 in John Niven, ed., **The Salmon P. Chase Papers** (5 vols.; Kent, Ohio: Kent State University Press, 1993–1998), 11:519.

[20] Salmon P. Chase, January 15, 1865 in John Niven, ed., **The Salmon P. Chase Papers** (5 vols.; Kent, Ohio: Kent State University Press, 1993–1998), 11:519.

[21] As cited in Walter Stahr, **Salmon P. Chase: Lincoln's Vital Rival** (New York: Simon & Schuster, 2021), 518.

[22] Note: there were many changes to the number of justices, with Congress finally settling on nine with the 1869 Judiciary Act.

[23] Catron as Chief Judge of the Tennessee Supreme Court in *Loftin v. Espy*, 12 Tenn. 83 (1833).

[24] Charles Sumner, Salmon P. Chase to Charles Sumner, January 23, 1865, **Papers of Charles Sumner**, reel 32.

[25] Charles Sumner, "John Rock to Charles Sumner," January 26, 1865, **Papers of Charles Sumner**, reel 32.

[26] Charles Warren, **The Supreme Court in United States History**, vol. 3 (Boston: Little, Brown, and Co, 1935), 134.

[27] Cf. Clarence Contee, "The Supreme Court Bar's First Black Member," *The Supreme Court Historical Society 1976 Yearbook* (1976): 64.

[28] Charles Sumner, **The Works of Charles Sumner**, vol. IX (Boston: Lee and Shepard, 1873), 231. The missing text (marked above by ellipses): "Mr. Rock, who was waiting in Boston, appeared February 1st, and was at once presented by Mr. Sumner. The few formal words which passed on this occasion are not without interest. . . . At the same time, on motion of Mr. Sumner, Francis V. Balch, Esq., of Boston, his private secretary, was also admitted."

[29] "John S. Rock to Salmon Portland Chase, February 2, 1865," in **Papers of Salmon Portland Chase**, Reel 32, Series 1 (November 17, 1864–March 11, 1865).

[30] "Stadt Boston," *Der Pionier*, March 29, 1860; "Dr. Rock's Lecture," *The Liberator*, April 20, 1860.

[31] See James M. McPherson, **The Struggle for Equality: Abolitionists and the Negro in the Civil War and Reconstruction** (Princeton: Princeton University Press, 1992).

[32] Cf. *Jones v. United States*, 137 U.S. 202 (1890); "Everett J. Waring: Education, Law and Business Careers," https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/17452000.html. See also, John G. Browning, "A Forgotten First: Everett J. Waring, First Black Supreme Court Advocate, and the Case of Jones v. United States," *Journal of Supreme Court History*, 47 (2022), 265–283.

[33] Buzby, 63. As Buzby notes, the Record of Death indicates that Rock's immediate cause of death was "phthisis now defined as asthma." Buzby, 63; Massachusetts State Archives, Record of Death, vol. 194, p. 143, no. 60.

Justice Robert H. Jackson "Arrives" in Washington

G. Edward White

I Introduction

Between 1934 and 1941 Robert Houghwout Jackson had one of the most meteoric rises within the officialdom of the federal government. He went from being general counsel of the Bureau of Internal Revenue (1934) to temporary special counsel for the Securities and Exchange Commission (1935) to assistant attorney general in the Tax Division of the Department of Justice (1936) to assistant attorney general heading the Justice Department's Antitrust Division (1937) to solicitor general of the United States (1938) to attorney general of the United States (1940) to associate justice of the Supreme Court (1941). In that time interval he had become deeply involved in support of the Roosevelt administration's 1937 plan to change the membership of the Court, resulting in the eventual publication of a book, **The Struggle for Judicial Supremacy**, which emphasized the "outmoded" response of Court majorities to New Deal legislation and argued that in those cases the majority's view of constitutional interpretation was cramped and unresponsive to changing social and economic conditions.[1] In the process Jackson had become an intimate of Franklin D. Roosevelt, so much so that Roosevelt initially intended to appoint him chief justice after Charles Evans Hughes retired in 1941, only retreating from that position after he was convinced that appointing Associate Justice Harlan Fiske Stone, who had been named to the Court by Republican Calvin Coolidge in 1925, would be an effective bipartisan gesture as the United States drew closer to entering World War II.[2]

Before taking the job at the Bureau of Internal Revenue, Robert H. Jackson had been a lawyer in Jamestown, New York, a small city in the southwestern part of the state. He had engaged in general practice, developing a successful and lucrative career, and although he had spent a brief interval practicing law in

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Buffalo and had been modestly involved in state Democratic politics, he had shown little inclination to move beyond Jamestown since first entering practice there in 1913 at the age of 21. He had married Irene Gerhardt, a native of Kingston, New York, in 1916 and fathered two children. By the 1930s his income from practice was around $30,000 a year, over a million dollars in current value, and his family had been able to build an impressive home and keep a motor yacht on Chautauqua Lake near Jamestown. Jackson's practice ranged from criminal cases to regular representation of a local telephone company and local banks and manufacturers. In the midst of the Great Depression, he had carved out a successful and lucrative life as a small city lawyer. In an unpublished autobiography Jackson began in 1944, he said that "I had an excellent law practice," and "a private law practice was the best public office."[3]

Thus despite his longstanding connection to Franklin D. Roosevelt, whom he had first met in 1912, Jackson showed no inclination to leave Jamestown for government work or politics as Roosevelt became a national figure in the late 1920s and early 1930s, culminating in Roosevelt's becoming Governor of New York in 1928 and securing the Democratic presidential nomination in 1932. It was not Roosevelt, but Robert Morgenthau, the Secretary of the Treasury, and Herman Oliphant, General Counsel to the Treasury Department, who urged Jackson to take a position with the Bureau of Internal Revenue in 1934. Jackson initially only agreed to assume the position if he could serve on a part-time basis, commuting from Jamestown to Washington and retaining his law practice. But this arrangement soon proved unworkable, with the result, as Jackson recalled, that "in about six months I found it expedient to dissolve my law firm and aside from continuing old matters it was the end of private practice."[4] Eventually Jackson and his wife Irene moved into an apartment in the Wardman Park Hotel in Washington, along with their daughter Mary Margaret, their son William boarding at St. Albans' preparatory school in D.C.[5]

When Jackson arrived at the Bureau of Internal Revenue he found that a major challenge awaited him. The Roosevelt Justice Department had resolved to bring criminal charges against Andrew W. Mellon, former Secretary of the Treasury in three Republican administrations in the 1920s and most recently Ambassador to the Court of St. James's in London, for tax evasion. Mellon was one of the wealthiest individuals in the United States at the time, and the Roosevelt administration was seeking to use him as an illustration of its new attitude toward enforcement of the tax laws. Mellon, on the advice of his lawyers, had engaged in a number of transactions designed to reduce his income for tax purposes without actually divesting any of his assets. The Department of Justice under Roosevelt was attempting to convey the message that although Mellon's and potentially a large number of other wealthy individuals' transactions might technically be legal under the current tax laws, substantively they were efforts to commit fraud on the government by hiding taxable assets.

The Mellon trial marked a distinct transition in Jackson's professional life. When it began Jackson had only recently, and reluctantly, joined the Bureau of Internal Revenue and had had the prosecution of Mellon essentially dumped on his lap because Homer Cummings, the attorney general, wanted to make an example of Mellon.[6] By the time the Board of Tax Appeals handed down a decision in the Mellon trial, which took place in early December, 1937, Jackson had moved from the Treasury to the Justice Department, first in the Tax Division and subsequently in the Antitrust Division, and would, three months later, become

solicitor general of the United States. By then (March, 1938) Jackson had become closely involved with the Roosevelt administration's unsuccessful 1937 effort to expand the membership of the Supreme Court, and would be in the process of beginning a defense of that plan and a critique of a majority of the Court's attitude toward constitutional interpretation that had prompted it. That defense was ultimately published in January, 1941 in the form of **The Struggle for Judicial Supremacy**, and six months later Jackson was appointed as an associate justice on the Court, with a realistic expectation of eventually becoming its chief justice. Jackson had arrived in Washington. In an oral history he contributed to Columbia University in 1952 and 1953, he said: "I got into the Mellon case and one thing after another. It wasn't easy to let go." The first thing he knew, Jackson added, "I was giving all my time to the administration and letting things run themselves in Jamestown."[7]

II The Mellon Trial

Background

Andrew Mellon had first been appointed Secretary of the Treasury in 1921 by President Warren Harding. He continued to serve in that capacity under Presidents Coolidge and Hoover, eventually resigning in 1931. For the early years of his tenure his general support of free-market activity had been associated with the run of prosperity that lasted through most of the 1920s, and he had been generally regarded as the archetype of successful American capitalism.[8] But when the Wall Street "crash" of 1929 and the subsequent economic crisis occurred, Mellon's policies, which consisted of a refusal to subsidize banks under stress and an insistence that the remedy for economic difficulties was for enterprises to refrain from excess spending, were ineffective, helping make the Hoover administration distinctly unpopular.

President Calvin Coolidge signed a package of tax cuts in 1926 as Andrew Mellon (far left) watched approvingly. Ardently anti-tax, Mellon served as Secretary of the Treasury in three Republican administrations, from 1921–1932.

Although Mellon was driven from the Treasury in 1931, his appointment to the Court of St. James's kept him in the public eye, and he continued to represent, after Roosevelt's election in 1932, the financial order that had failed.

Without any notice to Mellon or his attorneys, Attorney General Cummings announced a criminal investigation of Mellon for tax fraud, culminating in an indictment by a grand jury in Pittsburgh, Mellon's hometown. That turned out to be a mistake. Proving criminal or civil fraud requires a showing of "scienter," meaning either intention to mislead or reckless indifference to whether one's actions have the effect of misleading, by clear and convincing evidence. The disclosure of Mellon's transactions with tax consequences revealed that he had simply followed the advice of his attorneys, suggesting that he believed he was legally entitled to take the steps he had authorized. When the Justice Department sought to indict Mellon, the grand jury refused to do so. Jackson later recalled a 1934 article in the *New York Herald Tribune* referring to the attempt to bring criminal charges against Mellon as a "low and inept political maneuver."[9]

With a criminal prosecution not ensuing, the Roosevelt administration sought to save face by bringing a civil action designed to establish that Mellon owed the government a large amount of unpaid taxes. The venue for such an action was the Board of Tax Appeals.[10] The responsibility for prosecuting the case eventually fell to Jackson.

Before the decision to prosecute Mellon for fraud had been made, Jackson had written a memorandum arguing that the government should not include a fraud charge in its suit before the Board of Tax Appeals. In his memorandum Jackson had emphasized that the burden to prove fraud would be on the government, whereas a simple assertion that Mellon owed a certain amount in unpaid taxes would shift the burden to Mellon to show otherwise. Jackson had also argued in his memorandum that if it were shown in the Board of Tax Appeals proceeding that Mellon owed a very large amount of taxes, that would be the equivalent of suggesting fraud. Finally, Jackson had maintained that Mellon's age (he was eighty at the time he was indicted) and his long record of public service would make him a sympathetic defendant.[11]

Jackson's arguments were ignored, largely because the Roosevelt administration was seeking to disabuse public perceptions that its singling out of Mellon was politically inspired. Instructed to argue a fraud claim as well as a negligence claim, Jackson then produced an outline of a brief on the fraud issue, and, when it was tentatively endorsed, proceeded to gather the evidence he felt necessary to establish fraud.[12]

The brief emphasized that Mellon had a longstanding relationship with the Pittsburgh Coal Company, on whose Board of Directors he had served for thirty years, and on which his brother, R.B. Mellon, had served since 1921. The Pittsburgh Coal Company was at the very heart of Mellon's business affairs. And yet Mellon had sold a considerable amount of the assets of the Pittsburgh Coal Company to the Union Trust Company on December 30, 1931, and on April 25, 1932, the Union Trust Company had transferred a large percentage of its stock in the Pittsburgh Coal Company to the Coalesced Corporation. Neither the Union Trust nor Coalesced was in the coal business, and both had connections to Mellon. Union Trust was one of Mellon's principal bankers, and the common stock of Coalesced was owned by Mellon's son and daughter. The "sale" to Union Trust, Jackson's outline suggested, was "not a sale giving rise to a deduction of a loss for income tax purposes," and Mellon's claiming of such a loss on his income tax return for the tax year 1931 was thus "fraudulent with intent to evade tax."[13]

The Trial Itself

When the Mellon case subsequently came to trial,[14] Jackson's opening statement elaborated on the points he had made in the brief. By then the Bureau of Internal Revenue had gone through the records of companies associated with Mellon, interviewed a number of witnesses involved with Mellon's tax transactions, and assembled exhibits. Hearings in the trial before a panel of the Board of Tax Appeals lasted from May 7 to June 7, 1935 and resumed briefly on February 11 and 12, 1936. The government took testimony from 47 witnesses and produced 847 exhibits.[15]

Mellon's tax return for 1931 had disclosed an income of $10,890,485.40, of which he claimed only $1,927,116.40 was taxable because he had suffered losses of $7,277,851.30. The losses allegedly came from sales of securities, but Mellon's return did not disclose the securities involved. The Treasury Department, after an investigation, disallowed $6,528,263.75 of the claimed losses and determined that Mellon had earned an additional $5,000,000.00 of unreported income. It thus concluded that Mellon's true taxable income for 1931 was $13,529,853.74, and that he owed an additional $2,059,507.49 in taxes. To that figure the government added an additional 50% penalty, the amount "fixed by law for fraud to evade tax." Mellon appealed to the Board of Tax Appeals, asking that the losses he had claimed be allowed and that he be permitted "to escape the additions to his income which the [government] has found." He asked the Board to find that the government's determination was "wrong" and that the Board "redetermine his correct tax liability."[16]

Jackson's fraud case against Mellon emphasized two matters. One was a series of "sham" stock transactions between companies that Mellon controlled and the Union

Mellon testified at a hearing about his taxes in Pittsburgh on April 1, 1935, two years before his death.

Trust Company, of which Andrew Mellon was the largest single stockholder and his brother R.B. Mellon the vice-president. The transactions involved those between the Pittsburgh Coal Company, the Union Trust Company, and the Coalesced Corporation, previously described, as well as one involving the Western Public Service Corporation and the Union Trust Company in which shares in Western owned by Andrew and R.B. Mellon were sold to Union Trust on December 2, 1931 and returned by Union Trust to the Mellons on January 8, 1932. Mellon claimed a loss from the December 2 sales on his 1931 income tax return, but the shares were returned to him and his brother at the purchase price a month later. "It is perfectly apparent," Jackson said of the Western Public Service Corporation transaction, that it "served no purpose whatever except a tax sale purpose" and "was never intended to be a final and binding sale of property."[17]

In asking for the fraud penalty on the basis of those transactions, Jackson maintained that "[t]his is not the case of a taxpayer who lays all the facts before the government and asserts his claim." It was rather a "case of an elaborate structure of records and formalities which served no earthly purpose, except to deceive." The transactions were not the result of "a blunder . . . done in ignorance." They were "all carefully planned and skillfully executed" by someone "experienced in tax theory and practice." "If the fraud penalty is not applicable to this case," Jackson suggested, "then the fraud penalties of the Statute should be repealed, with apologies to all who have been penalized in the past." "We are confident," he concluded, that the Board would not "shelter from penalty a taxpayer whose transgressions were so inexcusable."[18]

Although Mellon's transactions involving the United Trust Company may have been the strongest part of the government's fraud case, they were not the ones that elicited the largest amount of public attention. Those involved the deductions Mellon claimed for donating paintings to the A.W. Mellon Educational and Charitable Trust, which he had initially created in December,1930. In 1933 Mellon had obtained a ruling from the Bureau of Internal Revenue that the Mellon Trust was exempt from taxation, which meant that donations to it could be deducted from the donor's taxable income. The Bureau rescinded that ruling in 1935, but its action had no effect on the 1931 tax year, in which Mellon had taken a deduction of $3,247,695 for gifts he made to the Trust.

Mellon had begun buying paintings in earnest in 1921, when he made the acquaintance of Joseph Duveen, an art dealer based in London. Through Duveen Mellon learned that the Soviet Union, facing an economic downturn after the stock market crash of 1929 and interested in acquiring revenue to launch another "Five Year Plan" of economic reform the next year, was eager to sell some of the paintings in the Hermitage Museum in St. Petersburg, which housed a collection of European masterpieces acquired by the Romanov dynasty. Instead of using Duveen as an intermediary, Mellon, who was Secretary of the Treasury at the time, dealt directly with the Soviets, buying twenty-three paintings for $8 million (in 1930 dollars). The great value of the paintings may have been the impetus for the creation of the Mellon Trust.[19]

With the Trust in place and a large art collection assembled, Mellon began donating paintings on a yearly basis to the Trust, taking their value as deductions. But many of the paintings remained in Mellon's home in Pittsburgh, his apartment in Washington, and his daughter's apartment in New York, with some being stored in Mellon's storage room in Corcoran Gallery in Washington. By the time of the trial Mellon had donated approximately $40 million worth of art to the Trust. Since there was no evidence that the paintings were being used for educational or charitable purposes, Mellon's donations, together

with his deductions, provided an ideal target for Jackson.

It was apparent, as the Mellon trial opened, that Mellon's lawyers understood their client's vulnerability with respect to his donations of paintings to the Trust. In his opening statement Frank Hogan, Mellon's lead counsel, announced that Mellon intended to give his art collection to the federal government so that a national art gallery could be created in Washington. That had been Mellon's purpose in purchasing paintings all along, Hogan asserted: the goal of the Mellon Trust was to ensure that Mellon would eventually give his art to the American public.[20] There may have been a kernel of truth in Hogan's claim. In 1927 the *Washington Post* had reported a rumor that a national art gallery was going to be built on the Mall in Washington, financed by an anonymous donor, and a subsequent biography of an art consultant, who worked with Mellon, has suggested that Mellon mentioned his possible plans for a gallery in 1927 and referred to it in two diary entries in 1928.[21]

But if Mellon's intention in creating the Mellon Educational and Charitable Trust had been to stockpile paintings for a national gallery of art, he had not taken any steps toward the launching of that gallery in the five years between his creation of the Trust and the opening of his trial. And on cross-examination of Mellon in the latter stages of the trial, Jackson was able to cast considerable doubt on the claim that the creation of a national gallery had always been Mellon's eventual aim in establishing the Trust. The following exchange took place between Jackson and Mellon:

> [Jackson] "Mr. Mellon, from photostat copies of the newspapers of November 13th of 1934, it appears that you issued a statement on that day, saying 'The report that I have arranged to build an art gallery in Washington is entirely unfounded. I have engaged no architects, have caused no plans to be drawn, and have made no commitment to build or endow a gallery at Washington, Pittsburgh, or elsewhere.' You made such a statement, did you not, on that date?"
>
> [Mellon] "I was in London at that time . . . and I was waylaid by a reporter, and I think what I told him was substantially true. . . . I do not . . . recall ['commitment'] being a part of the conversation. But I had not, and have not yet, engaged an architect or—I have forgotten what the other questions were."
>
> [Jackson] "Have caused no plans to be drawn."
>
> [Mellon] "That is true."
>
> [Jackson] "And have made no commitment to build or endow a gallery in Washington, Pittsburgh, or elsewhere."
>
> [Mellon] "That is substantially true."[22]

The value of the Mellon paintings, and Hogan's declaration that Mellon was planning to endow a national gallery of art in Washington, nonetheless served to overshadow the government's argument that the real purpose of the Mellon Educational and Charitable Trust was to reduce Andrew Mellon's tax liability. Jackson and Hogan jokingly referred to the paintings Mellon claimed to have given to the Mellon Trust as "madonnas," Jackson noting in his autobiography that "it seemed that every time we had a good point, Frank Hogan would present another madonna to the public."[23]

Mellon may also have been advantaged by Jackson's conscious decision to let him testify fully about his activities without

interruption. Jackson had been convinced of two things during the Mellon trial. First was that Mellon "did not intend to cheat the government": he simply "did not want to pay a dollar that the law did not require him to pay." The other was that a detailed rehearsal of Mellon's activities with the tax laws in mind "would afford one of the few complete pictures of the operation of men of Mr. Mellon's financial position during [the] lush periods [of the 1920s.]" "Someday the record of [the Mellon] case will be examined for its sociological implications," Jackson wrote in 1944.[24]

Jackson never believed that the government's fraud action would succeed, and it did not, the Board of Tax Appeals opinion dismissing the fraud claim and limiting Mellon's tax liability to around $800,000, substantially less than the government had asked for but still a quite significant sum in 1936.[25]

Mellon's lawyers might well have concluded, after the Board's opinions came down in December, 1937, that they had fared rather well. The fraud charges against Mellon had been categorically rejected, and the validity of his sales of stock upheld. His divestment of the ownership of stocks in connection with his becoming Secretary of the Treasury in 1921 had been ratified, with the Board majority's concluding that he did not own those stocks during the 1931 tax year. And Mellon's estate—he had died in August, 1937, four months before the Board rendered its opinions—had prevailed on the "contributions issue," meaning that Mellon was allowed to take deductions for the value of paintings he donated to the Mellon Trust for all the years beginning in 1931. It was likely, in fact, that as the National Gallery took shape Mellon's estate would be able to acquire additional valuable paintings and receive more deductions.

Mellon had not emerged unscathed, however. He had lost on the issue of whether he could deduct losses from the sale of Western Service Public Service Corporation stock, since he had been unable to prove that he had not entered into an agreement to buy back that stock within 30 days of selling it.[26] He had also lost on the quite technical issue of whether the transaction between the McClintic-Marshall Corporation and the Bethlehem Steel Corporation was a "statutory reorganization," meaning that shares of stock in Bethlehem he received from McClintic-Marshall need not be included in a computation of his taxable income for 1931.[27]

Mellon very likely prevailed on the central issues raised in his trial because he had died before the Board of Tax Appeals rendered its decision and because in his testimony he had conceded having engaged in a number of transactions whose purpose was obviously to avoid income taxes. As it was, he only prevailed because two members concurred in most of the majority opinion's holdings.[28] And in bringing forth abundant evidence about Mellon's activities, including giving Mellon ample latitude to testify freely about them, Jackson had played a long as well as a short game. By taking a hands-off posture toward Mellon as a witness Jackson had not provided any ammunition for the theory that the Mellon trial was a vindictive, partisan persecution of an elderly Republican appointee. At the same time he had allowed Mellon to demonstrate, in his own detailed testimony, the opportunities of very wealthy Americans to manipulate the tax laws, even where they were not intentionally misrepresenting their wealth on income tax returns. The principal dissenting opinion in the case made it plain that the Mellon case was not one in which a taxpayer sought to shape his income tax return to reflect the state of his business in a tax year, but rather one in which a taxpayer was, late in that tax year, attempting to reshape his business affairs to match the appearance of a desirable income tax return he wished to file.[29] Only the very wealthy, the dissent implied, had the ability

to control their business transactions in that fashion. After Mellon's death the Board of Tax Appeals, perhaps sensitive to his demise, issued a memorandum exonerating Mellon of all fraud charges.[30] In 1941 the Mellon Art Gallery, later named the National Gallery of Art, opened in Washington.[31]

III Jackson Arrives

Jackson Moves Up in the Roosevelt Administration

Roosevelt was extremely pleased with the results of the Mellon trial. Not only had the government saved face by showing that Mellon would be required to pay a substantial sum in back taxes, a national art gallery, housing some of the most valuable paintings in the world, would be built in Washington. The creation of that gallery in the midst of an economic depression could serve as a symbol that America was weathering that development, and when Mellon offered to finance the building of the gallery on behalf of the federal government, Roosevelt gladly accepted, wryly characterizing the gallery to Jackson as housing "your" art collection.[32] Jackson had recommended that the Roosevelt administration not accept Mellon's offer because Mellon had provided incorrect information on his 1931 tax return, but there was no chance Roosevelt was going to follow that advice.[33]

After the Mellon trial Jackson found himself tapped by the Roosevelt administration

Jackson wrote *The Struggle for Judicial Supremacy* "in odd intervals between arguments in Court as Solicitor General," a position he held between March, 1938 and January, 1940. Above he was sworn in by Ugo Carusi (right), executive assistant to the attorney general, while his predecessor as solicitor general, Stanley F. Reed (left), looked on.

for a series of positions between late 1935 and 1937. He was first given leave from the Bureau of Internal Revenue to make a trip to Europe in September and October of 1935 to investigate the affairs of the International Match Company and its chairman, Swedish engineer Ivar Kreuger, who had committed suicide in Paris in 1932, with his company declaring bankruptcy in federal district court in New York a month later. The International Match Company was the nexus of a group of interlocking companies that, among other ventures, sold government bonds and securities in Europe and the United States. It had falsified information about its securities since 1917, and when it filed for bankruptcy over sixty thousand American citizens had invested more than $145,000,000 in its securities.[34] Among the creditors making claims against the company and Kruger's estate was the federal government, which sought $193,599.[35]

Jackson was dispatched to Sweden, along with several officials of the Bureau of Internal Revenue and the Justice Department, to investigate Kruger's financial transactions in Europe. He sailed on September 25, 1935, returning on November 7.[36] A summary of the investigations Jackson, and the others attempted to make on the trip reveals that the investigations were generally frustrating. Kruger was dead; his closest associates were uncooperative when interviewed; the activities of Kruger and the International Match Company were diverse and extended to numerous European countries in addition to the United States, making gathering information and establishing financial connections difficult; and the U.S. government was unwilling to expend the very considerable sums necessary to undertake a more thorough investigation.[37]

After returning from Europe in November, 1935, Jackson was temporarily transferred from the Bureau of Internal Revenue to the Securities and Exchange Commission so that he could assist in defending constitutional challenges to the Public Utility Holding Company Act of 1935.[38] That legislation required holding companies associated with public utilities, mainly electrical and gas companies, to register with the SEC in order to permit oversight of their operations. Utility holding companies had been created in the 1920s and early 1930s to permit consolidation of the electrical and gas industries, driving up prices and making state regulation difficult.[39] The Act sought to attack that problem by compelling holding companies to register and be approved by the SEC, which limited each holding company to a single integrated electrical or gas system.

After the Act was passed in August, numerous electrical companies sought to challenge its constitutionality. By December, 1935, 45 challenges on behalf of more than 100 companies had been filed in federal district courts. The SEC, together with the Justice Department, made a motion before the Supreme Court to stay all those challenges and consolidate a proceeding in which the Electric Bond and Share Company would represent other holding companies in challenging the SEC registration process. After that motion was granted, Jackson argued the case for the SEC in federal district court in New York City. The SEC registration process was upheld, and that decision was affirmed by the Court of Appeals for the Second Circuit. The Supreme Court granted certiorari and sustained the SEC in a 6-1 opinion, with Chief Justice Charles Evans Hughes writing for the majority, Justice James C. McReynolds dissenting without an opinion, and Justices Benjamin Cardozo and Stanley F. Reed not participating.[40] Jackson, along with Benjamin Cohen, who had been a principal draftsman of the Public Utility Holding Company Act, argued the case before the Court.

While he was working with the SEC in early 1936, Jackson was offered the position of assistant attorney general for the Tax Division of the Justice Department.[41] The offer gave him the opportunity to engage in

more litigation, and he accepted, becoming confirmed in February 1936 and remaining in that office until January, 1937. Among the cases he argued was *Helvering v. Davis*,[42] challenging the old-age insurance program included in the Social Security Act of 1935, and *Steward Machine Co. v. Davis*,[43] challenging the Act's unemployment compensation program, the latter to be administered by the states. Both programs were financed by payroll taxes on employers with more than eight employees. If a state had an unemployment fund to which an employer had contributed, the employer could deduct up to 90% of the contributions he was required to make under the Social Security Act. The purposes of the Act were thus to establish old age and unemployment compensation systems and to encourage the states to establish their own unemployment compensation schemes. Both provisions were challenged on several grounds, most prominently as undue invasions on the reserved powers of the states and not authorized by the General Welfare Clause of Article 1, Section 8.[44] In an 8-1 decision, the Court upheld the old-age insurance program, and in a 5-4 decision it sustained the Act's unemployment compensation provisions.

In early January, 1937, John Dickinson resigned his position as assistant attorney general in charge of the Antitrust Division, the most senior of the assistant attorney generalships in the Justice Department. Although Jackson had had only a little experience with antitrust issues in his private practice, and the Antitrust Division had been largely inactive during Roosevelt's first term, he accepted the position.[45] A month later Roosevelt announced that he was planning to introduce legislation to change the composition of the Court. His "Court-packing plan" would give the president the power to appoint a new judge on all the federal courts, including the Supreme Court, if a sitting judge on a court resolved to remain in office after reaching the age of seventy. With respect to the Supreme Court, the plan provided that the president could appoint additional justices, up to a total of fifteen for the Court as a whole.

The Court-Packing Plan

The Court-packing plan had been created under conditions of extreme secrecy. It had been formulated by Attorney General Homer Cummings and one of his assistants, Carl McFarland, who subsequently revealed that a similar recommendation had been made by James C. McReynolds, then attorney general under President Woodrow Wilson, in 1913.[46] Although it was reported that Jackson only learned of the introduction of the plan by reading of it in the newspapers, and Jackson subsequently agreed with that report,[47] evidence in the Jackson Papers indicates that at a conference at the White House attended by Jackson on January 10, 1935, "[w]e discussed the possibility of enlarging the Court."[48]

Jackson would emerge as one of the principal supporters of the plan. In a speech to the New York Bar Association on January 29, 1937, made a week before the plan was announced, he was highly critical of the Court's invalidation of New Deal legislation.[49] Roosevelt promptly named him to a group of advisors dedicated to marshalling the plan through Congress, even though Jackson subsequently told Roosevelt that the plan's emphasis on the age of justices and the Court's purported inability to keep up with its docket was ill-advised, and that the president should "make a straight attack on the doctrine of the Court as embodied in some of its most objectionable decisions."[50] The plan's emphasis had gotten it "off on the wrong foot;" it needed "to be put in different terms or you're going to lose the country." Roosevelt subsequently decided to give a "fireside chat" on radio whose emphasis was substantive criticism of the Court's decisions on March 9, 1937,

and Jackson "was among those who supplied suggestions for that speech," in which Roosevelt described the Court's attitude toward interstate commerce as reflecting attitudes from a "horse and buggy era."[51]

Hearings were opened on the plan before the Senate Judiciary Committee on March 10, 1937,[52] and Jackson was one of the first witnesses called. He emphasized the extent to which the Constitution anticipated that Congress would have significant oversight of the Supreme Court, including the power to regulate the Court's jurisdiction, to confirm justices, to set the compensation of justices, to impeach them, and to change the number of sitting justices. He identified six times since the Court's creation in 1780 in which Congress had changed the Court's size.[53] He emphasized the significant increase in the number of congressional statutes held unconstitutional by the Court in the decade of the 1920s.[54] He pointed out the number of recent cases in which federal and state statutes seeking to implement New Deal policies had been challenged, and the number of those cases—eight out of sixteen—that had resulted in 5-4 splits among the justices.[55] His case for the plan rested on a combination of concern that current Court majorities were insisting on "rigid, permanent, and legalistic" definitions of constitutional terms such as "general welfare" and "commerce among the several states" and the undoubted authority of Congress to change the number of justices sitting on the Court. A "hostile press," Jackson, recalled, "conceded that [his testimony] was the strongest presentation of the President's case."[56]

Roosevelt had underestimated the extent to which an effort to change the size of the Court would invoke opposition. The American Bar Association mounted a campaign against it and polls showed that a majority of Americans did not support it.[57] But when Justice Willis Van Devanter informed Roosevelt on May 18, 1937 that he would retire after the close of the Court's current Term, and the Court sustained New Deal-inspired legislation in three decisions in March and April of that year, Roosevelt, with the plan still stalled in the Senate Judiciary Committee, declined to withdraw it and claim a victory in the Court for his policies. Jackson had urged that tactic, but Roosevelt insisted on pursuing a compromise proposal which would allow him to name only two additional justices.[58] In the late spring of 1937 he still believed that the plan would get through Congress. It did not: the Senate Judiciary Committee voted 10 to 8 against reporting out the Court-packing bill on June 14, 1937, and on July 22 the bill was returned to the Judiciary Committee with the stipulation that it would not be introduced in that session of Congress, and the Senate voted 70 to 20 to scuttle the plan.[59]

Undaunted, Roosevelt sought to emphasize that although he may have lost the battle to change the Court's size, he was winning the war over the course of his second presidential term, as additional justices who had opposed New Deal legislation retired and Roosevelt was able to name their successors. Between 1937 and 1940 Sutherland and Butler followed Van Devanter into retirement, Cardozo died, and Brandeis retired. By 1941, after Roosevelt had been elected to an unprecedented third term, McReynolds and Hughes had also retired. That gave Roosevelt seven appointments, and when James F. Byrnes, whom Roosevelt had nominated to replace McReynolds, left the Court to head up the Office of Economic Stabilization in October 1942, Roosevelt was given an eighth, naming Wiley Rutledge in January, 1943. The presence of seven justices nominated by Roosevelt, plus Harlan Fiske Stone, who by the early 1930s was consistently supporting New Deal legislation, eventually served to move the Court's posture toward one much more receptive to the policy goals of the Roosevelt administration. After the Court-packing

plan was defeated, Roosevelt hoped to show that nonetheless the Court had turned in his direction.

The Struggle for Judicial Supremacy

A vehicle for that showing was Jackson's book, **The Struggle for Judicial Supremacy**, which he wrote between 1937 and 1940. In his preface to the book Jackson stated that he had written it "in odd intervals between arguments in Court as Solicitor General," a position he held between March, 1938 and January, 1940, and revised it "as opportunity was found," the manuscript being completed in September, 1940 and published in January, 1941.[60] That June Jackson was nominated for an associate justiceship on the Supreme Court, and in July he was confirmed.

The relationship between the Roosevelt administration's Court-packing plan and the change in posture of Court majorities toward federal and state social and economic legislation challenged on constitutional grounds has been the subject of a voluminous and contested literature.[61] The principal issue in debates spawned by that literature has been whether the introduction of the plan had any causal connection to a majority of the Court's apparent alteration of its attitude toward state and federal legislation seeking to regulate economic activity or redistribute economic benefits in the 1936 Term. Three cases are singled out as illustrations of the "shift": *West Coast Hotel v. Parrish*,[62] sustaining a Washington state statute requiring minimum wages for female workers in the hotel industry, and *Steward Machine Co. v. Davis*[63] and *Helvering v. Davis*,[64] upholding federal unemployment compensation and old-age benefits. The first case abandoned the doctrine of "liberty of contract" and overruled an earlier case invalidating comparable minimum wage legislation; the latter two held that the "general welfare" clause of the Constitution need not be limited to the federal powers enumerated in that document. Taken together, the cases signaled that a new Court majority would be receptive to efforts on the part of the federal government and states to enact legislation designed to alleviate economic hardships or improve the condition of wage workers.

There has been general agreement among participants in the debates that the Court's stance shifted in the 1936 Term; the question has been why, and the participants have surveyed a variety of primary sources in search of evidence of the justices' motivation. Among those sources Jackson's **The Struggle for Judicial Supremacy** has rarely been investigated. And yet the book can be seen as an archetypal example of literature maintaining that the alteration in the Court's posture was in response to the Court-packing plan. As Jackson put it in his preface,

> The [Court-packing plan] was the political manifestation of a long-smoldering intellectual revolt against the philosophy of many of the Supreme Court's decisions on constitutional questions. This protest was led by outspoken and respected members of the Court itself. . . .
>
> The plan did not capitalize more than a fraction of the force of the revolt. It is not likely that any plan of reform would have united the protesting forces. But only as we separate the insurrection against the Court's doctrine from the court reform movement can we account for their separate fates—a failure of the reform forces and a victory of the reform.
>
> This paradoxical outcome is accounted for by the recognition on the part of some Justices—belated but vigorous—of the validity of the complaints against their course of decision. They united with long-protesting Justices and proceeded

> to weaken the President's political assault by acknowledging and correcting his grievances. They confessed legal error and saved themselves from political humiliation. They subdued the rebellion against their constitutional dogma by joining it.[65]

Here, in a nutshell, was the view of the impact of the Court-packing plan on the Court that Jackson had advanced to Roosevelt in the spring and early summer of 1937 and Roosevelt, in part because of his commitment to Senator Joe Robinson of Arkansas that he would appoint him to the Court if it could be enlarged, had rejected.[66] Jackson's view would have had the Roosevelt administration withdraw the Court-packing proposal and declare victory. That was what had actually happened, Jackson argued in **The Struggle for Judicial Supremacy**, even though the proposal was defeated rather than withdrawn.

"I tried in my book, **The Struggle for Judicial Supremacy**," Jackson wrote in his autobiography, "to outline the legal difficulties that the administration faced from decisions of the court and their consequences." The book "had been written," he added, "with the approval and at the suggestion of President Roosevelt . . . We felt that a record should be assembled of our struggle with the actual cases . . . Of course [the book] was written from an administration point of view."[67] The thesis of the book was that the Court "switched" its posture to preserve its institutional identity, a version of the "switch in time saved nine" catchphrase. But instead of changing its approach because otherwise it was likely to be "packed," and pressure would be placed on justices to retire at 70, Jackson argued, the Court changed because it began to listen to the increasing swell of voices suggesting that its attitude toward constitutional interpretation was outmoded and destructive.

In a chapter entitled "The Court Retreats to the Constitution," Jackson sought to show how the Court's apparent "switch" in its posture toward social and economic legislation challenged on constitutional grounds was a recognition by a majority of the justices of the jurisprudential awkwardness of maintaining an approach to interpreting the Constitution which threatened to scuttle not only much New Deal legislation but comparable social welfare programs in the states. He began by claiming that the Washington state statute challenged in *West Coast Hotel v. Parrish* was "substantially identical" to a New York minimum wage statute that had been invalidated by the Court in its previous Term, with no changes in the composition of the justices. "If precedents governed," Jackson claimed, the Washington statute was "certain to be set aside." But "forces more potent than precedents were at work."[68]

Those in the Supreme Court's Courtroom on March 29, 1937, Jackson said, witnessed "the spectacle of the Court . . . frankly and completely reversing itself and striking down its opinion but a few months old."[69] He then reviewed Hughes' opinion for the Court majority in *Parrish*: its attack on the doctrine of "liberty of contract" ("the Constitution does not speak of freedom of contract"[70]); its redefinition of "liberty" in the Due Process Clauses as "liberty in a social organization which requires to the protection of law against the evils which menace the health, safety, morals and welfare of the people"[71]; its recognition that "liberty of contract" barriers to minimum wage legislation could amount to "a subsidy for unconscionable employers"[72]; and its distinguishing the New York case on the ground that the lawyers representing New York state had not asked the Court to overrule an earlier decision, *Adkins v. Children's Hospital*,[73] invalidating a District of Columbia minimum wage statute on "liberty of contract" grounds.[74] In *Parrish*, however, the Court majority's decision was squarely in conflict with *Adkins*, and so that case was overruled.[75]

Then Jackson advanced an interpretation of the political repercussions of the Court's changing its approach to minimum wage legislation that was highly implausible. He first claimed that although "liberals" "had to like the decision, because it was what they had long contended the law to be" and "[i]t stimulated the movement in both state and nation . . . to prescribe minimum wages and maximum hours," they would have "a good deal to say about judicial strangling for fifteen years of such legislation . . . by what was now conceded to be a blunder of the Court," and they expressed concern that "we now had in substance a one-man Supreme Court, before which laws were constitutional or unconstitutional, as Mr. Justice Roberts voted."[76] There was, in the fallout from the *Parrish* decision, some literature suggesting that the Court was now controlled by Roberts' whimsy,[77] but much of the "liberal" commentary suggesting that the Court's posture toward social welfare legislation was outmoded and wrong-headed had appeared before the 1936 Term.

Even more dubious was Jackson's conclusion that the Court's "conservatives liked the decision," because "[t]hey knew the former one took ground too reactionary to be held."[78] According to Jackson, "[t]he timing of the yielding was a boon" to conservatives on the Court, because "[i]t removed a great deal of pressure for reform of the Court," enabling its conservatives to "make much of the argument that the Court did not need reforming, but could and would reform itself."[79]

There would seem to be some obvious difficulties with Jackson's reasoning. If the Court's "conservatives," by which Jackson meant Van Devanter, McReynolds, Sutherland, and Butler, "knew" that the *Adkins* decision "took ground too reactionary to be held," it was odd that in dissenting in *Parrish*, they vigorously reaffirmed *Adkins* and the "liberty of contract" doctrine.[80] And if *Parrish* was a response to "pressure for reform of the Court," none of Jackson's "conservatives" responded to that pressure. The only justice who could have been said to have responded was Roberts, since none of the other justices who joined Hughes' opinion in *Parrish* had voted to invalidate the New York minimum wage law.

Undaunted, Jackson identified other "liberal" decisions in the Court's 1936 Term: the upholding of the National Labor Relations Act, establishing the right of labor unions to organize;[81] validating a Wisconsin statute declaring picketing in labor settings legal and prohibiting injunctive interference with it;[82] and two decisions finding the unemployment and old-age benefit provisions of the 1935 Social Security Act constitutional.[83] Van Devanter, McReynolds, Sutherland, and Butler dissented in all of those cases save the last, which elicited only two dissents, from McReynolds and Butler.[84] Jackson then asserted that "[t]he Court by its avalanche of liberal decisions had greatly reduced the pressure originally back of the revolt against judicial supremacy as practiced in [the 1935 Term]." He added that as a result of the Court's decisions in 1936–37, "many in the Administration felt that there was no longer urgency about a reconstruction of the federal judiciary and that the President's plan might prudently be withdrawn." He of course had been among the "many," and he noted that "[o]ther counsels prevailed, and the plan was not withdrawn."[85]

Jackson concluded his analysis by claiming that "the Court, with no change of its Justices, had ridden out of the storm and when it closed the books for the [1936] term it had rewritten the law of the Constitution." He suggested that "many of the old precedents which so restricted the Constitution were overruled by the identical Court which had previously invoked them," although the only line of cases that seemed to merit that suggestion were the "liberty of contract" decisions. He nonetheless repeated that "the Court, with no change of its Justices, had . . . convinced

the Court of Public Opinion that the sentence of reorganization proposed by the court bill might safely be suspended, at least during a period of probation."[86]

The problem with Jackson's thesis was that he could point to only one or two cases (two if Van Devanter's and Sutherland's not dissenting when the Court upheld the old-age benefit provisions of the Social Security Act are counted) where justices that had previously found that social welfare legislation of one form or another offended against the Constitution now embraced it. Only in *Parrish* did there seem clear reconsideration of constitutional opposition; that reconsideration involved only one justice; and Hughes' opinion in *Parrish* gave a technical explanation for the Court majority's conclusion in the New York minimum wage case that it did not need to revisit the *Adkins* precedent. So if the Court's "retreat to the Constitution" in its 1936 Term was predicated on some recognition on the part of its justices that the existing constitutional jurisprudence which served to block much New Deal legislation was "too reactionary to be held," that recognition seemed extremely limited.

But Jackson also recognized that Van Devanter's retirement in 1937 had ushered in additional retirements and deaths, so that in the next two years Roosevelt had four appointments to the Court, and would have four more by 1941, although McReynolds and Hughes had not yet retired when Jackson had published **The Struggle for Judicial Supremacy**. Jackson asserted that "[t]here was no change in [the Court's] personnel until after it had provided new precedents that were an adequate basis for much that the newer judges were later to decide,"[87] but it is hard to see how many of those "new precedents" had been a result of "conservative" justices recognizing that their existing jurisprudence was too reactionary to hold onto. After the 1936 Term Roosevelt, who had made no appointments to the Court during his first Term and thus witnessed the first round of New Deal legislation being considered by some justices whose tenures on the Court stretched back to the Taft administration, was in a far different position: he could choose appointees whom he fully expected would be in sympathy with his administrations' goals.

Of Roosevelt's eight appointments between 1937 and 1941, six—Stanley F. Reed, William O. Douglas, Felix Frankfurter, Frank Murphy, James Byrnes, and Jackson himself—had either been officials in his administrations or close friends and advisors. Only Hugo L. Black, whom Roosevelt had selected because of his conspicuously liberal views and because he was a member of the Senate when nominated, and Harlan Fiske Stone, a bipartisan appointee during wartime, did not fall into that category, and their general sympathy toward New Deal legislation was apparent when they were appointed.

So Jackson's claim that the Court retreated to the Constitution during its 1936 Term does not hold up; the better interpretation would seem to be that the changes in the Court's constitutional jurisprudence which took place between the late 1930s and 1950 were largely a product of new justices joining the Court who largely shared Roosevelt's policy goals. Nonetheless Jackson insisted, in **The Struggle for Judicial Supremacy**, that there had been a connection between the introduction of the Court-packing plan and the Court's "retreat to the Constitution." For Jackson the retreat was a jurisprudential one rather than an effort at institutional self-preservation: conservatives on the Court had recognized the outmoded character of their approach to constitutional interpretation. His analysis presupposed a causal relationship between the plan and a change in the Court's interpretive posture.

The relationship Jackson posited seems hard to discern on closer analysis, but the idea that the plan exerted some "pressure" on the Court, and that pressure was responded to,

would be one of the linchpins in a narrative suggesting that once the plan was introduced, some justices "switched" their posture. Although Jackson had argued numerous cases before the justices, that allegedly recognized that their approach to constitutional interpretation had become outmoded, and his familiarity with them might be accorded some weight, his claim was entirely speculative. No additional evidence has turned up, over the years, to document a causal relationship between the Court-packing plan and an inclination on the part of post-1937 Court majorities to defer to rather than to invalidate federal and state social welfare legislation. Still, many historians have found that purported relationship too enticing to resist. So **The Struggle for Judicial Supremacy** should be included in literature endorsing the "switch in time" hypothesis.

Toward the Supreme Court

In November, 1937, while he was serving as assistant attorney general in the Antitrust Division, Jackson met with Roosevelt and announced that he planned to return to private practice in Jamestown.[88] Roosevelt responded that Jackson should not resign, and that he had a plan to support Jackson for Governor of New York in 1938, believing that the incumbent governor, Herbert Lehman, would not run for reelection. Roosevelt added that if Jackson were elected governor, he would be in a good position to run for the presidency in 1940. Roosevelt acknowledged that he was eligible to run for a third term but indicated that he wanted to retire.[89]

Jackson initially signaled that he was interested in considering running for the governorship, and a campaign was launched by Roosevelt supporters. But conditions were not particularly favorable for Jackson. He lacked a base of political support in the state and was not generally well known; Roosevelt had not courted any of the political organizations in the state after becoming president; and eventually Lehman, whose popularity as governor had been high, resolved to run for an additional term. Jackson's candidacy thus never got off the ground.[90]

But Roosevelt wanted to retain Jackson in his administration, and a vacancy on the Court gave him an opportunity to do so. In 1938 Justice George Sutherland indicated that he would be retiring at the end of the Court's Term, and Roosevelt, in January of that year, decided to appoint Stanley Reed, currently solicitor general, to Sutherland's spot. That created a vacancy in the solicitor generalship, and Roosevelt offered the position to Jackson. Jackson was far more enthusiastic about becoming solicitor general than in running for the governorship of New York: he later described the solicitor generalship as "pure advocacy," a role he welcomed.[91]

Jackson thrived in that role. Of the forty-four cases he argued before the Supreme Court in the approximately two years in which he served as solicitor general, Jackson won thirty-eight of them.[92] On one occasion Justice Brandeis told Felix Frankfurter that "Jackson should be solicitor general for life."[93] Part of Jackson's success can be attributed to the changes in the composition of the Court after 1937. Of the new justices appointed between that year and early 1940, when Jackson moved from the solicitor general's office to the attorney generalship, all of them—Black, Reed, Frankfurter, and Douglas—were far more inclined to defer to federal social welfare legislation than some of the justices they replaced, notably Van Devanter and Sutherland. The new appointments joined with Hughes and Stone to create a solid majority inclined to endorse New Deal programs.

Nonetheless the solicitor generalship, of all the official positions that Jackson held in his career, best suited his professional skills and temperament. Although Jackson regularly identified himself as a "liberal" in his pre-Court

career, he was not a committed ideological partisan in the same manner as many who served with him in the Roosevelt administrations, but he was a team player. Although he thought the Court-packing plan's emphasis on the age of justices misguided, he immediately defended the plan—not its rationale—in speeches after it was announced. Although he thought prosecuting Mellon for fraud had little chance of succeeding, he spent time and effort developing arguments for why fraud had been committed. For Jackson advocacy was a professional rather than a political pursuit. And he was extremely good at it: his work as solicitor general combined sophistication with a sense of which arguments went to the core of a legal dispute.

Although Jackson would later say that "[t]he only office I ever really coveted was that of Solicitor General of the United States" because "the work was not political, but was professional," and that "[t]he Solicitor Generalship proved the happiest and most satisfying of my public offices in the Executive Department,"[94] his time in the office was not free from frustration. The source of his discontent was Frank Murphy, who succeeded Cummings as attorney general after Cummings resigned in the late fall of 1938. Murphy's appointment was entirely a political payoff. He had been a strong supporter of Roosevelt when governor of Michigan, and when Murphy ran for reelection in 1938, Murphy asked the White House to support his candidacy. Overt support of Murphy by federal officials was hazardous because it might have been regarded as federal interference with state politics, but advisors to the Roosevelt administration sought to persuade Jackson to make speeches on Murphy's behalf. Jackson was disinclined to do so and was able to persuade those directing Murphy's campaign that his publicly endorsing Murphy might be counterproductive.[95]

Murphy was soundly defeated in his bid for reelection. This left him in an unfortunate position because he had no law practice to fall back upon and no other source of income. Pressure was mounted by Catholic sources on the Roosevelt administration, which coveted Catholic votes, to provide Murphy with some position in the federal government. The position Murphy preferred was Secretary of War, but another Roosevelt supporter, Louis Johnson, believed that he had been promised the position. Johnson was from New York state, as was Jackson. Although Jackson was Roosevelt's first choice to replace Cummings as attorney general, Roosevelt felt that his and Johnson's appointments would result in "too many New Yorkers" being in the cabinet. So Roosevelt proposed appointing Murphy as attorney general "temporarily" until a position more desirable to Murphy, who had not sought the attorney generalship, surfaced. Jackson, harboring no illusions that Murphy's "temporary" status could be achieved, nonetheless agreed to remain in the solicitor general post.[96]

The relationship between the attorney general and the solicitor general is not an arm's length one. Although the solicitor general's office is typically described as nonpartisan, that characterization is not quite accurate. The attorney general's office sets governmental policy, often at the direction of the President. That policy includes priorities for legislative action, and as such may have an influence on the litigation strategies of the solicitor general's office. In that sense the solicitor general is somewhat beholden, in making litigation decisions, to what the Attorney General believes should currently be emphasized.

Murphy's priorities as attorney general seemed to center on issues that would generate maximum publicity for himself. He instituted an income tax prosecution of the Kansas City political boss Tom Pendergast and federal judges Martin Manton and Warren Davis. He concluded that Alcatraz prison, the leading federal maximum-security facility

Jackson replaced Frank Murphy as attorney general in January 1940 when President Roosevelt appointed Murphy to the Supreme Court. Jackson wrote to FDR explaining that he would conduct the attorney general's office differently than his predecessor in terms of not announcing prosecutions without sufficient evidence or the support of DOJ members in charge of the cases.

of the time, should be shut down. He called a grand jury into session to investigate seditious activities in the United States. He announced that he was considering filing suit against labor unions for violating the antitrust laws. He fell out with FBI director J. Edgar Hoover, whom he felt was seeking to horn in on Murphy's public crusades, and reportedly planned to fire him. All those activities caused consternation among staff in the attorney general's office, some of whom complained to Jackson, whom they viewed as Murphy's successor.[97]

Jackson was appalled by Murphy's conduct as attorney general, later saying that "I found great difficulty cooperating with Mr. Murphy in his conduct of the Department."[98] At one point in his oral history memoirs Jackson declared that Murphy "had the least knowledge of federal procedure, or federal law, or the limitations of the federal government, of any man in such a responsible position that I ever knew."[99] By May 1939, only a few months after Murphy had been appointed, it was reported that Jackson was "restive" in his position and considering resigning,[100] and by October of 1939 he was said to be "very unhappy" in his dealings with Murphy.[101]

Then, in November, 1939, Justice Pierce Butler died. Butler was a Catholic from the Midwest, and speculation immediately turned to Murphy as his possible successor. Murphy, for his part, was ambivalent about the appointment when consulted: he did not particularly want the position but opposed the

nominations of other Catholic candidates. Roosevelt asked Jackson his views of Murphy, and Jackson strenuously objected to Murphy's appointment, saying that Murphy had no interest in legal issues, no jurisprudential perspective, and no intellectual inclinations.[102] Roosevelt nonetheless resolved to appoint Murphy to Butler's seat, thereby opening up the attorney generalship for Jackson.

Jackson's response to Roosevelt's proposal to name him attorney general at the same time he announced Murphy's nomination was characteristic. He wrote Roosevelt a long letter attempting to disabuse Roosevelt of any expectations that he would conduct the attorney general's office in a comparable fashion to Murphy.[103] He singled out "prosecutions [that] have been announced or undertaken prematurely, either without sufficient evidence or contrary to the advice of those in the Department who are in immediate charge of the cases," Murphy's "statement of labor policy," Murphy's "announcement of policy" that the Justice Department was going to "recommend deportations . . . 'even though it means a boat load or several boat loads of offenders,'" and Murphy's apparent effort to begin a "grand jury investigation of organizations fostering 'anti-Semitism and other isms'." Jackson wanted to make clear that he would not "defer to an established policy" on those matters, and advised Roosevelt that "if there is any substantial difference of viewpoint between you and me, I should not undertake the office."[104]

Roosevelt apparently assured Jackson that he would not support Murphy's positions if Jackson opposed them, and Jackson consented to being appointed. But when Murphy was appointed to the Supreme Court on January 4, 1940, along with Jackson's appointment as attorney general, Murphy held a press conference indicating that he planned to stay in office for up to thirty days to clean up some of the cases pending.[105] When Jackson heard that, he became incensed, thinking that the implication of Murphy's comments was that Murphy was fearful that Jackson "would settle some of his important cases which Murphy believed should be prosecuted."[106] Jackson, after reassuring himself that Roosevelt had not expected Murphy to remain on as attorney general after being appointed to the Court, told Murphy that he would not agree to his remaining, since after his appointment he would be a member of the Court and the Justice Department was the largest litigant before the Court.[107]

Thus Jackson became attorney general, and, as he later said, "stepped out of the office in the executive branch of the government that I had enjoyed most and into a sea of troubles."[108] He much preferred his time as solicitor general to that as attorney general, characterizing the former office as being "recognized as the foremost place in the legal profession," and the latter as "a managing clerk" who "has to spend most of his time on administrative matters."[109] Most of his tenure as attorney general, which lasted until June, 1941, was spent advising Roosevelt about how best to prepare for what seemed the inevitable entry of the United States into World War II. Jackson's most important contribution to that effort was his drafting of an opinion on the legality of the "destroyers-bases" agreement with Great Britain, in which the U.S. sent 50 reconditioned destroyers to Great Britain in exchange for acquiring 99-year leases to naval and air bases in British possessions in Newfoundland, Bermuda, and the Caribbean.[110] The destroyers had been certified as "surplus to the military needs of the United States" by the Navy.

Jackson's opinion made reference to three statutes, one dating back to 1882 and another to 1917, that allegedly authorized the United States to transfer, sell, exchange, or give naval material to another party provided "the Chief of Naval Operations . . . shall first certify that such material is not essential to

the defense of the United States."[111] It further stated that the agreement could be concluded as an Executive Agreement, not requiring ratification by the Senate, and that under the Constitution the president had power to transfer military material upon certification by the relevant members of the armed service in question. The validity of Jackson's opinion was challenged,[112] but the deal was overwhelmingly popular.[113]

In early 1941 Justice McReynolds announced that he was retiring from the Court, effective on February 1.[114] Roosevelt made no immediate plans to name McReynolds' successor, and although Jackson's name was mentioned, Roosevelt did not want Jackson to leave the attorney generalship while negotiations involving the Lend-Lease Act, which was enacted on March 11, 1941, were pending.[115] That statute authorized the United States, which had not yet entered World War II, to supply food, oil, and materiel to Great Britain, the Soviet Union, and other Allied nations at war with the Axis powers. It was passed in the face of some Republican resistance, reflecting the continuation of isolationist sentiment in America. A provision of the Lend-Lease Act provided for its repeal by a concurrent resolution of both houses of Congress, which Roosevelt believed to be unconstitutional. He signed the Act despite his reservations, then asked Jackson to draft a memorandum placing him on record about the concurrent resolution provision. Jackson did so, and Roosevelt then authorized Jackson to publish the memorandum "someday as an official document,"[116] which Jackson subsequently did in the *Harvard Law Review*.[117]

FDR congratulated Jackson after his swearing-in as associate justice in the president's office on July 11, 1941. Jackson's daughter Mary and wife Irene attended the ceremony.

By June, 1941, the situation with the Court changed. Hughes sent a note to Roosevelt on June 2 indicating that he planned to resign from the Court effective July 1.[118] After that news became public some newspapers reported that Jackson was Roosevelt's first choice to succeed Hughes, and Jackson had previously indicated a strong interest in becoming chief justice.[119] But when Roosevelt met with Hughes a week after hearing of his resignation, the latter indicated that although he thought well of Jackson, he recommended that Roosevelt appoint Harlan Fiske Stone chief justice in light of Stone's seniority and the ease by which a sitting Associate Justice could adapt to the chief's position.[120] Hughes also suggested that Roosevelt consult Frankfurter about the nomination, and Frankfurter, who also spoke well of Jackson, urged that Roosevelt appoint Stone, who had been nominated by a Republican president, as a bipartisan gesture in wartime.[121] Roosevelt then told Jackson that he planned to nominate Stone as Chief Justice and Jackson to fill Stone's slot, and, Jackson recalled, he told Roosevelt that the decision was entirely agreeable to him.[122] By July 7 Jackson had been confirmed by the Senate.

IV Conclusion

There have been few ascendancies of influence within the official ranks of the federal government to match that of Jackson between 1934 and 1941. He had gone from a general practitioner in upstate New York to positions in the Bureau of Internal Revenue, the Justice Department, and eventually the Supreme Court. He had arguably been at the very center of the Roosevelt administration from 1935 to 1941, prosecuting the Mellon tax case to make good on the promises of a Roosevelt appointee as attorney general; arguing many of the significant cases brought by the federal government between 1935 and 1940; arguing on behalf of the Court-packing plan even though he thought its emphasis misguided; writing an extended defense of the plan in which he claimed that its ultimate aim, changing the posture of the Court toward social welfare legislation, had succeeded; playing a central role in formulating and drafting the destroyers-for-bases deal with Great Britain and the Lend-Lease policy; and along the way serving as an advisor to Roosevelt on a host of domestic and international policy issues.

In that time interval Jackson had earned the reputation of being a skillful and tenacious advocate, winning a very high percentage of the cases he brought to the Court as solicitor general. He had been confronted, as attorney general, with a Justice Department that his predecessor Murphy had sought to politicize and had managed incompetently, and he had taken prompt steps to rectify that situation. When his advice to Roosevelt was rejected, as when he opposed the Court-packing plan's rationale or when he had declined to recommend Murphy for the Court, he had nonetheless supported Roosevelt's decisions once made. When he was passed over for a vacancy on the Court, as when McReynolds' slot became open or when Roosevelt named Stone chief justice, he had, by all appearances, cheerfully acquiesced. And when Roosevelt eventually named him to fill Stone's vacancy, Jackson had accepted the nomination even though he would have preferred to have the chief justiceship. When Roosevelt made Jackson the seventh of his Court appointees within a four-year period, he doubtless did so with the confidence that Jackson had every quality associated with being an outstanding Supreme Court justice. It had been an astonishingly successful rise from practice in Jamestown.

There were, however, qualities in Jackson that would stand in the way of success on the Court, although they took some time to surface, and the details of which are outside the scope of this article. Close associates

of Jackson, including Roosevelt, recognized that for someone immersed in political life and policymaking he was both thin-skinned and fiercely independent, taking criticism of his views personally, frank to make his objections to personalities or policies known, and inclined to threaten resignation rather than to compromise his views. He was, in addition, more comfortable as an advocate than as a policymaker or an arbiter, and would have trouble, as he later acknowledged, adjusting from the roles of administration spokesperson to that of judge.[123] "I was never a crusader. I just liked a good fight!,"[124] he said of his Jamestown law practice, and he was happiest in that posture as a government attorney, not so much formulating policy as seeking to defend it. On the Supreme Court he encountered a form of political intrigue that made him uncomfortable and to which he was ill suited.

The result was that rather than being a central linchpin in a presidential administration, as he had been in his various positions under Roosevelt, he became something of a loner and something of a gadfly on the Court, creating the sense that his judicial career had elements of unfulfilled promise.[125] But this article has been about the great successes Jackson achieved in a short time interval between 1934 and 1941. In that interval he decisively "arrived" as a formidable presence in government circles.

ENDNOTES

[1] Robert H. Jackson, The Struggle For Judicial Supremacy (1941).

[2] See Noah Feldman, Scorpions 201–03 (2010).

[3] Robert Jackson, "Reminiscences of Robert Jackson," draft of Autobiography, Box 189, Folder 1, Robert Houghwout Jackson Papers, Library of Congress. Entries from the Jackson Papers, which include Correspondence Files, Case Files, an Autobiography, and an Oral History Memoir, are hereafter cited as Jackson Papers, with Box and Folder numbers and occasional page numbers.

[4] *Ibid*., Box 189, Folder 1.

[5] *Id*.

[6] Jackson's initial reaction to the case was that it was unlikely a jury would indict Mellon for criminal fraud and that civil fraud would be difficult to show. He nonetheless produced a memorandum outlining the fraud case, and eventually agreed to try to case after efforts to recruit a visible Republican lawyer to do so had failed. *Id*.

[7] Robert Jackson, Oral History Memoir, Jackson Papers, Box 258, Folder 2. Jackson originally produced this memoir for the Columbia University Oral History Project, under the direction of Harlan Phillips, in 1952 and 1953.

[8] Mellon's life and career is treated in David Cannadine, Mellon: An American Life (2006), a source that needs to be used with care.

[9] Oral History Memoir, Jackson Papers, Box 258, Folder 2.

[10] The Board of Tax Appeals was initially created in 1924 as an "independent agency in the executive branch of the government," specializing in hearing appeals for determinations about required income taxes by the Bureau of Internal Revenue. Revenue Act of 1924, Sect. 900 (k), 43 Stat. 253 (1924). In 1929 the Supreme Court confirmed the executive status of the Board, indicating that taxpayers disappointed by its decisions could petition the federal courts for review. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929). The Revenue Act of 1942, Sect.504 (a), 56 Stat. 798 (1942) renamed the Board the Tax Court of the United States, designating its members judges. The Tax Court's status as an independent court was confirmed by the Supreme Court in *Freitag v. Commissioner*, 501 U.S. 868 (1991). At present its decisions can be appealed to the U.S. Courts of Appeals, other than the Court of Appeals for the Federal Circuit. Internal Revenue Code, 26 U.S.C., Sect. 7482 (a) (1).

[11] Jackson's memorandum and his subsequent tentative brief on the fraud issue are in Legal File, Jackson Papers, Library of Congress, Box 66, Folder 11.

[12] Jackson's "Tentative Outline for Brief on Fraud Issues" is in *ibid*., pages 120–121.

[13] *Ibid.*, 125.

[14] Hearings began on May 7, 1935, before a "Special Division" of three Board of Tax Appeals members. 15 members of the Board would eventually dispose of the Mellon case. A. W. Mellon v. Commissioner, 36 U.S. Board of Tax Appeals Reports 977 (Docket No. 76499) (December 7, 1937). Hereafter cited as 36 B.T.A. ___(1937).

[15] Eugene Gerhart, America's Advocate 74 (1958). Gerhart's biography was authorized by Jackson, who made a number of documents currently in the Jackson Papers available to Gerhart and had several conversations with him as Gerhart worked on the biography.

[16] Robert Jackson, Opening Statement in A.W. Mellon, Petitioner v. Commissioner of Internal Revenue, 36 B.T.A. 977 (Docket No. 76,499), Legal File, Jackson Papers, Box 68, File 4, pages 1–2.
[17] Jackson in *ibid.*, Box 68, File 4, page 14.
[18] *Ibid*., 19.
[19] For more detail on Mellon's art purchases and their role in the trial, see Cannadine, Mellon: An American Life at 130–31; Meryle Seacrest, Duveen: A Life in Art 299–302, 314–17, 346; Feldman, Scorpions, at 98–101; Gerhart, America's Advocate 75–78 (1958).
[20] Feldman, Scorpions, 99.
[21] "Mall Site Selected for Gallery of Arts," *Washington Post*, November 9, 1927, 20; David Doheny, David Finley: Quiet Force for American Art 112 (2006).
[22] Transcript of Record, Mellon v Commissioner of Internal Revenue, at 5245–46, quoted in Gerhart, America's Advocate, 77–78.
[23] Autobiography, Jackson Papers, Box 189, Folder 1.
[24] *Ibid*.
[25] A.W. Mellon, Petitioner, v. Commissioner of Internal Revenue, Respondent, 36 U.S. Board of Tax Appeals Reports 977 (Docket 76499) (1937). Hereafter cited as 36 B.T.A. 977 (1937)
[26] *Ibid*. at 1053.
[27] *Ibid*. at 1083–84.
[28] Bolon B. Turner's concurring and dissenting opinion was joined by six other members of the Board, Arthur J. Mellott, William W. Arnold, Samuel B. Hill, Richard L. Disney, Marion J. Harron, and John Worth Kern. *Id*. at 1083. Five members, Charles P. Smith, John M. Sternhagen, C. Rogers Arundell, Eugene Black, and John A. Tyson had joined Ernest H. Van Fossan's opinion, which would end up being the majority opinion. *Id*. This left members J. Russell Leech and J. Edgar Murdock, who both concurred separately,
[29] 36 B.T.A. at 1084.
[30] "Mellon Is Cleared of Fraud on Taxes By Board's Ruling," New York Times, Dec. 8, 1937, 1.
[31] Gerhart, America's Advocate, 78.
[32] Feldman, Scorpions, 101.
[33] *Ibid*.
[34] For more detail on Kruger's life and career and his numerous financial ventures, some of whom were legitimate, see Frank Partnoy, The Match King (2009).
[35] Gerhart, America's Advocate, 80–81.
[36] Autobiography, Jackson Papers, Box 189, Folder 1.
[37] See memorandum from Homer R. Miller, a colleague of Jackson's at the Bureau of Internal Revenue who accompanied him to Europe in the fall of 1935, to Thurman Hill, also on the staff of the General Counsel's Office of the Bureau of Internal Revenue, November 18, 1935, Legal File, Jackson Papers, Box 66, File 7, pages 22–32.
[38] Autobiography, Jackson Papers, Box 189, Folder 1.
[39] Public Utility Holding Company Act of 1935, 74 Stat. 333 (1935)
[40] Autobiography, Jackson Papers, Box 189, Folder 1. The case, *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U.S. 419 (1938), was argued in early February 1938, when Cardozo was incapacitated from a heart attack and stroke he had suffered in December,1937 and January,1938. Reed did not participate because he had been a member of the Justice Department when the case was first litigated. On Cardozo's health problems see Andrew L. Kaufman, Cardozo 566–567 (1998). Cardozo would never return to the Court, dying in July, 1938. *Ibid*., 567.
[41] Autobiography, Jackson Papers, Box 189, Folder 1. Although Jackson had intended to leave the Bureau of Internal Revenue to return to private practice, he recalled that working for the Justice Department "has a peculiar appeal to a lawyer, because it is the lawyers' department." *Id*.
[42] 301 U.S. 619 (1937)
[43] 301 U.S. 548 (1937).
[44] *Ibid*. at 578. Cardozo wrote the majority opinion in *Steward Machine Co. v. Davis*, joined by Hughes, Brandeis, Roberts, and Stone. McReynolds, Van Devanter, Sutherland, and Butler dissented.
[45] Autobiography, Jackson Papers, Box 189, Folder 1.
[46] Homer Cummings and Carl McFarland, Federal Justice 531 (1937).
[47] Autobiography, Jackson Papers, Box 190, Folder 4.
[48] Autobiography, Jackson Papers, Box 189, Folder 1.
[49] The speech, Jackson recalled in his Autobiography, was "widely circulated and commented upon, generally—I may say—adversely." *Id*.
[50] *Id*.
[51] *Id*.
[52] Hearings Before the Committee on the Judiciary, U.S. Senate, 75 Cong., 1st Sess. Jackson's testimony is report at pages 37–64.
[53] *Ibid*. at 40. Jackson was mistaken: the Court's size had been changed seven times before his testimony.
[54] *Ibid.* at 43.
[55] *Ibid.* at 63–64.
[56] Autobiography, Jackson Papers, Box 189, Folder 1.
[57] See Barry Cushman, Rethinking the New Deal Court 2–3 (1998).
[58] After the Court's decisions in the spring of 1937 Jackson believed that "it had become clear that the original bill could not pass . . . and had become a proposal that two members be added to the Court." In a May, 1937 conversation with Roosevelt he urged the president not to accept the two-member proposal, but simply to state that the "Court had announced new doctrine in accordance

with the contentions of the Administration" and that he was withdrawing his proposal, at least for the time being. Roosevelt declined that advice because he felt committed to appointing Senator Joe Robinson to the Court as one of the additional justices. Jackson's account of his conversation with Roosevelt is in Autobiography, Jackson Papers, Box 189, Folder 1.

[59] Recent works detailing the progress of the Court-packing plan in the spring of 1937 are Jeff Shesol, Supreme Power: Franklin Roosevelt vs. The Supreme Court (2010) and Laura Kalman, FDR's Gambit (2022).

[60] Robert H. Jackson, The Struggle For Judicial Supremacy ix (1941).

[61] Compare William E. Leuchtenburg, The Supreme Court Reborn (1995), with Cushman, Rethinking the New Deal Court. Two recent entries in the debate are Shesol, Supreme Power and Kalman, FDR's Gambit. See also G. Edward White, The Constitution and the New *Deal* (2000).

[62] 300 U.S. 379 (1937).

[63] 301 U.S. 548 (1937).

[64] 301 U.S. 619 (1937).

[65] Jackson, The Struggle For Judicial Supremacy, v–vi.

[66] Autobiography, Jackson Papers, Box 190, Folder 4.

[67] Jackson, The Struggle for Judicial Supremacy, v–vi.

[68] *Ibid*., 207.

[69] *Ibid*., 207–208.

[70] *Ibid*., 391.

[71] *Id*.

[72] *Ibid*., 399.

[73] 261 U.S. 525 (1924).

[74] 300 U.S. at 389.

[75] Jackson, the Stuggle for Judicial Supremacy, 209–210.

[76] *Ibid*. at 211.

[77] A suggestion that would be subsequently highlighted in Fred Rodell, nine men (1955).

[78] Jackson, The Struggle for Judicial Supremacy, 211.

[79] *Ibid*., 211–212.

[80] See 300 U.S. at 409–414.

[81] *Labor Board v. Jones & Laughlin*, 301 U.S. 1 (1937).

[82] *Senn v. Tile Layers Union*, 301 U.S. 468 (1937).

[83] *Steward Machine Co. v. Davis*, *Helvering v. Davis*.

[84] 301 U.S. at 646.

[85] Jackson, The Struggle for Judicial Supremacy, 234.

[86] *Ibid*. 235.

[87] *Id.*

[88] Jackson, Oral History Memoir, Jackson Papers, Box 190, Folder 5.

[89] *Ibid*. See also Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 31–32 (2003). Jackson was in the process of writing *That Man* when he died in 1954. The manuscript remained among his papers until almost fifty years later, when it was discovered by John Q. Barrett, who arranged for publication of a version he edited.

[90] For more detail on Jackson's reluctance to run for the governorship, Roosevelt's encouragement, the quite lukewarm reaction to Jackson's prospective candidacy from New York Democrats, and Jackson's eventual withdrawal of his candidacy after Lehman decided to run for re-election, see Oral History Memoir, Jackson Papers, Box 190, Folder 5.

[91] In his oral history memoir Jackson said that "The solicitor generalship had always appealed to me as the highest price that could come to a lawyer." He added that" '[t]he place of Solicitor General . . . is probably regarded as the foremost place in the legal profession." *Ibid*.

[92] Justice Jackson Dead at 62 of Heart Attack in Capital," *New York Times*, October 10, 1954,

[93] Letter from Felix Frankfurter to Eugene Gerhart, September 27, 1955, quoted in Gerhart, America's Advocate, 191.

[94] Jackson, Autobiography, Jackson Papers, Box 189, Folder 2.

[95] For more detail on Jackson's role in Murphy's re-election campaign, see *id*.

[96] For more detail, see *id*.

[97] For more detail on Jackson's reaction to Murphy, see *id*.

[98] *Id*.

[99] Oral History Memoir, Jackson Papers, Box 259, Folder 1.

[100] 2 Ickes, The Secret Diary of Harold L. Ickes 628, 631, quoted in Gerhart, America's Advocate, 175.

[101] 3 Ickes, The Secret Diary of Harold L. Ickes 51–53, quoted in Gerhart, America's Advocate, 184.

[102] Autobiography, Jackson Papers, Box 189, Folder 2.

[103] *Ibid*.

[104] The letter, dated December 30, 1939, is quoted in full in Gerhart, America's Advocate, 184–186, citing "from the personal files of Mr. Justice Jackson."

[105] Excerpts from Murphy's press conference of January 4, 1940 are in *id*., 187–188, citing "from the copy of Murphy's notes in the personal files of Mr. Justice Jackson."

[106] Gerhart, America's Advocate, 188–189.

[107] *Ibid*., 189,

[108] Quoted in *ibid*., 190. Gerhart gives no source for Jackson's comment.

[109] Oral History Memoir, Jackson Papers, Box 258, Folder 5.

[110] 39 Op. Att'y Gen. 484 (1940). For details of Jackson's involvement with wartime issues during his tenure as attorney general, see Autobiography, Jackson Papers, Box 191, Folder 2.

[111] The quoted language is from the Act of June 28, 1940, Ch, 440, Sect 14(a), 54 Stat. 676. The other statutes were the Act of March 3, 1882, Ch.391, Sect. 2, 22 Stat.196 and Act of October 6, 1917, Ch.106, Sect 10 (i), 40 Stat.422. Commentators have suggested that Jackson's opinion turned the 1940 statute, intended as a prohibition against the U.S. transferring naval vessels in wartime, into a justification for doing so provided the Navy certified vessels as not essential to the defense of the United States, and quite self-consciously misinterpreted the other two statutes. See, e.g., William R. Casto, *Advising Presidents: Robert H. Jackson and the Problem of Dirty Hands*, 26 Geo. J. Legal Ethics 183 (2013).

[112] See Edward Corwin, letter to the editor, *New York Times*, October 9, 1940.

[113] Wiliam R. Casto, *Advising Presidents; Robert H. Jackson and the Destroyers-for-Bases Deal*, 52 Am. J. Legal Hist. 1, 101–104 (2012).

[114] *Id*.

[115] *Id*.

[116] Franklin D. Roosevelt, Memorandum For The Attorney General, April 7, 1941, quoted in Gerhart, America's Advocate, 228.

[117] Robert H. Jackson, *Presidential Legal Opinion*, 66 Harv. L. Rev. 1354 (1953).

[118] *Id*.

[119] See *Philadelphia Record*, June 3, 1941; *Washington Post*, June 3, 1941; *New York Herald Tribune*, June 4, 1941, quoted in Gerhart, 229–230.

[120] See Feldman, Scorpions, 201–203.

[121] 2 Merlo J. Pusey, Charles Evans Hughes 787–788 (2 vols. 1951).

[122] Oral History Memoir, Jackson Papers, Box 191, Folder 2.

[123] See Philip Kurland, *Robert H. Jackson*, in Leon Friedman and Frank Israel, 4 The Justices of the Supreme Court 2543 (4 vols.1969).

[124] Robert H. Jackson to Eugene Gerhart, October 8, 1948, quoted in Gerhart, America's Advocate, 36.

[125] For more detail see G. Edward White, The American Judicial Tradition 190–191 (3d ed. 1988).

Court-packing in Context

Barry Cushman

There is a curious lacuna in the literature on the Court-packing crisis of 1937. The proposal for reform of the federal judiciary that received the most attention and consideration in that year was, of course, president Franklin D. Roosevelt's proposal to enlarge the membership of the Supreme Court from nine to fifteen justices.[1] Yet, both before and throughout the battle over the president's "Court-packing plan," members of Congress introduced a wide variety of alternative measures for addressing their dissatisfaction with recent Supreme Court decisions invalidating various state and federal laws designed to relieve economic distress and stimulate economic recovery.[2] Some of these proposals would have taken statutory form, while many others would have amended the Constitution in various respects. In the end, none of these measures was reported out of Committee. Nevertheless, they were the subject of serious discussion in multiple contemporary venues.

Scholarly treatments of the Court-packing episode typically are focused on two related questions: First, what were the Court-packing plan's prospects for ultimate congressional enactment, and second, to what extent, if any, did the pendency of the Court-packing plan affect the outcomes in the Court's major constitutional decisions in the spring of 1937? Perhaps as a consequence of this focus, proposed alternatives to Court-packing tend to be treated as something of a sideshow. Discussion of such proposals typically concentrates on the strategic reasons for which Roosevelt rejected them in favor of his own Court-packing plan. Largely overlooked is the rich contemporary legal, newspaper, and periodical literature in which these alternative measures received sustained legal and policy consideration.[3] Similarly, the Senate Judiciary Committee hearings on Roosevelt's bill, at which such proposals also were the subjects of extensive deliberation, routinely receive rather limited exploration. In some cases, discussion is largely confined to the manner in which the bill's opponents used the hearings to delay its ultimate floor consideration.[4] Other treatments offer more

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fulsome accounts of the arguments made for and against the president's bill but pay little if any attention to the substantive arguments that witnesses raised concerning alternative proposals.[5] At a time when proposals for Court reform have resurfaced in public conversation,[6] it may prove illuminating to reconstruct the robust discussion of the topic that took place in the 1930s.

Court-packing

On February 5, 1937, President Roosevelt sent Congress a proposal for the reorganization of the federal judiciary. The proposal included a provision for adding an additional justice to the Supreme Court for every sitting justice who had reached the age of 70 years and six months but had not retired. Because there were at the time six justices answering that description, the bill would have enabled Roosevelt to enlarge the Court from nine justices to fifteen, thus assuring himself of what he and his advisors regarded as a "dependable" majority sympathetic to the New Deal.[7]

Enlarging the membership of the Court of course was not a novel proposal in 1937. Indeed, as recently as January 1936, Minnesota Farmer-Laborite Representative Ernest Lundeen had introduced a bill to expand the Court to eleven justices,[8] and Pennsylvania Democratic Representative James L. Quinn's bill had proposed a Court of fifteen.[9] Throughout the struggle over Roosevelt's bill, there was much talk of a compromise under which the Court would be expanded to eleven or perhaps twelve justices.[10] Yet few bills embodying such a compromise actually were introduced. On February 5, the very day that Roosevelt's Court-packing plan was introduced, now-Senator Lundeen again introduced a bill expanding the Court to eleven.[11] Nevada Democratic Senator Pat McCarran introduced amendments to Roosevelt's bill fixing the size of the Court at eleven on April 15 and again on May 6.[12] On March 12 and May 6, Florida Democratic Senator Charles O. Andrews introduced joint resolutions amending the Constitution to provide for an eleven-justice Court.[13] As Andrews later put it, "[i]f the Federal courts are to be fundamentally changed, it should be done without building our judicial house upon the sand (in the form of a legislative act) which could be washed away by repeal even by the next Congress."[14]

On April 19, Democratic Senator Carl Hatch of New Mexico introduced an amendment to the president's bill limiting the appointment of additional justices to one per year.[15] On May 6, California Democratic Senator William G. McAdoo introduced a joint resolution that would have amended the Constitution to provide for a Court of fifteen justices for a period of twenty-five years, with Congress to fix the size of the Court thereafter for another period of twenty-five years.[16] On May 11, Democratic Senator George McGill of Kansas introduced an amendment authorizing additional appointments for each justice who reached the age of seventy-five without retiring, limiting the number of such additional appointments to two per four-year presidential term, and limiting the total number of justices to fifteen.[17] President Roosevelt steadfastly refused to accept any of these proposed compromise measures, insisting on passage of his own bill.[18] Meanwhile, between March and May 1937, numerous members of Congress introduced joint resolutions that would have amended the Constitution to fix the number of justices at nine.[19]

In the hearings held before the Senate Judiciary Committee, opponents of the president's proposal produced seventy witnesses to testify in opposition to the plan. They repeatedly testified that they identified with the Democratic Party, had voted for Roosevelt, and sympathized with the New Deal.[20]

Yet they were united in opposing the Court bill. These witnesses objected to the bill for a range of reasons. Some observed that it would establish a precedent that could set off an ever-escalating, iterated game of Court-packing between the two major parties, for which no foreseeable end could be identified without an excursion into eschatology.[21] As one witness observed, "other succeeding administrations that would have an Executive and Congress in control might continue to increase" the number of justices until the Court "became so large as to be a mob rather than a judicial tribunal."[22] New York lawyer Frederic Coudert observed that the president "might appoint 5,000 other judges, and turn the Court into a debating forum."[23] As Dean William E. Masterson of the University of Missouri School of Law put it, under such a dynamic the "high tribunal would lose its character as a court and become a political arena."[24] James Truslow Adams worried that "if the winning party cannot only carry out its political policies but also alter the Constitution at will by packing the Court, then political campaigns may become matters of life and death." "Who can tell," he asked, "what man may be swung unexpectedly into power 10 years hence or sooner?" If Roosevelt could "bring the Supreme Court to heel by packing it, then some other man can do the same if the precedent is once established. If one man and another, one party and another, are to be able to insure the passage of all legislation by simply adding members to the bench, where do we end?" It would

> mean that in electing a President and Congress we would also be electing a Supreme Court which in regard to its chief functions would become wholly unwieldy, and in regard to its duty of passing on the constitutionality of legislation would become merely another house of Congress acting as a rubber stamp not to pass on, but to sign, any acts passed by the party in power.

"What then," he asked, "becomes of the Constitution and the Bill of Rights guaranteeing our personal liberties?"[25]

Most commonly, however, witnesses denounced the Court bill as an attack on judicial independence and the separation of powers.[26] Only a few suggested that the bill was an unconstitutional attempt to induce elderly justices to resign, and thus an indirect attack on their tenure during good behavior.[27] Many conceded that the bill was within the "letter" of the Constitution. But they joined others in arguing emphatically that the bill was inconsistent with its "spirit."[28] Its purpose, which was candidly to place justices on the Court who would interpret the Constitution in a manner different from the manner in which it had been interpreted by the incumbent majority, was improper.[29] It was an attempt to amend the Constitution without going to the American people through the mechanism for amendment set forth in Article V of the Constitution.[30] If the people wanted to amend the Constitution to provide the federal government with greater regulatory authority, Article V prescribed the proper method.[31] Critics analogized the bill to congressional refusal to appropriate funds to support the judicial branch. That would be consistent with the letter of the Constitution, they argued, but it would violate the Constitution's spirit.[32] If the President's bill was not unconstitutional, it was "anti-constitutional."[33] If the justices had been misinterpreting the Constitution "willfully or corruptly or through a spirit of malicious intent," the appropriate remedy was impeachment.[34] These witnesses shared the President's concerns over some of the Court's recent decisions, and were openly critical of them.[35] But, as one witness put it, there was "a right way and a wrong way" to address these concerns. Court-packing was the "wrong way."[36]

Senate Judiciary Committee members met to consider President Roosevelt's request to increase the membership of Supreme Court. Pictured here (seated left to right): William E. Borah of Idaho; Henry F. Hurst of Arizona, Chairman; and Pat McCarran of Nevada. Standing left to right: Frederick Van Nuys of Indiana; Edward R. Burke of Nebraska; Warren Austin of Vermont; Key Pittman of Nevada; George McGill of Kansas; and Carl Hatch of New Mexico.

Alternatives

These witnesses, and like-minded members of Congress, thus rejected Court-packing because they regarded it an extreme and unwarranted reaction to circumstances that could be addressed adequately by other, reasonable means consistent with both the letter and the spirit of the Constitution. As the *Washington Post* editorialized, there were "many practical alternatives" for "achieving desirable objectives."[37] In fact, many members of Congress introduced, and many opposition witnesses endorsed, a wide variety of proposals to amend the Constitution so as to address "the Court problem." As Turner Cateledge reported, "The sweeping nature of the President's own plan" had "bred a veritable host of substitute plans."[38] Many of these would have expanded federal regulatory power, and/or relaxed the restraints imposed upon economic regulation by the Due Process Clauses.[39] Several others were designed to make the process of constitutional amendment easier.[40] But many other proposed amendments were directed toward the Court.

A. Congressional Override

One idea would have permitted Supreme Court decisions to be overturned by a majority popular vote in, or by a two-thirds vote of both Houses of Congress after an intervening election for the House of Representatives. Two such proposals were introduced in 1936,[41] and another was offered two days before the

introduction of the Court-packing plan.[42] On February 17, 1937, Burton Wheeler, the Montana Democrat who led the Senate opposition to the Court-packing plan, introduced such a joint resolution. His proposal, co-sponsored by Democrat Homer Bone of Washington State, would have amended the Constitution to provide that Congress could overrule a Supreme Court decision invalidating a federal law by a two-thirds vote after an intervening House election.[43] Similar measures were introduced in the House in March and again in June.[44] In late March, Mississippi Democratic Senator Theodore G. Bilbo introduced a bill providing for override of Supreme Court decisions by a two-thirds vote of each House as soon as the decision had been rendered.[45] Two days later, Pennsylvania Democratic Representative Matthew A. Dunn introduced a proposed amendment to the Constitution that would have deprived all state and federal courts of power to declare unconstitutional any law passed by at least sixty percent of the members of each House of Congress.[46]

Writing in September 1936, historian Charles Beard favored such an override amendment because it called for "some delay, popular discussion, and popular judgment."[47] In January 1937, Harvard Law Professor Thomas Reed Powell saw "merits" in making "the judicial veto . . . more amenable to political overriding," but suggested that such a remedy be resorted to only "if the conduct of the Supreme Court creates an effective demand for some mode of legislative or popular relief."[48] In an editorial published just two weeks before the announcement of the Court-packing plan, the editors of *The Nation* by contrast endorsed such a proposal as "an immediate and practicable plan."[49] And in May 1937, Princeton Professor Alpheus Thomas Mason, a critic of Roosevelt's bill, wrote in support of the Wheeler proposal, arguing that "it would maintain adequate judicial review over executive and legislature" while permitting Congress "to overturn any decision setting aside a law which the voters are determined to have enacted."[50]

Columbia University Law School Dean Young B. Smith opposed such a congressional override amendment because "it would give Congress power to amend the Constitution by a two-thirds vote."[51] Another commentator, quoting legal scholar Charles Warren, criticized the proposal as one under which "'a bad statute shall become good by repetition.'"[52] Columbia Law Professor Howard Lee McBain, a critic of the institution of judicial review, denounced the proposal as "grotesque." "For the Court to declare that a law collides with the Constitution and for Congress to retort that it does not," he wrote, "strikes me as an almost childish method of seeking solution for a nation's problem."[53] Tennessee Chancellor James B. Newman objected that this would "allow Congress to do all things which the Constitution had forbidden it to do." It would enable Congress to "alter or abolish any power of the President or the judicial department granted by the Constitution, alter or destroy any of the reserved powers of the states," and "deprive individuals of any right guaranteed them by the Bill of Rights."[54] Reverend Anson Phelps Stokes, the Canon of Washington Cathedral, worried that it would fail to "keep separate and distinct the legislative and judicial functions of government."[55] Harvard Professor Erwin Griswold and Kentucky Democratic Senator Marvel M. Logan opposed such an amendment because it would take judicial power from the Court and vest it in Congress. As Griswold remarked, it was "not the function of Congress to decide cases between private litigants."[56] New York lawyer Charles C. Burlingham agreed that it would destroy "the independence of the Court."[57] Detroit College of Law Professor James Oxtoby claimed it would be like allowing the members of a baseball team to overrule a call made by the umpire.[58]

Carr V. Van Anda, the former managing editor of the *New York Times*, described the

Wheeler-Bone Amendment as the "least attractive" of several proposed amendments. "The idea that a just popular verdict on such an issue could be obtained in a general election, in which it would probably be complicated with many other issues, or lost sight of entirely in the presence of one overwhelming issue, such as a sudden outbreak of war," he maintained, "can hardly be considered seriously."[59] Walter Lippmann likewise objected that the proposal "would make the will of two-thirds of Congress supreme over the Constitution, provided they can get themselves reelected, possibly in a campaign where some other issue is paramount." He denounced

> the spectacle of American liberals, so bent upon the attainment of their immediate needs that they are prepared to establish a system of government in which all liberty and democracy in America would be staked on the outcome of one election. If liberal Democrats are willing to do that, what in the name of the Great Jehovah will the enemies of liberty and democracy do when they win an election?[60]

Syracuse University Law School Dean Paul S. Andrews observed that, when Congress passed a law, its primary consideration was the measure's "political or economic wisdom." The Supreme Court, by contrast, considered "whether the law is contrary to the will of the people as laid down in the Constitution." Reenactment of a statute after its invalidation by the Court "might well be

Law school deans weighed in on the Court-packing plan. Syracuse University Law School Dean Paul S. Andrews observed that, when Congress passed a law, its primary consideration was the measure's "political or economic wisdom." He posited that the Supreme Court, by contrast, considered "whether the law is contrary to the will of the people as laid down in the Constitution."

a declaration of the judgment of Congress solely on the question whether a majority of Congress or of the people at the moment want the law passed." Reenactment "in the heat of political controversy" "might not furnish even a suggestion as to whether the majority of Congress, or the lawyers among that majority, or a single member, had considered whether such law violated the Constitution." And this "recall of decisions . . . with its threat to the integrity of the Constitution, the laws and the courts," would take place "without the people having any means, actually, to express their choice." For in a general election, with "various other issues presented," "how many votes would be influenced solely, or primarily or even slightly, by the judicial decision which the candidates, when and if returned to Congress, were in turn to vote on?"[61]

Andrews worried, moreover, that congressional override of judicial decisions would result in doctrinal instability and disuniformity. "Suppose," he posited, "the N.R.A. in this way were restored to life." That statute would be deemed constitutional, but the doctrinal foundations of the decision declaring it unconstitutional would remain. "When the next law, similar perhaps in principle but by no means identical, is tested before the Court," Andrews inquired, would not the Justices be bound by their oaths to determine whether the second statute was consistent with the Constitution? "If so, the second law falls, and the same process of a general election and repassage must be gone through again." This was a "most unwise" recipe for "piecemeal, irresponsible, unplanned, haphazard constitutional disintegration." It was "not amendment," but instead "constitutional deliquescence." One "primary purpose of the Constitution," Andrews admonished his listeners, "was to hold one thread of consistency and stability through all the temporal majorities that might come. Even majorities are not infallible."[62]

Arthur Krock reported on February 26 that "[f]ew persons in Washington expect Congress to submit the Wheeler-Bone amendment" for ratification, irrespective of the fate of the president's proposal.[63] In a March 8 address before Labor's Nonpartisan League, Wisconsin Progressive Senator Robert LaFollette, whose father's similar proposal in 1922 had met with widespread criticism, ventured "the prediction that the amendment proposed by Senator Wheeler and others could not muster 30 votes in the Senate."[64]

B. Advisory Opinions

Members of Congress also introduced joint resolutions to require the Court to provide advisory opinions on the constitutionality of federal legislation at the request of the president or Congress.[65] Three such joint resolutions were introduced in 1935, and a fourth was offered in January 1937.[66] On March 29, 1937, Senator Bilbo proposed yet another.[67] That same day, Democratic Senators Louis B. Schwellenbach of Washington State and Sherman Minton of Indiana introduced a resolution calling on the Court

> to adopt such amendments to its rules and procedure as to enable the Congress of the United States, on a majority vote of both Houses of Congress, to request and receive from the Supreme Court of the United States advisory opinions as to the constitutionality of legislation pending before, and being considered by, the Congress of the United States.[68]

Such proposals received some support from a few opposition witnesses.[69] Some witnesses who spoke to such proposals, however, suggested that such measures would be of limited utility, as such advisory opinions could address only the facial validity of legislation, and not its validity as applied to particular

factual circumstances—a matter of considerable concern, for instance, with respect to the reach of the commerce power.[70]

This was the view taken by Ohio State University Professor of Political Science F. R. Aumann, who built on the foundation laid by Harvard Law Professor Felix Frankfurter in a 1924 article. Frankfurter argued that "our national experience makes it clear that it is extremely dangerous to encourage extension of the device of advisory opinions to constitutional controversies, in view of the nature of the crucial constitutional questions and the conditions for their wise adjudication."[71] Like Frankfurter, Aumann disparaged the assumption that advisory opinions from the Supreme Court "will grind out controlling legal principles, which will resolve all doubts for good and all." On the contrary, he argued, "some of the most important cases decided by the Court are resolved into a judgment upon the facts." Such cases were "concerned not with legal principles, but the application of admitted principles to complicated and elusive facts." "Broad and indeterminate concepts like 'due process' and 'liberty,'" Aumann contended, "take on meaning only when construed in terms of human facts." The same was true of "the nature, scope, and limitations" of the Commerce Clause. It "would be impossible to resolve" controversies about "facts and judgments upon facts . . . in the dim, nebulous, half-world of abstraction."[72] As Frankfurter put it, the effort to deal with such fact-dependent controversies "abstractedly, to formulate them in terms of sterile legal questions," was "bound to result in sterile conclusions unrelated to actualities."[73]

Aumann pointed to additional weaknesses in advisory opinions. First, facts might "be established in favor of measures after their enactment which could not possibly be brought forward" at the time the Court's opinion was solicited.[74] Second, as judges in states authorizing advisory opinions had "forcibly" complained, a jurist considering the constitutionality of a statute *in vacuo* did not have the benefit of the research and arguments of counsel.[75] In addition, "when the advisory practice is made a part of the court's procedure, the burden of work imposed on the judges is bound to be increased. With less time and attention to give, the quality of their work is bound to suffer."[76] Aumann further noted that both Sir Henry Maine and Alexis De Tocqueville had opposed drawing judges into political controversies outside of actual litigation. The ordinary process of adjudication was slower, Maine conceded, " 'but freer from suspicion of pressure and much less provocative of jealousy than the submission of broad and emergent political propositions to a judicial body.' "[77] Tocqueville agreed that judges resolving constitutional questions at the behest of parties litigating the issue were "much less likely to arouse distrust and criticism than if the court decided such questions without parties in controversies."[78]

Professor McBain observed that

> the function of a court in rendering an advisory opinion is not identical with its function of rendering an opinion in a concrete case. A completely formulated statute is not before the Court; usually only a succinctly and more or less generally worded question of law is presented. The opportunity to view the law as an integrated whole and possibly to sustain one part of it while condemning another or to sustain it in application to one set of facts but not another, is not usually present.

Moreover, there was "commonly no presentation of arguments by opposing counsel and therefore no martialing of facts in support of such arguments." Courts had "no independent fact-finding facilities," and so must rely upon lawyers and others to present them. Advisory opinions therefore were prepared

"in an atmosphere devitalized by theory and apriority because robbed of the life-giving potency of essential factual considerations." Accordingly, McBain concluded, "despite its advantage of seasonableness, unless the rendering of advisory opinions could be accompanied by some wholly new and hitherto untried" procedural requirements allowing for "the full play of the forces of facts upon the minds of judges," an amendment authorizing the Court to issue such opinions "should be cautiously considered."[79]

Writing in *The Nation* in March 1936, Max Lerner acknowledged the case in favor of advisory opinions yet agreed that the "true meaning of a law is not to be found in the bare statute. The statute must take root, like a tree, in the soil of actual circumstance, it must bear a leafage of functioning and consequence before it can be seen as a reality. 'How do we know what we think,' the judges might ask, 'until we know how things work out?'"[80] The ABA Committee on Jurisprudence and Law Reform similarly opposed such measures in view of the "unnecessary burden" that would be placed on the Court, "and in view of the fact that in our opinion constitutional questions are best presented after the argument of counsel and the filing of briefs in an ordinary litigation."[81]

Journalist Raymond G. Carroll reported that

> advisory opinions have not worked out very satisfactorily among the states which have embraced their usage. United States Senator Borah, an authority on constitutional law, and the eternal defender of the Constitution, says: 'The lesson of a thousand years of Anglo-Saxon jurisprudence is that courts must be free from political influence and exempt from all duties not compatible with judicial power. We are instructed by experience and admonished by our clearest conception to demand such a court.' Mr. Borah vigorously opposes the burdening of the United States Supreme Court with the task of giving advisory opinions to a Congress in which more than 80 per cent of its members are lawyers, who should know a bad law on sight.

Carroll continued:

> The fear has been that if the United States Supreme Court gave advisory opinions to Congress, its nine members would take their place as legislators, become entangled in the legislative atmosphere and eventually saturated with politics. A decade has been given as the time in which the highest court would lose its prestige if it took on advisory opinions. It is cited that it is just in the proportion and to the extent that courts have been divorced from the demoralizing influence of politics that they have commanded the respect of the people; their judgments accepted and their decrees obeyed without resentment.[82]

Journalist David Lawrence suggested that advisory opinions were both unnecessary and probably futile. Writing in June 1935, he argued:

> Obviously the long series of cases already decided by the Court throughout its history constitutes a splendid record of advice if the legislative body cares to heed it, and there is no warrant for the belief that even if advisory opinions were rendered the legislators would feel that this in any way inhibited them from making further excursions into the twilight zones of law which are often motivated by reasons of political expediency.[83]

The editors of the *Saturday Evening Post* opposed such proposals on two grounds. The first concerned the benefits of percolation. Acting as an appellate court, the Supreme Court had the benefit of both the decisions of the lower federal courts and "the documented discussions appearing in the law journals and reviews." "On the whole," lower federal court judges were "men of excellent ability." Thus, "facts and arguments are sifted out through many competent minds before they reach the highest tribunal." By the time the case arrived at the Court, it had "already been threshed out by extremely able counsel and competent judges." The fact that the issue had received such thorough and careful consideration gave the public "a justified confidence in the final decision." Second, the editors feared that the requirement of advisory opinions would create perverse incentives in the other branches. If the Supreme Court "were required to pass upon every law immediately," they predicted, "the temptation for the Executive to recommend and for Congress to pass acts of dubious validity would be greatly intensified. The temptation to give militant minorities any legislation they want while at the same time being relieved of responsibility for its ill effects would be overwhelming."[84]

C. Voting Rules

Members introduced numerous measures that would have changed the Court's voting rules to require a supermajority of six, seven, eight, or even all nine of the justices to invalidate federal and/or state legislation. Many of these proposals were bills, and typically limited their application to the exercise of the Court's appellate jurisdiction.[85] Four such bills were introduced in the weeks following Roosevelt's unveiling of his Court-packing plan.[86] Proponents of such measures, such as Independent Senator George Norris of Nebraska, maintained that such legislation was permissible under Congress' power to regulate the Court's appellate jurisdiction.[87] The weight of opinion by 1937, however, seems to have held that such a change to the Court's voting rules could be accomplished only by constitutional amendment,[88] and most of the proposals along these lines took that form.[89] No fewer than twelve such joint resolutions were offered in the wake of the president's February 5 announcement,[90] and they enjoyed at least tentative interest or support in principle from some opposition witnesses and in the scholarly literature.[91]

Columbia University Law School Dean Young B. Smith, by contrast, opposed such a measure, because it would give "a minority of the Court . . . the power to uphold admittedly vicious legislation," and Senator McGill agreed with him.[92] John P. Devaney, President of the National Lawyers' Guild, testifying in support of the president's proposal, opposed such a change to the Court's voting rules. First, he noted, an amendment requiring the vote of six justices to invalidate legislation "would inadequately protect the kind of legislation the public demanded." The vote striking down the Agricultural Adjustment Act, for example, had been 6-3. An adequately protective amendment would require at least seven votes to declare legislation unconstitutional. But that "would put completely within the control of the minority of three judges the power of preventing the Court from declaring an act unconstitutional." Thus, "three obtuse Justices . . . would hold the balance of power." "To give the balance of power on a court to a conspicuous minority" ran "against the grain of all the traditions of our judiciary."[93] It would constitute, argued Minnesota Republican Representative Theodore Christianson, "not only a repudiation of the generally accepted principle of majority rule," but also "a gross denial of justice" to individual litigants.[94] Rhode Island Democratic Senator Theodore Francis Green likewise objected that such an amendment "would introduce into our constitutional law the novel, and, I

submit, unsound doctrine of minority rule."[95] The ABA Committee on Jurisprudence and Law Reform likewise denounced such proposals as "absolutely subversive of the right of majority government."[96] Ohio State University History Professor Ralph Martig noted that, in 1933, Democratic Senator Alben Barkley of Kentucky had stated that a 5-4 decision of the Court was

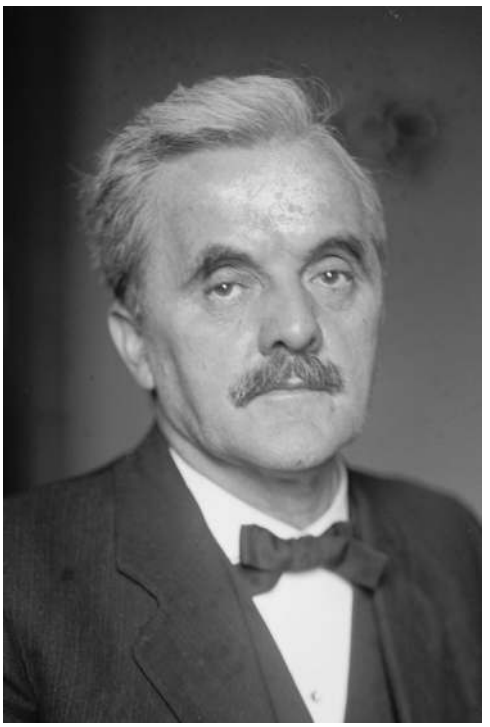
> "a perfectly legal and binding decision, just as a law passed by the Senate and the House by a majority of one is just as binding on the people as if it had been passed unanimously. . . . I have just as much respect for a decision of the Supreme Court whether it is unanimous or whether it is rendered by a majority of 5 to 4, because it is binding . . . under our theory of the rule of the majority."[97]

George Wharton Pepper opined that a requirement of unanimity or a supermajority had

> little to recommend it. If unanimity were requisite, one Justice might become interpreter of the Constitution. Even when the Court in rare cases divides 5-4, it is the view of five that prevails and not merely the view of one. If a two-thirds majority were required and the validity of an act were then to be sustained against the protest of more than half the Court, the citizen (sent, perhaps, to jail) would have a much stronger reason than at present to rail at the practical consequences of division.[98]

Carr Van Anda objected that "such an amendment, however useful it might be for the validation of a few laws desired by a transient administration, would take from the majority of the Supreme Court the power to negative unconstitutional legislation and give to the minority the power to affirm it."[99] An author in the *Florida Law Journal* similarly denounced supermajority amendments as "most certainly an effort at control over the Court and its decisions," adding that such proposals "uproot fundamentals" and "would leave a minority of the Court all powerful."[100] Charles Beard worried more generally that it was "impossible to calculate [the] consequences" of such an amendment.[101] The editors of *The Nation* similarly regarded such an amendment as "less desirable" than proposals for a congressional override of Court decisions.[102]

Professor Powell believed that the justices could adopt an internal voting rule requiring a supermajority to invalidate legislation, but



Members of Congress introduced four bills to change the Court's voting rules to require a supermajority of six, seven, eight, or even all nine of the justices to invalidate federal and/or state legislation. Independent Senator George Norris of Nebraska backed such legislation.

cautioned that it "would, if effective, cause grave complications unless carefully confined to certain fields of action. The problem is loaded with technicalities that no competent person would ignore." There was

> much intricate fitting together of state and national statutes and administrative orders that can be done wisely only by a single hand. A minority with effective power to sanction both state and national action might be so erratic that a federal system would become an incongruous jumble instead of a workable pattern.

Though "the requirement of an extraordinary majority for the exercise of the judicial veto might work well enough if confined to judicial applications of due-process clauses to certain types of legislation," it was "a risky device to adopt as a controller of the whole of the judicial umpiring of the federal system."[103]

Syracuse Law Dean Andrews contended that such proposals were "as dangerous as the plan to add six new Justices," because "some future President would only need then to pack the Court to the extent of one-third, instead of a majority, in order to give his program synthetic constitutionality."[104] Missouri Law Dean Masterson objected that the proposal would "in effect permit the minority to rule: It would destroy the democratic character of the Court." Moreover, "over a period of years, a minority of [the Court's justices was] more likely to be in error than the majority." The argument that "frequently the majority in close decisions misinterpret the law, or are influenced by their personal political and economic views," and thus nullify laws that were constitutional "prove[d] too much." For if 7–2 vote were required to invalidate a law, "only three judges who might favor a measure because they misinterpret the law or because they are influenced by their predilections, could prevent the court from holding it void, even though it might be clearly unconstitutional." A super-majority voting requirement would thus exacerbate rather than ameliorate the purported problem.[105]

In 1912, the State of Ohio had amended its constitution to impose a supermajority requirement on its supreme court. The amendment provided, "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring the law unconstitutional and void." This meant that the concurrence of six of the seven justices was necessary to reverse a court of appeals decision holding a law constitutional, but that a mere majority could affirm a judgment of unconstitutionality. By 1930, University of Michigan political scientist W. Rolland Maddox reported nine instances in which a minority of the court had controlled the disposition of a case under this provision—four times by a minority of three justices, and five times by a minority of two.[106] In one such case the opinion of the minority justices upholding the law stated, "While members of this court deplore such a constitutional provision—one which permits judicial control over grave constitutional questions by minority vote—the fault lies, not in the court, but in the constitutional provision which produces such a result."[107]

Maddox observed that the supermajority requirement had produced disparate outcomes in different appellate districts, depending upon whether the lower court had upheld or invalidated the law in question. This occurred, he reported, even where the facts were "identical in all essential respects." "By this restriction," he observed,

> the influence of the Supreme Court in harmonizing the judgments of the lower courts is destroyed, in so far as it concerns the constitutionality of statutes. In effect, the final

> determination of this all-important question of the validity of legislative acts is turned over to the intermediate judicial bodies except where their decision is so manifestly erroneous that there can be practically no difference of opinion. Litigants, in place of finding a uniform law throughout the state, may find a law applicable in one jurisdiction while it is void in another.[108]

The supermajority requirement also left the condition of precedent in a state of disarray. One lower court refused to be bound by a decision rendered by a minority of the supreme court, holding that in such instances its judgment was "binding only in that particular case as an adjudication, but is not binding in other cases." "Further," Maddox noted, "any court of appeals in the state is at liberty to proceed to its decision as if no previous case had been determined, knowing that the higher court could not order a reversal. No generally accepted body of principles is created." "The very basis of our system of law is threatened."[109]

Referring to Charles Warren's extensive critique of the proposal, Maddox noted that "Similar results have been forecast" if such a proposal "were adopted as a limitation upon the federal Supreme Court." "Inconsistent and inequitable application of the law" was "bound to follow."[110] Maddox lamented that the Ohio Supreme Court's majority was

> forced to permit decisions to be handed down which are contrary to its convictions, or members of the minority are forced to concur with the majority in order to make the real opinion of the court effective. Small wonder that the Ohio Supreme Court chafes under the restriction and demonstrates its impatience in no uncertain terms.

"How long," he asked, "can the dignity and honor with which we have endowed our highest tribunals be maintained in the face of such adverse circumstances? The remedy for our 'judicial oligarchy' is worse than the evil it was designed to alleviate."[111]

Later commentators on supermajority voting rule proposals concurred in Maddox's assessment. Philadelphia lawyer Thomas Raeburn White worried that lower courts and executive officials would not feel bound by minority decisions, and described the operation of Ohio's experiment as "anything but satisfactory."[112] Chancellor Newman derided it as producing "rather absurd results."[113] Other observers wondered "whether a legislature, knowing that its enactments cannot be struck down by a bare majority of the court passing on the validity thereof, tends to disregard necessary technicalities in its drafting of legislation and to pay less attention than in the past to constitutional precedents." Moreover, the proposal might not achieve its objective, as there was "at least some indication, so deeply embedded in our make-up is the belief in the rule of the majority, that where a majority concurs in the unconstitutionality of an act, judges who would otherwise dissent may sometimes concur for the sake of making up the requisite number to hold legislation valid."[114] Participants in the Senate Judiciary Committee hearings likewise noted the difficulties that had arisen with respect to Ohio's supermajority requirement.[115]

Several witnesses and Committee members expressed concern that such supermajority voting rules might result in future Courts upholding statutes impinging upon the protections of the Bill of Rights or the educational freedoms protected by the Court's earlier decisions,[116] and some suggested that such cases (excepting, perhaps, those involving the Fifth Amendment's Due Process Clause) should be exempted from such a supermajority requirement.[117] New York Republican Representative Hamilton Fish III's

resolution, introduced on April 22, contained such an exemption.[118] Senator Norris' amendment to the president's bill, that would have required the concurrence of more than two-thirds of the justices to invalidate federal legislation, was rejected in the Judiciary Committee on May 18 by a vote of 12-6.[119]

D. Limitations on Tenure

A proposal to limit the tenure of justices surfaced as early as May 1933, when Democratic Senator Clarence Dill of Washington State introduced a joint resolution amending Article III of the Constitution to provide that "[t]he Judges of the Supreme Court and of the inferior courts shall be chosen in such manner and for such periods of time as Congress shall by law provide."[120] President Roosevelt's proposal stimulated the introduction of six such term-limiting amendments in 1937. On March 8, Mississippi Democratic Representative John Rankin introduced an amendment authorizing Congress to fix the terms of office for all federal judges.[121] Rankin informed his colleagues,

> I have discussed this proposition with large numbers of Members of both Houses, and I have yet to find any substantial number of Members in either party in either House of Congress who oppose it. If it were put to a vote today, I am confident that it would be passed overwhelmingly, and that it would be ratified by three-fourths of the States as soon as their legislatures could pass upon it. If this amendment is adopted and becomes a part of the Constitution, Congress can then fix the term of a Supreme Court judge at, say, 12 or 15 years, and could fix the term of a circuit court judge or a district judge at 5, 7, or 9 years, or at any other length of time that Congress might agree upon. In my opinion such an amendment should have been adopted a hundred years ago.[122]

A week later, Senator Norris introduced a measure that would fix the term of all federal judges at nine years. Federal judges holding office on the date of ratification would hold office for nine years from that date.[123] On May 20, Indiana Democratic Representative Finly H. Gray introduced a similar amendment limiting tenure on the Supreme Court to nine years, but applying only to justices appointed after ratification.[124] In late May, California Republican Representative Bertrand W. Gearhardt introduced a measure limiting tenure on the Supreme Court to eighteen years, providing for staggered appointments to such terms every two years, and making provision for the assignment of incumbent justices to the various staggered terms. Under this proposal, there would have been two appointments to the Court during each four-year presidential term.[125]

Under questioning from Nebraska Democratic Senator Edward Burke, Dean Ignatius M. Wilkinson of Fordham University School of Law opposed "short terms for the members of the Federal bench" on the ground that "the merits of an appointment for life make it possible to have an independent judiciary."[126] Wilkinson did not elaborate this thought, but several commentators on contemporaneous proposals for reform of the tenure and selection of state court judges voiced similar concerns. University of Michigan Law School Professor Burke Shartel, for instance, believed that judges should enjoy tenure during good behavior, so long as there were adequate mechanisms for removal from office "whenever the incumbent becomes incapacitated by reason of age or mental or physical disability, or whenever he proves to be incompetent, of whenever he willfully neglects the duties of his office, or whenever

he misconducts himself in such a way as to show that he is morally unfit to be a judge." "Permanent tenure," Shartel contended, "is necessary in order to attract competent men to the bench and to give incumbents that independence which will insure fair and impartial performance of judicial duties."[127]

Baltimore lawyer Paul Kach insisted that a judge's "term in office be sufficient to fortify him against all the insidious influences of self-interest, whether secretly operating in his own mind or being exerted upon him by others."[128] Kach further quoted Chief Justice Taft as stating that life tenure "'makes the incumbents give their whole mind to their work, to order their household with a view to always being judges, and to take vows, so to speak, as to their future conduct.'"[129] Kach also quoted Professor W. F. Willoughby as stating that "'[t]he merits of tenure during good behavior are generally recognized, and the fact that it has given good results in practice in the federal judiciary is generally accepted.'"[130]

Los Angeles lawyer and former trial judge John Perry Wood quoted Lord Bryce as remarking that

> "short terms, though they afford useful opportunities of getting rid of a man who has proved a failure, yet had done no act justifying an address for his removal, sap the conscience of the judge, for they oblige him to remember and keep on good terms with those who have made him what he is and in whose hands his fortunes lie. They induce timidity, they discourage independence."

Bryce worried about "'ways in which sinister influences can play on a judge's mind, and impair that confidence in his impartiality which is almost as necessary as impartiality itself.'"[131] Wood concluded that "respect for the law, respect for the courts that administer it, the administration of justice and, by the same token, the continuance of orderly society depends upon the maintenance of a judiciary entitled to respect, which means: a judiciary carefully selected for qualifications alone and made and kept independent of all pressure individual or collective."[132]

Henry T. Lummus, Associate Justice of the Supreme Judicial Court of Massachusetts, observed that "the Godsend of the Federal system and our Massachusetts system is security of tenure, which enables a judge to give the people the best that is in him without fear and without need for favor." "The system of appointment with permanent tenure, properly guarded," had "produced and will produce, impartial justice, and public confidence in that justice." "Appointment for limited terms," he opined, "to my mind, is almost or quite as bad as election for like terms." Lummus was confident that in Massachusetts "either election or appointment for terms of years would long ago have dragged our judiciary into the mud." Courts could not "be put into politics or kept in politics without impairing their independence and their impartiality and without a loss of public confidence." Reformers should be mindful of

> the truth expressed by an able committee of the National Economic League, of which Louis D. Brandeis and Roscoe Pound were members, that appointive courts with secure tenure have in general had a more liberal outlook and have been more progressive that courts elected for short terms.[133]

In any event, the prospects for enactment of a term limits amendment may not have been as rosy as Representative Rankin believed. Senator Andrews of Florida related that such an amendment "would seem to me to smack of politics, and tend to destroy the independence of the judiciary." Andrews concluded, "I don't think it would stand much chance of getting through."[134]

Burton Wheeler, the Montana Democrat who led the Senate opposition to the Court-packing plan, introduced a joint resolution that would have amended the Constitution to provide that Congress could overrule a Supreme Court decision invalidating a federal law by a two-thirds vote after an intervening House election.

E. Compulsory Retirement

Such measures imposing term limits received comparatively little attention, perhaps because the more common proposal for limiting judicial tenure was a constitutional amendment to impose a mandatory retirement age on federal judges and justices. Most of the joint resolutions proposed seventy-five as the appropriate age,[135] though a few proposed younger ages such as seventy[136] or seventy-two,[137] and one would have raised the age to eighty.[138] Several witnesses before the Judiciary Committee testified in favor of such proposals,[139] and a mandatory retirement amendment was the measure that polled best with the general public. In poll after poll taken during the Court fight, proposals to enlarge the Court's membership never commanded the support of a majority of those surveyed. But a Gallup poll taken in early April 1937, 64% of respondents said that they would "favor an amendment requiring Supreme Court justices to retire at some age between 70 and 75." In a similar Gallup poll administered in mid-July, 70% of those with opinions agreed that "Supreme Court justices should be required to retire after reaching a certain age," with most thinking that the appropriate age would be seventy.[140]

In mid-May, Walter Lippmann suggested that it "might be desirable . . . to let the people decide whether they wish to compel the retirement of judges at the age of 75."[141] In June, Henry Goddard Leach, editor of the *Forum and Century*, wrote in support of such a measure, while insisting that the age of retirement should not be "less than 75 years."[142]

Professor Shartel defended such proposals as allowing "escape" from "the difficulty of passing on individual cases and of making invidious distinctions between individuals affected. Often the individual who ought to be retired does not realize that he has ceased to be able to perform his functions," and it was "not easy for others to tell him that he has lost his fitness for the job. A compulsory retirement age makes the process of elimination easy and quite impersonal." Shartel believed that the appropriate age of compulsory retirement for appellate judges was somewhere between seventy and seventy-five.[143]

By contrast, *Time Magazine* reported in early March that a mandatory retirement amendment "did not appeal particularly to most liberals, because the two outstanding examples in recent years of aged justices have been the Court's famed Liberals, Justice Holmes who resigned at 90 and Justice Brandeis who at 80 is still on the bench."[144] Similarly, American Law Institute Director William Draper Lewis, testifying in support of Roosevelt's bill, opposed the imposition of a mandatory retirement age, as "numerous judges over 70 are amply able to do a full day's work, just as they were when they were 50, perhaps better from years of experience."[145] Syracuse University Law Dean Andrews also expressed reservations about the imposition of a mandatory age of retirement. He thought it better to have no retirement age at all rather than "to lose 20 magnificent years of a Holmes, or 10 of a Brandeis, or 10 again of a John Marshall, and many years perhaps of Cardozo, Hughes, and Stone and the rest." Had they been forced to retire at seventy, it would have cost two-thirds of Holmes' career on the Supreme Court, "one-half of Brandeis', and one-third of Marshall's." As Chief Justice Hughes had written in in 1928, "'It takes a new judge a long time to become completely master of the materials of his court. Contrary to general opinion, the work of the Court tends to keep a man keen witted and earnest.'" Were such an amendment necessary, however, Andrews favored one fixing the retirement age at seventy-five, with the proviso that the term of a justice who had reached the age of retirement could be extended in one-year increments by the unanimous certification of his colleagues that he remained "completely fit" to perform his duties.[146] Oregon Republican Senator Frederick Steiwer and Delaware Democratic Senator James Hughes worried that the failure of unanimous certification would humiliate a retiring justice, and would create ill-will, dissension, and bad feeling among his remaining colleagues.[147]

Professor Shartel recognized the difficulty of fixing a uniform age for retirement, because "not all men become incapacitated at the same age." Some retained their "faculties and full vigor until 90 or over." "Whatever age of retirement is set," he conceded, "some waste of competent man power will result; the judicial system will lose the experience and ability of some men who still have all their faculties though they have passed the fixed age." But against such waste "must be balanced the advantage of eliminating dead timber." Shartel did not believe "that setting an age for judicial retirement is different in kind from fixing an age for any other significant act or event." The age of majority was "typical; not all persons arrive at the age of discretion at the same time. Nevertheless we must and do fix such an age on the basis of a general estimate." Moreover, he concluded, probably inaccurately, "no one has ever felt that the fact that some good professors or army officers or business executives will be

put on the shelf by an automatic superannuation provision, constituted a conclusive reason against such a requirement."[148]

In any event, proposals to limit the terms of or impose a mandatory retirement age for justices did not enjoy the support of the White House. While lunching with the president on February 18, Wyoming Democratic Senator Joseph C. O'Mahoney attempted to persuade Roosevelt to accept a constitutional amendment limiting the tenure of all federal judges and justices to fifteen years and requiring retirement at the age of seventy-five. The president genially rebuffed the suggestion.[149]

F. Judicial Pensions

As an alternative to Court enlargement, Congress also considered a handful of statutory remedies. The possibility of changing the Court's voting rules by statute has been discussed above. Another approach was to induce elderly justices to retire by providing that they could do so at full salary. Both Justice Willis Van Devanter and Justice George Sutherland were rumored to be anxious to retire.[150] But under the judicial pension system then in place, justices who had resigned from the Court were not protected against reductions in their stipends. Justice Holmes had resigned in 1932, and in the following year Congress had cut his pension in half with the Economy Act of 1933.[151] Democratic House Judiciary Chairman Hatton Sumners of Texas had introduced several bills making provision for secure retirement pensions for justices during 1935,[152] as had New Jersey Democratic Representative Edward J. Hart in February 1936.[153] But these bills had not made any headway.[154] Indeed, Ohio Democratic Representative Stephen M. Young introduced bills in 1933 and 1935 that would have abolished payment of salaries to all resigned or retired federal judges.[155] In January 1937, Sumners introduced his bill once again,[156] and its ultimate fate remained uncertain. But after President Roosevelt introduced his Court-packing bill on February 5, the tide quickly turned. Senator Andrews introduced a bill providing for voluntary retirement of Supreme Court justices at full pay at age 72 on February 11.[157] The House passed Sumners' bill on February 10,[158] and the Senate followed suit on February 26.[159] By March 1, President Roosevelt had signed the bill into law.[160]

G. Restrictions on Appellate Jurisdiction

Two bills introduced in early 1937 would have deprived the Court, in the exercise of its appellate jurisdiction, of the power to "pass upon or consider any plea which raises the question of the constitutionality of an Act of Congress."[161] Another contemporaneous bill provided that the Court "shall not review or declare" any "statute or Act of Congress void or unconstitutional whenever said statute or Act is based upon a finding of fact made by the Congress of the United States declaring that such statute or Act is a necessary and proper exercise of a power specifically granted to Congress by the Constitution of the United States."[162] Several such jurisdiction-stripping proposals had been introduced in the preceding Congress.[163] On February 18, 1937, California Democratic Representative Jerry Voorhis reintroduced a proposal that had been offered by Colorado Democratic Representative John Martin and New York Democratic Representative Frederick J. Sisson the preceding year. That bill provided that no state or federal court, except for the Supreme Court in the exercise of its original jurisdiction, should have jurisdiction to hear or decide any question concerning the constitutionality of any statute that (a) was, or purported to be, an exercise of congressional power to tax, to pay the debts and provide for the common defense and general welfare of the United States; to regulate commerce among the States; or to coin money and

regulate the value thereof; or (b) affected, or purported to affect, rights under the Due Processes Clauses of the Fifth or Fourteenth Amendment when the rights affected were not procedural in nature.[164]

The idea of jurisdiction stripping was vigorously supported by the testimony of former Republican Senator Smith W. Brookhart of Iowa, who supported the president's proposal as an alternative to such a measure.[165] There had been discussion, "in low tones," of "deflat[ing] the powers of the Court by riddling its jurisdiction with exceptions" as early as spring 1933.[166] In January 1934, the editors at the Christian socialist *The World Tomorrow* warned that the Court's "powers may be shorn" as "a last resort."[167] In February 1935, the editors of *The Nation* called for "a constitutional amendment depriving the Supreme Court of its self-arrogated right to invalidate legislation duly enacted by Congress,"[168] and in June of that year they again urged adoption of "a constitutional amendment depriving the Supreme Court of the veto over national legislation."[169] In the wake of the *Schechter* decision, the editors at *Commonweal* opined that the question of whether "the jurisdiction of the Supreme Court shall be drastically limited" had "come before the people."[170] Writing in December 1936, Congress of Industrial Organizations President John L. Lewis favored including in "legislative measures designed to establish labor standards and public control, provisions denying jurisdiction on grounds of unconstitutionality to the lower federal courts, and prohibiting appeals on the same grounds to the Supreme Court." In addition, Lewis urged the adoption of a "a comprehensive constitutional amendment depriving the Supreme Court of power to question the constitutionality of any act of Congress."[171]

New York civil liberties lawyer Osmond K. Fraenkel, by contrast, derided the proposal to deprive the Court of the power to declare congressional statutes unconstitutional as covering "both too much and too little ground. Its scope is too limited," he observed, "because adopting it would do nothing to curb interference with desirable state laws" by decisions invoking the Due Process Clause. At the same time, it was "too extensive, because there are many respects in which Congress should properly be subject to supervision," such as statutes infringing First Amendment freedoms.[172] In a radio address delivered in February 1936, Princeton political science professor Edward S. Corwin described such proposals as "objectionable." He reminded his audience that "*cases* involving constitutional questions have to be decided somewhere; and where more appropriate than the Supreme Court? One should not forget the old warning not to throw out the baby with the bath."[173] Professor Martig noted that were the Court deprived of jurisdiction in constitutional cases, "the power of review would still remain in the lower Federal courts and in the State courts, and instead of one interpretation of the Constitution there might be many." The power to curtail the Court's jurisdiction was "dangerous," and "capable of upsetting the tripartite balance, should Congress see fit to abuse it."[174]

Writing in September 1936, Charles Beard argued "against such an emancipation of legislative authority." "Having seen sadism incarnate in members of congressional committees in charge of repressive legislation," he wrote, "I respectfully beg to be excused from giving sovereignty to Congress." "Without nursing any illusions about the Supreme Court or staking any high hopes on its humanity in an hour of crisis, I find myself unwilling to entrust everything I hold dear to a mere majority of Congress."[175] Six months earlier Beard had written in a similar vein, "The Congress of the United States could do a lot of damage to life, as distinguished from property, if it were turned loose without bridle or rider."[176] Lloyd Garrison similarly observed that an amendment depriving

the courts of the power of judicial review, "among other objections to it, would remove from judicial protection the Bill of Rights."[177] And in any event, as Damian Cummins observed in late April 1936, "The people are unquestionably not ready to empower Congress to pass legislation not subject to judicial review, as some have suggested."[178]

William Draper Lewis regarded "the constitutionality of a provision that would limit the jurisdiction of the Court to pass on only part of the laws affecting the case presented" as "doubtful." It was "a very doubtful question as to whether Congress should go so far as to deprive any court, in any case between man and man, of the power of passing on a constitutional question, when in taking office they swear to uphold the Constitution of the United States." It would, he remarked, "be a dangerous thing to do."[179] Political Science Professor Charles Groves Haines of the University of California at Los Angeles, testifying in favor of the president's bill, agreed that such proposals were of "doubtful" constitutionality, and would probably be declared invalid as deprivations of due process of law. In any event, he doubted that "the limitation of the jurisdiction" was "an effective and satisfactory way" of dealing with the problem.[180] Harvard's Professor Powell maintained that such "[l]egislative action to obtain legislative omnipotence" would be a "legal revolution." "I should expect the Supreme Court to call it by its right name by a vote of nine to none."[181] University of Southern California Law Professor Charles Carpenter cautioned that any statute "withdrawing extensively the power of the Court

When the 75th Congress passed a bill in May 1937 giving the justices security over their pensions, Justice Willis Van Devanter promptly retired. (Justice Holmes had found his pension cut in half by the Economy Act of 1933, a year after he retired).

to pass on legislation may prove bad," and that state courts could still declare legislation unconstitutional. Moreover, a constitutional amendment depriving federal courts "of all power to hold statutes unconstitutional might defeat one of the dearest aims of the founders of the Constitution, namely the protection of individual rights and liberties."[182]

Harvard Professor Erwin Griswold similarly doubted the constitutionality of a wholesale repeal of the Court's appellate jurisdiction,[183] and reminded the Committee of the congressional repeal of the Court's appellate jurisdiction in habeas corpus cases that *Ex parte McCardle* upheld in 1869. "With the perspective of history," he testified, "we are nearly all agreed that this was a very dark and indefensible chapter in our national progress. And the error that was then made should lead us to be very careful before making another attack on the powers of the Supreme Court."[184] Senate Judiciary Committee Chairman Henry Fountain Ashurst of Arizona stated that he was opposed to curtailing the power of the Court to rule on the constitutionality of legislation, and that he did not believe that any member of the Judiciary Committee would vote in favor of a proposal to do so.[185]

Amend the Constitution?

President Roosevelt opposed addressing the Court issue through any form of constitutional amendment because he believed that its framing, congressional passage, and ratification by the states would take too long, and could be too easily blocked by conservative interests in the legislatures of states containing only a fraction of the nation's population.[186] There was "no substantial group within the Congress or outside it" who were "agreed on any single amendment." Reaching such an agreement "would take months or years," as would assembling the supermajorities in both Houses of Congress necessary for its passage. Thirteen states containing "only 5 percent of the voting population" could "block ratification even though the 35 States with 95 percent of the voting population are in favor of it." Powerful economic interests pretending to favor an amendment would "sabotage any constructive amendment which is proposed." Packing the Court was thus the only solution.[187]

Witnesses testifying in support of the president's proposal repeatedly echoed these contentions before the Senate Judiciary Committee.[188] They cited the example of the pending Child Labor Amendment, which had been passed by Congress in 1924, but had yet to be ratified by the requisite number of states.[189] The Sixteenth Amendment had been ratified in four years after its adoption by Congress, but "years of agitated argument preceded action by Congress." The Seventeenth Amendment had been ratified in only a year, but again "it took more than a decade of agitation to get it through Congress."[190] The amendment process was "too slow to give relief."[191]

Opposition witnesses vigorously contested these claims. To the contention that opponents of the president's plan could not agree on a proposed constitutional amendment, Senator Wheeler professed confidence that they could, and other opposition witnesses offered similar assurances.[192] Wheeler testified that Congress would pass "any amendment which this committee will report out that is intended to amend the Constitution so as to cover all the objectives that we all desire," and lamented the "whispering campaign" that Administration officials were waging against the amendment approach.[193] Wheeler reported that he had "discussed this matter with practically all the Members of the Senate who are opposed to this proposal," and he believed he was "safe in saying that those who are opposed to it will submerge their own views. We have no pride of authorship. We will vote for any

reasonable amendment which this administration will submit to the Congress of the United States."[194] Democratic Senator Key Pittman of Nevada expressed doubt that the opposition could reach such an agreement and suggested that that Senators Wheeler and O'Mahoney get together to see whether they could "agree on which of your amendments should be supported." Wheeler responded that "Senator O'Mahoney and I will have no quarrel in agreeing."[195] On April 3, 1937, Wheeler and O'Mahoney announced their agreement to support a constitutional amendment requiring a two-thirds majority of the Court to invalidate any state or federal law, and in a letter to Senator Pittman urged prompt action on the proposal.[196] Senator Burke stated publicly that both a majority of the opposition and a majority of the Senate Judiciary Committee would support such an amendment. Pittman expressed concern that such an amendment would confer too much power on a minority of justices, but agreed that the measure would win the support of the Committee.[197] Yet Roosevelt continued to insist on his own proposal, and after Postmaster General James Farley on May 14 very publicly suggested that the administration would withhold its support for O'Mahoney-backed measures unless the Senator fell into line, O'Mahoney elected to abandon his alternative bill and to oppose both the president's plan and any and all compromise proposals.[198]

Witness after witness rejected the contention that the amendment process was too slow and cumbersome. As Wheeler put it, "the people of the United States have a way of acting expeditiously when they want something done. And if they do not want an amendment, it is generally because of the fact that the majority of the people of this country are not in favor of it."[199] Numerous witnesses agreed with Princeton President Dodds and Texas Democratic Senator Tom Connally that "if the people really want a constitutional amendment . . . and are overwhelmingly for it, it can be done speedily."[200] This was particularly the case if Congress were to choose state conventions as the means of ratification, as had been done effectively with the Twenty-First Amendment,[201] and if the president, who was "very strong politically,"[202] would "put his great prestige"[203] and "influence behind it."[204] Participants repeatedly noted that many amendments, including the two most recent, had been ratified in less than a year from the time they were submitted to the states, and many others had been ratified in fewer than fifteen months.[205] A study undertaken by lawyer and historical writer Fred Taylor Wilson disclosed that the average time between the submission of an amendment to the states and its ratification was fourteen months and seventeen days, and that most amendments had been ratified more quickly.[206] On March 12, Senator O'Mahoney observed that there were at the time forty-two state legislatures in session. It "normally" took "a year or two for a law of Congress to reach the Supreme Court for determination." That would provide adequate time for the ratification of a constitutional amendment requiring a two-thirds majority of the Court to invalidate a federal law before any legislation enacted by Congress in its present session might reach the Court.[207] In early May, O'Mahoney added that amendments imposing mandatory retirement or term limits on judicial tenure "could have been ratified in less time than it has taken for the Senate Committee on the Judiciary to consider [the president's] bill."[208] Professor Mason contended that Cummings' "condemnation" of proposals to amend the Constitution as a "'strategy of delay'" was "not altogether convincing." Noting the celerity with which the last five amendments had been ratified, Mason asked, "Are we to believe now, that Jim Farley, plus his unique entourage of political organizers and propagandists, would fail where the heirs of Susan B. Anthony, of Wayne Wheeler, and the anti-Prohibitionists all succeeded?"[209]

The experience with the child-labor amendment, Raymond Moley contended, was an inapt comparison.[210] The principal problem with that amendment, as Senator O'Mahoney observed, was that it would authorize Congress "to regulate, control, or prohibit the labor of persons under 18 years of age." It went "much further than authorizing Congress to prohibit what is commonly known in the popular mind as child labor."[211] It had failed thus far to achieve ratification, Grange Washington Representative Fred Brenckman explained, "largely because common sense revolts at the idea of classifying boys and girls up to 18 years of age as children. A large proportion of the soldiers in the Union and Confederate Armies during the Civil War were under 18 years of age."[212] Moley agreed that the amendment's fate was attributable to the selection of "an unfortunate age, of 18," and to the fact that the "Democratic Party, I am sorry to say, has never really got squarely behind it," with which Senator Logan concurred.[213] North Dakota Republican Representative William Lemke agreed that the language of the Child Labor Amendment was "too sweeping," and for this reason had been voted down at one time or another by thirty-five States. Reminding his listeners that "the State of Oregon attempted to direct the course of education by prohibiting parochial schools," he asserted that, if the amendment "had made the age limit a little lower and had made some exception for children working for their parents and had put in a provision that it would not interfere with education, and so forth . . . it would have been adopted."[214] Canon Stokes noted that it was "well known that the main difficulty" encountered by the Child Labor Amendment was not

> that it makes it possible for Congress to legislate regarding children receiving wages in industry but because the wording seems to some authorities to give Congress such broad powers outside the field of industry as might conceivably endanger the freedom of home, church, and school. Were it not for this it would have received the support of the overwhelming majority of our citizens and would long ago have become the law of the land.[215]

Senator O'Mahoney believed that the delay in ratification of the Child Labor Amendment did not provide "any reason to believe" that an amendment requiring a two-thirds majority of the Court to invalidate federal legislation would face a similarly lengthy delay.[216] The more appropriate analogy, Moley insisted, was the amendment repealing prohibition.[217]

Chicago lawyer Walter Dodd dismissed the "argument that 13 States of small population may defeat an amendment" as one "without weight." "The States of small population," he explained, "do not have common interests." There was "no probability" that they would unite to defeat such an amendment.[218] Columbia University Law School Dean Young B. Smith added that "[n]o amendment has ever been suggested yet, that I know of, in which 95 percent of the people were for it and 5 percent of the people blocked it. I just do not think things like that are apt to happen." Senator Logan agreed on that point, but followed up by asking, "Of course, Professor Smith, I believe you will grant readily that there is what we might for want of a better name call the 'conservative group' in the United States, that are powerful and very strong, and who control largely the vehicles that carry information to the public, and that they would be against any kind of amendment?" Smith responded, "They could carry only two States last fall," to which Logan could only reply, "That is true."[219] Syracuse Law Dean Andrews similarly could not "believe that a political party which carried 46 States can have any great fear of delay in amendment of the Constitution along the

lines of the issues of last November."[220] Raymond Moley ridiculed "direful pictures of the dangers of a conspiracy on the part of enemies of progress which might permanently tie up the votes of 13 States through pelf, plunder, and propaganda." This was

> like one of these mathematical propositions in which you bring out that the Omaha High School could have beaten Notre Dame, and did in fact, and that is shown from the statistics. The fact is that these 13 States never went together in any attempt to put through a constitutional amendment, and they probably will not. And to assert that these 13 small States will offer this kind of a handicap, I think is to resort to the same kind of mathematical puzzles that are indulged in by sports writers when they haven't anything else to do.[221]

Moley had been arguing that Congress should pass an amendment enhancing federal regulatory power since 1935, and now testified that, if it had done so, such an amendment would have been ratified by 1937.[222] William Lemke speculated that, if "this administration, and our President, with his splendid personality and power," had "confined himself to a constitutional amendment" at the outset of the legislative session, Congress and the states would have adopted it in short order.[223] William Hirth, publisher of *The Missouri Farmer*, agreed that,

> if during recent weeks, when practically all of our legislatures were in session, the President had asked for a clarifying amendment or amendments, and had frankly stated his reasons therefor, his undisputed leadership and great popularity would undoubtedly have brought quick action for or against.[224]

Indeed, Moley argued that the Court-packing proposal enjoyed, "in the matter of speed," no "great advantage" over the amendment approach. He reasoned that the president's proposal "cannot conceivably be approved for some months. There must then be reckoned the time required for the selection of the judges and the approval of the Senate," which was "not always expeditiously performed." This would exhaust the remaining time in the first session of the Seventy-fifth Congress. For a "considerable part" of the second session, Congress would "undoubtedly devote itself to a consideration of those economic measures that the new Court is expected to approve." Then would come "the process of litigation,"[225] which might elicit, as it often had during Roosevelt's first term, crippling injunctions from lower federal courts.[226] Moley therefore thought it "a fair inference that the present co-called crisis cannot possibly be met and definitively liquidated until the beginning of 1939." A constitutional amendment could be ratified by that time.[227]

A memorandum submitted by the American Bar Association similarly observed that, "so far as present evidence indicates, the President's plan will not be consummated, if at all, without the elapse of a considerable length of time." There was "present talk of extending the hearings indefinitely." Moreover, the "possibility of extended debate when the measure finally reaches the Senate and the House" was "almost a certainty." Further discussion would "undoubtedly follow before the Senate confirms each proposed nominee," which would "involve considerably more time." It was thus "doubtful whether a new bench can be created in less than a year." The president's plan therefore was not necessary "to save time." If a constitutional amendment could "be enacted and ratified within the same approximate time that would be required to consummate the President's proposal," it was "plain that the

amendment method" was "more desirable from the standpoint of expediency as well as preserving the spirit of the Constitution and the scheme of tripartite government."[228] Paul F. Hannah, Secretary of the Junior Bar Conference Section of the American Bar Association, alleged that the "theory that a constitutional amendment cannot be had" reflected "a defeatist attitude" that smacked "more of the Liberty League than this administration." It was

> so undemocratic in essence as to be unworthy of persons claiming to be members of the Democratic Party. Anyone who has the slightest faith in the people knows that if a constitutional amendment is needed, and sound reasons for the need exist, the people, through constitutional conventions, set up by the Congress, can ratify it in less time than it may take to pass this bill.[229]

After canvassing the arguments, *Washington Post* columnist Franklyn Waltman opined that "[t]he Administration's objections to submitting a Constitutional amendment to achieve its ends boil down to nonsense. Actually they amount to a repudiation of faith in the democratic process."[230]

Several witnesses suggested that little or no action was necessary. The principal difficulty with New Deal legislation was not the reasoning of the Court's majority in declaring it unconstitutional; the principal problem was that Congress had not given sufficient consideration to the constitutionality of the statutes it had enacted, and that the Justice Department had not taken sufficient care in selecting test cases to bring before the Court.[231] As William Lemke observed, "many of the acts that the Supreme Court held unconstitutional could be reenacted."[232] The Agricultural Adjustment Act not only had been replaced but also improved by the Soil Conservation Act, which was drafted so as to insulate the tax by which it was financed from judicial review.[233] The Frazier-Lemke Farm Debt Relief Act, unanimously invalidated by the Court in 1935, had been carefully redrafted with attention to constitutional detail, and unanimously upheld by the Court in March 1937.[234] The "hot oil" provisions of the National Industrial Recovery Act invalidated by the Court in early 1935 had been redrafted so as to eliminate the unconstitutional delegation of legislative power to the executive.[235] Both the Railroad Retirement Act and the Guffey Coal Act had been redrafted so as to eliminate their respective constitutional defects.[236] By contrast, the Securities Act had been drafted "with its constitutionality carefully kept in view," and had survived constitutional challenge.[237] As Senator Wheeler put it, "Federal laws should be more carefully drawn and more carefully presented to the Supreme Court than some have been; and if they had, we might have had a different result from the Court itself. I agree with Carter Glass that what we need more than anything else is not an addition to the Supreme Court but a new Attorney General."[238] One witness surmised, "Congress has all the power needed to pass any necessary legislation."[239] It was a "sad mistake," Senator O'Mahoney agreed, to "imagine that there can be no New Deal legislation without" the president's Court bill. The Constitution needed "no amendment to give Congress substantive power to do the things that ought to be done."[240] It was, testified Erwin Griswold, "hard to see that there is a crisis when we have not fully used the legislative powers that are plainly available."[241]

Conclusion

Members of Congress in the mid-1930s thus proposed and supported a wide variety of alternative means of judicial or constitutional reform both before Roosevelt announced his Court-packing plan and throughout the

struggle over the fate of that initiative. Yet despite this proliferation of ideas for reform, and notwithstanding the serious and extensive discussion and consideration they elicited, not a single one of these bills was so much as reported out of committee, much less enacted into law.

The reasons for their lack of success varied. With respect to some proposals, such as those providing for congressional override of Court decisions, those authorizing or requiring the Court to provide advisory opinions, those altering the Court's voting rules, and those restricting its appellate jurisdiction, forceful criticisms both inspired and reinforced congressional resistance to render them stillborn. The remarks of Senator Andrews suggest that the same may have been true of proposals for limiting judicial tenure; in any event the president's opposition to such proposals, expressed to Senator O'Mahoney, was dispositive. Proposals for mandatory retirement enjoyed broader support, but the president's dogged insistence on his own plan foreclosed the possibility of their adoption. Only Sumners' bill providing secure pensions for retired justices, which was not opposed by Roosevelt, enjoyed much chance of passage at the first session of the Seventy-Fifth Congress. And that bill, which induced Justices Van Devanter and Sutherland to enter their longed-for retirements, gave the president two appointments in rapid succession and, by January 1938, a secure majority of justices whose jurisprudence was more congenial to the New Deal.[242]

The proliferation of alternative reform proposals early in 1937 raises questions about the motivations of those who put them forward. In many instances, one can at most speculate. Some, no doubt, sincerely believed in their proposals as a matter of principle. Wheeler, who insisted that perceived problems with constitutional interpretation be addressed through constitutional amendment, had endorsed a congressional-override measure as early as 1924, when he was running as the vice-presidential candidate on the Progressive ticket with Robert M. LaFollette, Sr., and when Republicans still held majorities in both Houses of Congress.[243] Others who supported Wheeler's proposal may have sincerely agreed with him. Norris, who likewise sincerely believed that there was a structural problem with the system of judicial review, maintained that either it needed to be made more difficult for the Court to invalidate legislation,[244] or else that it needed to be made easier for the people to amend the Constitution when they were dissatisfied with the Court's interpretation.[245] Others, including both members of Congress and ordinary citizens polled by Gallup,[246] apparently genuinely believed that it was good policy to require justices to retire at a certain age, just as many elsewhere in the private and public sectors were required to do. The same sincerity likewise probably motivated many who favored limitations on judicial tenure, or an amendment requiring the Court to provide advisory opinions.

Animated by the passions of the moment, some members of Congress may have sincerely supported one or more measures to address what they perceived as problems with the Supreme Court's interpretation of the Constitution, but thought better of it after deliberation, reflection, and sober second thought. Still other members of Congress may have embraced one or more alternative proposals in part sincerely and in part as a matter of expediency, as an effort to head off the more drastic Court-packing proposal with more modest reforms.[247] Others may, as Roosevelt charged, have been proposing alternatives only as a matter expediency, with neither genuine hope nor expectation that they actually would come to fruition.[248]

But the temporal distribution of proposals for Court reform is suggestive. Put to one side for the moment the president's February 5 proposal for Court enlargement, proposals

to enlarge the powers of the federal government or to relax the constraints of the Due Process Clauses, and proposals to make it easier to amend the Constitution. Putting such proposals to one side, between the opening of the Seventy-Fifth Congress on January 3 and the introduction of the Ashurst-Logan-Hatch compromise Court-enlargement substitute on July 6,[249] members of Congress introduced approximately forty-eight resolutions, bills, or amendments proposing some type of Supreme Court reform. Only sixteen of those proposals[250] were introduced on or after March 29, the date on which the Court upheld the Washington State minimum wage statute.[251] Six of those were variations on the Roosevelt's Court-enlargement bill designed to make it more appealing and thus to help save face for the president.[252] Of the remaining ten, only seven[253] were introduced after the Court's decisions upholding the National Labor Relations Act on April 12.[254] Only five[255] of these were introduced after the announcement of Justice Van Devanter's retirement on May 18,[256] and only two[257] were introduced after the decisions upholding the Social Security Act on May 24.[258] Meanwhile, Roosevelt continued well into July strenuously to pursue the enactment of legislation enlarging the Court's membership.

The dwindling number of alternative proposals for Court reform during this period suggests that the diminishing congressional appetite for Court reform was not confined to the president's proposal. Throughout this period, the Court's decisions and Justice Van Devanter's retirement announcement helped to consolidate opposition to Roosevelt's proposal.[259] The precipitous decline in alternative proposals suggests a more general diminution in congressional enthusiasm for Court reform. Indeed, it appears that for some—perhaps many—of the participants in the Court-packing struggle, the debate may never really have been about the optimal size of the Supreme Court, or the optimal voting rule on the Court, or the optimal retirement age for justices, or the optimal duration of judicial tenure, or the optimal rule for amendment of the Constitution, or any other such ostensibly "neutral principle" of constitutional or institutional design. It seems instead that it may have been only about the outcomes in cases decided by the Supreme Court.

ENDNOTES

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[1] S. 1392 (75-1), 81 Cong. Rec. 6740 (1937).

[2] *See, e.g.*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating New York State's minimum wage statute for women); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the National Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating the Frazier-Lemke Farm Debt Relief Act of 1934); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act ("NIRA")); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating the "Hot Oil" provisions of NIRA).

[3] Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court 203–05, 260, 328, 347–48, 381–82 (2010); Burt Solomon, FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy 87–88, 90 (2009); Marian C. McKenna, Franklin D. Roosevelt and the Great Constitutional War: The Court-Packing Crisis of, at 248–52, 440–41 (2002); Leonard Baker, Back to Back: The Duel between FDR and the Supreme Court 9–10 (1967); Joseph Alsop & Turner Catledge, The 168 Days 28–29 (1938); Laura Kalman, FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism 30–31, 40, 43, 53, 56, 83, 86, 111, 115-18, 130, 175, 190, 198 (2022); *see especially id*. at 63–70 (discussing Warner Gardner's Justice Department memorandum analyzing various possibilities). Compare *id*. at 36, 56, 124, 127–29, 131–32, 155–56, 346 n.102 (briefly discussing some objections to proposed alternatives).

[4] Solomon, FDR v. The Constitution, 141, 197–98; Baker, Back to Back, 149–52; Alsop & Catledge, The 168 Days, 120–24, 177–78.

[5] Shesol, Supreme Power, 383–85, 390–94, 417–21; McKenna, Franklin D. Roosevelt and the Great Constitutional War, 356–406; Kalman, FDR's Gambit, 145–66, 173–74, 184–87, 190.

[6] *See, e.g.*, Presidential Comm'n on the Supreme Ct. of the U.S., Final Report (2021).

[7] Barry Cushman, *Court-Packing and Compromise*, 29 Const. Com. 1, 10–17 (2013).

[8] H.R. 10362 (74-2), 80 Cong. Rec. 632 (1936).

[9] H.R. 10102 (74-2), 80 Cong. Rec. 298 (1936).

[10] See Cushman, *Court-Packing and Compromise*, 4–6, 8–9.

[11] S. 1378 (75-1), 81 Cong. Rec. 883 (1937). Nevada Democratic Senator Key Pittman wrote Attorney General Homer Cummings on February 8 urging an eleven-justice compromise. KALMAN 112.

[12] 81 Cong. Rec. 3505 (1937); 81 Cong. Rec. 4229 (1937).

[13] S.J. Res. 100 (75-1), 81 Cong. Rec. 2138 (1937); S. 2352 (75-1), 81 Cong. Rec. 4224 (1937). Andrews' joint resolution would have provided for a Court consisting of "a Chief Justice and one Associate Justice appointed from the territory of each of the circuit courts of appeals," which at the time numbered ten.

[14] Robert C. Albright, *Judiciary Committee to Meet Today; Garner Concedes Defeat*, Wash. Post, July 22, 1937, 1, 24.

[15] 81 Cong. Rec. 3575 (1937).

[16] S.J. Res. 143 (75-1), 81 Cong. Rec. 4224 (1937). McAdoo's proposal was rejected by a unanimous vote of the Judiciary Committee on May 18. *Van Devanter Retires at 78*, N.Y. Herald Tribune, May 19, 1937, 1.

[17] 81 Cong. Rec. 4332 (1937).

[18] Cushman, *Court-Packing and Compromise*, 2, 5–9, 13–14, 26.

[19] H.J. Res. 265 (75-1), 81 Cong. Rec. 1992 (1937); H.J. Res. 277 (75-1), 81 Cong. Rec. 2185 (1937); H.J. Res. 293 (75-1), 81 Cong. Rec. 2731 (1937); H.J. Res. 303 (75-1), 81 Cong. Rec. 2933 (1937); H.J. Res. 307 (75-1), 81 Cong. Rec. 3057 (1937); H.J. Res. 312 (75-1), 81 Cong. Rec. 3116 (1937); S.J. Res. 86 (75-1), 81 Cong. Rec. 1273 (1937); H.J. Res. 360 (75-1), 81 Cong. Rec. 4476 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937). In a Gallup poll taken in April of 1938, 61% of those with opinions said that they would "favor an amendment to the Constitution to fix the number of justices at nine." 1 George H. Gallup, The Gallup Poll: Public Opinion, 1935–1971, 104–05 (1972). *Accord*, *Reorganization of the Federal Judiciary, Hearings Before the Committee on the Judiciary, United States Senate, Seventy-Fifth Congress, First Session* (1937) (hereafter "Hearings") at 527 (statement of E.E. Everson, President of the Farmers' Union); *id*. at 700 (statement of Fred Brenckman, Washington Representative, National Grange); *id*. at 988 (statement of Rev. Anson Phelps Stokes, Canon of Washington Cathedral); *id*. at 1279 (statement of New York lawyer Frederic R. Coudert); *id*. at 1350, 1352 (statement of Dr. C.P. Patterson, Head of the Government Department, University of Texas at Austin); *id*. at 1940 (statement of Margaret Hopkins Worrell, President General, The Wheel of Progress, National Patriotic Instructor and National Legislative Chairman, Ladies of the Grand Army of the Republic).

[20] *See, e.g.*, Hearings, at 485–86, 508 (statement of Senator Burton Wheeler); *id*. at 540, 543 (statement of Raymond Moley); *id*. at 685 (statement of William Hirth, Publisher of *The Missouri Farmer*); *id*. at 716 (statement of Young B. Smith, Dean, Columbia University Law School); *id*. at 809–10 (statement of John Miller, President, National Cooperative Council); *id*. at 885–886, 892 (statement of Henry M. Bates, Dean, University of Michigan School of Law); *id*. at 1038 (statement of Oswald Garrison Villard, Associate Editor, *The Nation* magazine); *id*. at 1044, 1064 (statement of New York lawyer Charles C. Burlingham); *id*. at 1078 (statement of James Truslow Adams); *id*. at 1159 (statement of Fred Taylor Wilson); *id*. at 1173 (statement of Judge J.S. Manning of North Carolina); *id*. at 1200 (statement of New York lawyer Siegfried F. Hartman); *id*. at 1251 (statement of Professor William M. Cain, Professor of Law, University of Notre Dame); *id*. at 1272, 1275 (Coudert); *id*. at 1288 (statement of William E. Masterson, Dean, University of Missouri School of Law); *id*. at 1325 (statement of Houston attorney John H. Crocker): *id*. at 1361 (statement of L.L. James, Chairman of the Supreme Court Defense Association of Texas); *id*. at 1372 (statement of Austin, Texas attorney James P. Hart); id at 1378 (statement of U.S. District Judge John Clark Knox); *id*. at 1413 (statement of Rev. Linus Lilly, S.J., Professor of Law, St. Louis University); *id*. at 1449 (statement of Paul Shipman Andrews, Dean, Syracuse University College of Law); *id*. at 1458, 1478 (statement of Sylvester C. Smith, Chairman of the Special Committee to Present the Views of the American Bar Association on the President's Proposals with Reference to the Supreme Court); *id*. at 1661–62 (statement of Alan M. Limburg); *id*. at 1665–66, 1669 (statement of William Alfred Eddy, President, Hobart & William Smith Colleges); id. at 1684 (statement of Col. Frederick Hobbes Allen, Constitutional Democracy Association); *id*. at 1761 (statement of L.J. TePoel, Dean, Creighton College of Law); *id*. at 1840, 1849 (statement of J.F. Smith, Chairman, Democratic Central Committee in Connecticut); *id*. at 1932–33 (statement of Massachusetts Institute of Technology President Karl K. Compton); *id*. at 1936 (statement of Bowdoin College President Kenneth C. M. Sills); *id*. at 1942 (statement of Houston Attorney James E. Kilday).

[21] *See, e.g.*, Hearings, at 395 (Sen. Burke quoting a pamphlet written by Professor Robert Cushman); *id*. at 513 (Sen. Wheeler); *id*. at 543, 587–88 (Moley); *id*. at 619 (statement of Princeton University President H.W. Dodds); *id*. at 659, 665 (statement of Louis J. Taber, Master of the National Grange); *id*. at 741, 749 (Young B. Smith); *id*. at 862 (Dorothy Thompson); *id*. at 895–96, 899, 906, 912 (Bates); *id*. at 919 (statement of John T. Flynn, Writer and Economist); *id*. at 985 (Stokes); id at 1034, 1036 (Villard); *id*. at 1044 (Burlingham); *id*. at 1080, 1098, 1104 (Adams); *id*. at 1134, 1137, 1140, 1154 (statement of Ignatius M. Wilkinson, Dean, Fordham University School of Law); *id*. at 1242 (statement of Rev. W.B. Harvey, Pastor, Trinity Baptist Church, Oklahoma City); *id*. at 1270 (Memorial of the New York City Bar Association ["NYC Bar Assn."]); *id*. at 1274 (Coudert); *id*. at 1403 (statement of Bishop Edwin Holt Hughes, Methodist Episcopal Church, Washington, D.C.); *id*. at 1446 (Andrews); *id*. at 1498–99 (statement of Paul F. Hannah, Secretary of the Junior Bar Conference Section of the American Bar Association); *id*. at 1728 (statement of Edward T. Lee, Dean, John Marshall Law School); *id*. at 1760, 1766, 1776 (TePoel); *id*. at 1929 (statement of Henry W. Taft); *id*. at 1932 (statement of Dartmouth College President Ernest M. Hopkins); *id*. at 1932 (Compton); *id*. at 1936 (Sills); *id*. at 1937 (statement of Yale University President James R. Angell); *id*. at 1938 (statement of Mrs. Vinton Earl Sisson, National Chairman, National Society of the Daughters of the American Revolution); *id*. at 1974 (American Bar Association ["ABA"], Answer to the Testimony in Behalf of the President's Plan); 81 Cong. Rec. 7053–54 (1937) (Sen. Bailey); 81 Cong. Rec. App. 1175 (1937) (Sen. Copeland); *Three Senators Go Against Court Bill, Carry Committee*, N.Y. Times, Apr. 29, 1937, 1, 10 (Sen. O'Mahoney); Arthur Sears Henning, *Senators from Michigan Fight Court Packing*, Chicago Daily Tribune, Mar. 3, 1937, 1, 8 (Sen. Vandenberg); *Will Ask President to Yield on Court*, N.Y. Times, May 12, 1937, 5 (Sen. Shipstead); *The Big Debate*, Time, Mar. 1, 1937, 10, 11; 81 Cong. Rec. 6979–80 (Sen. Wheeler).

[22] Hearings, at 1776 (TePoel).

[23] Hearings, at 1276.

[24] Hearings, at 1288.

[25] Hearings, at 1082; *see also* James Truslow Adams to George W. Norris, July 14, 1937, Box 119, Norris MSS, LC.

[26] *See, e.g.*, Hearings, at 512 (Sen. Wheeler); *id*. at 546–47 (Moley); *id*. at 618–21, 626, 633–34, 637–39 (Dodds); *id*. at 659 (Taber); *id*. at 702–03 (Brenckman); *id*. at 717, 746 (Young B. Smith); *id*. at 768, 806, 808 (statement of Professor Erwin Griswold, Harvard Law School); *id*. at 826–27, 851–53 (statement of Edwin Borchard, Professor of Constitutional Law, Yale University); *id*. at 862 (Thompson); *id*. at 885–86, 891–93, 895, 897, 912 (Bates); *id*. at 919, 941 (Flynn); *id*. at 948–49 (statement of Chicago lawyer Walter F. Dodd); *id*. at 984–86 (Stokes); *id*. at 1010, 1017, 1026 (statement of Frank H. Sommer, Dean, New York University School of Law); *id*. at 1030, 1032, 1037 (Villard); *id*. at 1041, 1044, 1046, 1050, 1061, 1066, 1071–72 (Burlingham); *id*. at 1080, 1112 (Adams); *id*. at 1131–34, 1140 (Wilkinson); *id*. at 1175–76, 1180 (Manning); *id*. at 1251–52 (Cain); *id*. at 1267, 1269–70 (NYC Bar Assn.); *id*. at 1271–73, 1275–76 (Coudert); *id*. at 1285–87, 1292 (Masterson); *id*. at 1345–46 (Patterson); *id*. at 1400–01 (statement of G.M. Bruce, Secretary, Luther Theological Seminary, St. Paul, Minn.); *id*. at 1415–16, 1424 (Lilly); *id*. at 1431 (statement of Edward E. Kennedy, Farmer's Union); *id*. at 1460–63 (Sylvester C. Smith); *id*. at 1498–1500 (Hannah); *id*. at 1542–43 (statement of Bishop James E. Freeman); *id*. at 1666–67, 1669 (Eddy); *id*. at 1673–76, 1682 (statement of Dr. Katherine J. Gallagher, Professor of History, Goucher College); *id*. at 1698, 1703–04 (statement of Rabbi William F. Rosenblum, Temple Israel, New York); *id*. at 1707–08, 1716 (statement of Francis H. Kinnicutt, President, Allied Patriotic Societies, Inc.); *id*. at 1722–26, 1729 (Lee); *id*. at 1735, 1748–49 (statement of Louis B. Ward); *id*. at 1759–62, 1775–76 (TePoel); 1778, 1780–82, 1784 (statement of Catherine Curtis); *id*. at 1806–09, 1812–13, 1815, 1819 (statement of Former Ambassador Jacob Gould Schurman); *id*. at 1824 (statement of John W. Wayland); *id*. at 1841–42, 1844, 1846 (J.F. Smith); *id*. at 1918, 1921 (Resolutions of the News York County Lawyers' Association); *id*. at 1920–21 (Joint Report of the Committee on Federal Legislation and the Committee on the Federal Courts, New York Lawyer's Association); *id*. at 1922–23 (Letter of Goldthwaite H. Dorr to William S. Bennett, Chairman, Committee on Federal Legislation, New York Lawyers' Association); *id*. at 1924–25, 1929–30 (Taft); *id*. at 1933 (statement of Brown University President Henry M. Wriston); *id*. at 1934–35 (statement of Tufts College President John A. Cousins); *id*. at 1936 (Sills); *id*. at 1939 (Resolution of the Society of Colonial Wars in the District of Columbia); *id*. at 1940 (Resolution of the Washington Preachers' Meeting of the Methodist Episcopal Church on the Supreme Court ["Washington Preachers"]); *id*. at 1941 (Resolution of the Philadelphia Conference of the Methodist Episcopal Church ["Philadelphia Conference"]); *id*. at 1954 (statement of Boston Attorney Edward F. McClennen); *id*. at 1965–69, 1971–72, 1976, 1979–80, 1982, 1986, 2013–16 (ABA). Mr. Schurman characterized the creation of six new justiceships to be filled by one president "a usurpation of the future by the present." *Id*. at 1809, 1815, 1817; *see also* S. Rept. 711 (75-1) at 9, 13; 81 Cong. Rec. 6798 (Sen. Hatch); *id*. at 7045, 4047 (Sen. O'Mahoney); *id*. at 7051, 7053 (Sen. Bailey). This charge was widely echoed in contemporary publications; *see, e.g.*, Warren Olney, Jr.,

President's Proposal to Add Six New Members to the Supreme Court, 23 A.B.A. J. 237 (1937).

[27] *See, e.g.*, Hearings, at 1137–39, 1143, 1149 (Wilkinson); *id*. at 1219 (Hartman); *id*. at 1272 (Coudert); *id*. at 1415–16 (Lilly); *id*. at 1718, 1728 (Lee); *id*. at 1967 (ABA); *see also* George Wharton Pepper, *Plain Speaking: The President's Case Against the Supreme Court*, 23 A.B.A. J. 247, 248 (1937) ("to give a Justice the alternative of resignation or of having his vote nullified by an understudy is the equivalent of removal"). The report of the Senate Judiciary Committee maintained that the bill's effect was "to provide a forced retirement" of elderly justices, and harbored no doubt "about the constitutional impropriety of such a course." S. Rept. 711 (75-1), at 8–9.

[28] *See, e.g.*, Hearings, at 526–27 (Everson); *id*. at 540, 586–87 (Moley); *id*. at 620–21 (Dodds); *id*. at 702–03, 710 (Brenckman); *id*. at 767 (Griswold); *id*. at 827, 851–53 (Borchard); *id*. at 862 (Thompson); *id*. at 1011, 1013–14, 1027 (Sommer); *id*. at 1037 (Villard); *id*. at 1062, 1064–65 (Burlingham); *id*. at 1079, 1112 (Adams); *id*. at 1267, 1270 (NYC Bar Assn.); *id*. at 1286–87 (Masterson); *id*. at 1345 (Patterson); *id*. at 1415–16, 1424 (Lilly); *id*. at 1461 (Sylvester C. Smith); *id*. at 1504 (Hannah); *id*. at 1677–78 (Gallagher); *id*. at 1760, 1763 (TePoel); *id*. at 1806 (Schurman); *id*. at 1929 (Taft); 81 Cong. Rec. 6971 (Sen. Wheeler); *id*. at 7053 (Sen. Bailey).

[29] *See, e.g.*, Hearings, at 495, 497 (Sen. Wheeler); *id*. at 588 (Moley); *id*. at 594 (statement of Representative William Lemke); *id*. at 622 (Dodds); *id*. at 659, 665, 667 (Taber); *id*. at 697, 709–10 (Brenckman); *id*. at 744 (Young B. Smith); *id*. at 766 (Griswold); *id*. at 846, 849 (Borchard); *id*. at 918 (Flynn); *id*. at 947–48 (Dodd); *id*. at 984–85, 988–89 (Stokes); *id*. at 1004–05 (statement of John A. McSparran); *id*. at 1010–11, 1013–14, 1017–18, 1026–27 (Sommer); *id*. at 1036 (Villard); *id*. at 1046, 1065 (Burlingham); *id*. at 1079, 1097–98, 1108–09 (Adams); *id*. at 1123–24, 1126–27 (statement of James O. Monroe); *id*. at 1133–34, 1141 (Wilkinson); *id*. at 1185 (Manning); *id*. at 1218 (Hartman); *id*. at 1267, 1270 (NYC Bar Assn.); *id*. at 1274–75 (Coudert); *id*. at 1286, 1290 (Masterson); *id*. at 1346, 1351–52 (Patterson); *id*. at 1403 (Hughes); *id*. at 1461 (Sylvester C. Smith); *id*. at 1499, 1502–03 (Hannah); *id*. at 1542 (Freeman); *id*. at 1764–65 (TePoel); *id*. at 1926 (Taft); *id*. at 1933 (Wriston); *id*. at 1937 (Angell); *id*. at 1976, 2011, 2016 (ABA); 81 Cong. Rec. 6971 (Sen. Connally, Sen. Wheeler); 81 Cong. Rec. 6966, 6974, 6978, 6980 (Sen. Wheeler); 81 Cong. Rec. 7022, 7024 (Sen. McCarran); *id*. at 7051–52 (Sen. Bailey); *see also* Ruby R. Vale, *Observations on the Proposals of the President to Change the Personnel of the Judges*, 41 Dick. L. Rev. 195 (1937); Louis A. Lecher, *The President's Supreme Court Plan*, 23 A.B.A. J. 242, 243 (1937); James T. Pugh, *Mr. Pugh's Article*, 22 Mass. L.Q. 25–29 (1937) (arguing that the bill's improper purpose rendered it beyond the legitimate power of Congress).

[30] *See, e.g.*, Hearings, at 512 (Sen. Wheeler); *id*. at 602, 607 (Rep. Lemke); *id*. at 715 (Brenckman); *id*. at 717–20, 741, 745 (Young B. Smith); *id*. at 768 (Griswold); *id*. at 912–13 (Bates); *id*. at 1055, 1059 (Burlingham); *id*. at 1078 (Adams); *id*. at 1271 (Coudert); *id*. at 1499–1500 (Hannah); *id*. at 1941 (Resolution of the Wilmington Annual Conference of the Methodist Episcopal Church ["Wilmington Conference"]); *id*. at 2011 (ABA); 81 Cong. Rec. 1989–90 (1937) (Rep. Cox); *id*. at 6914 (Sen. Tydings); *id*. at 6969–70 (Sen. Wheeler); *id*. at 7052–53 (Sen. Bailey); Merlo J. Pusey, *The Court Issue*, Wash. Post, Feb. 19, 1937, 9; Vale, *Observations*, 195.

[31] *See, e.g.*, Hearings, at 483, 495, 500–05, 508, 511–12, 516 (Sen. Wheeler); *id*. at 519–20 (Everson); *id*. at 547–48, 554–55, 558–61, 563, 565, 587, 589 (Moley); *id*. at 602, 611–12 (Rep. Lemke); *id*. at 618, 620, 623, 629, 635–36, 638, 650, 652 (Dodds); *id*. at 657, 660 (Taber); *id*. at 671, 679 (statement of Professor Theodore Graebner); *id*. at 697–98, 715 (Brenckman); *id*. at 716, 720–21, 742, 744, 749 (Young B. Smith); *id*. at 808 (Griswold); *id*. at 825–27, 830, 838, 840, 847–48 (Borchard); *id*. at 868–69, 881–83 (Thompson); *id*. at 891, 895–96 (Bates); *id*. at 917, 944–45 (Flynn); *id*. at 949–50, 977 (Dodd); *id*. at 986 (Stokes); *id*. at 1023–25 (Sommer); *id*. at 1031 (Villard); *id*. at 1044–45, 1066–67 (Burlingham); *id*. at 1078, 1080, 1082, 1086, 1089, 1091, 1111–13 (Adams); *id*. at 1141, 1157 (Wilkinson); *id*. at 1175 (Manning); *id*. at 1207–08 (Hartman); *id*. at 1255 (Cain); *id*. at 1274 (Coudert); *id*. at 1287–88, 1297 (Masterson); *id*. at 1381 (Knox); *id*. at 1444, 1453 (Andrews); *id*. at 1463, 1479 (Sylvester C. Smith); *id*. at 1540, 1547 (Freeman); *id*. at 1669 (Eddy); *id*. at 1671, 1674, 1683–84 (Gallagher); *id*. at 1700 (Rosenblum); *id*. at 1722, 1730 (Lee); *id*. at 1775 (TePoel); *id*. at 1817 (Schurman); *id*. at 1844 (J.F. Smith); *id*. at 1924 (Taft); *id*. at 1933 (Wriston); *id*. at 1934 (Cousins); *id*. at 1936 (Sills); *id*. at 1937 (Angell); *id*. at 1938 (Sisson); *id*. at 1940 (Washington Preachers); *id*. at 1941 (Wilmington Conference); *id*. at 1941 (Philadelphia Conference); *id*. at 1971–74, 1977, 1986–87 (ABA); 81 Cong. Rec. 6914 (1937) (Sen. Tydings); *id*. at 6969–70 (Sen. Wheeler); *id*. at 7052 (Sen. Bailey); *see also Trend Against Court Proposal is Shown in Poll of Senators*, N.Y. Times, Feb. 10, 1937, 1, 15 (Sen. Capper, Sen. Holt, Sen. Bailey); *Copeland's Statement Opposing Court Plan*, N.Y. Times, Feb. 21, 1937, 24 (Sen. Copeland); Merlo J. Pusey, *The Court Issue*, Wash. Post, Feb. 19, 1937, 9; *Professor Lists Plans to Better Court System*, Wash. Post, Mar. 10, 1937, 7 (Dr. Herbert Wright, Chair, Department of Politics, Catholic University); Charles P. Taft, "*More Than This Would Be Revolution,*" Saturday Evening Post, Apr. 10, 1937, 18, 112; Frederick H. Stinchfield, *The Proposals as to the Supreme Court*, 11 Fla. L.J. 135,

140–41 (1937); George G. Bogert, *A Law Teacher's View of the President's Plan*, 23 A.B.A. J. 251, 252–53 (1937).

[32] *See, e.g.*, Hearings, at 853 (Borchard); *id*. at 1012 (Sommer); *id*. at 1176, 1179 (Manning); *id*. at 1283 (Coudert); *id*. at 1678–79 (Gallagher); 1704 (Rosenblum); 81 Cong. Rec. 1990 (1937) (Rep. Cox); *id*. at 6888 (Sen. Connally); 81 Cong. Rec. 6969, 6971, 6972 (Sen. Wheeler).

[33] Hearings, at 1062 (Burlingham); *id*. at 1276 (Coudert); *id*. 1380 (Knox).

[34] Hearings, at 650 (Dodds); 81 Cong. Rec. 6970 (1937) (Sen. Wheeler).

[35] *See, e.g.*, Hearings, at 486, 507 (Sen. Wheeler); *id*. at 540, 556, 563, 565, 589 (Moley); *id*. at 617–18 (Dodds); *id*. at 716, 719, 742, 744, 749 (Young B. Smith); *id*. at 764, 801 (Griswold); *id*. at 888, 897 (Bates); *id*. at 919 (Flynn); *id*. at 1029, 1035 (Villard); *id*. at 1200 (Hartman); *id*. at 1378 (Knox); *id*. at 1934 (statement of Wesleyan University President James L. McConaughy); 81 Cong. Rec. 2146, 6979 (Sen. Wheeler); *see also* 81 Cong. Rec. 7376 (speech by Sen. Logan listing senators who opposed the President's bill but nevertheless favored some alternative measure).

[36] Hearings, at 1803 (statement of Dorothy Frooks). *Accord*, *Fight Intensified*, N.Y. Times, Feb. 14, 1937, 1, 28 (Sen. Bailey).

[37] *Editorial Article*, Wash. Post, Feb. 20, 1937, 8.

[38] Turner Catledge, *Court Debate Looses Flood of Amendments*, N.Y. Times, Mar. 21, 1937, 72. Even in March of 1936 Max Lerner described proposals "for dealing with the court" as "thick as blackberries." Max Lerner, *The Fate of the Supreme Court*, Nation, Mar. 25, 1936, 379.

[39] *See, e.g.*, S.J. Res. 8 (75-1), 81 Cong. Rec. 71 (1937); S. J. Res. 11 (75-1), 81 Cong. Rec. 71 (1937); S.J. Res. 92 (75-1), 81 Cong. Rec. 1585 (1937); S.J. Res. 117 (75-1), 81 Cong. Rec. 2803 (1937); H.J. Res. 17 (75-1), 81 Cong. Rec. 37 (1937); H.J. Res. 18 (75-1), 81 Cong. Rec. 37 (1937); H.J. Res. 23 (75-1), 81 Cong. Rec. 37 (1937); H.J. Res. 30 (75-1), 81 Cong. Rec. 38 (1937); H.J. Res. 64 (75-1), 81 Cong. Rec. 39 (1937); H.J. Res. 93 (75-1), 81 Cong. Rec. 140 (1937); H.J. Res. 99 (75-1), 81 Cong. Rec. 140 (1937); H.J. Res. 103 (75-1), 81 Cong. Rec. 170 (1937); H.J. Res. 162 (75-1), 81 Cong. Rec. 504 (1937); H.J. Res. 237 (75-1), 81 Cong. Rec. 1451 (1937); H.J. Res. 256 (75-1), 81 Cong. Rec. 1770 (1937); H.J. Res. 258 (75-1), 81 Cong. Rec. 1770 (1937); H.J. Res. 374 (75-1), 81 Cong. Rec. 4896 (1937); *see also* H.J. Res. 248 (75-1), 81 Cong. Rec. 1636 (1937) (calling for broad construction of congressional powers). Such proposals had predecessors in the preceding Congresses. *See, e.g.*, S.J. Res. 185 (74-2), 80 Cong. Rec. 190 (1936); S.J. Res. 221 (74-2), 80 Cong. Rec. 2900 (1936); S.J. Res. 225 (74-2), 80 Cong. Rec. 3300 (1937); S.J. Res. 249 (74-2), 80 Cong. Rec. 5069 (1936); S.J. Res. 285 (74-2), 80 Cong. Rec. 9191 (1936); H.J. Res. 429 (74-2), 80 Cong. Rec. 153 (1936); H.J. Res. 440 (74-2), 80 Cong. Rec. 183 (1936); H.J. Res. 446 (74-2), 80 Cong. Rec. 298 (1936); H.J. Res. 454 (74-2), 80 Cong. Rec. 412 (1936); H.J. Res. 471 (74-2), 80 Cong. Rec. 1143 (1936); H.J. Res. 617 (74-2), 80 Cong. Rec. 8763 (1936); H.J. Res. 618 (74-2), 80 Cong. Rec. 8763 (1936); H.J. Res. 620 (74-2), 80 Cong. Rec. 9015 (1936); H.J. Res. 621 (74-2), 80 Cong. Rec. 9128 (1936); H.J. Res. 629 (74-2), 80 Cong. Rec. 9688 (1936); H.J. Res. 637 (74-2), 80 Cong. Rec. 10054 (1936); S.J. Res. 3 (74-1), 79 Cong. Rec. 104 (1935); H.J. Res. 29 (74-1), 79 Cong. Rec. 57 (1935); H.J. Res. 48 (74-1), 79 Cong. Rec. 57 (1935); H.J. Res. 55 (74-1), 79 Cong. Rec. 57 (1935); H.J. Res. 304 (74-1), 79 Cong. Rec. 8492 (1935); H.J. Res. 316 (74-1), 79 Cong. Rec. 8920 (1935); H.J. Res. 323 (74-1), 79 Cong. Rec. 9220 (1935); H.J. Res. 327 (74-1), 79 Cong. Rec. 9506 (1935); H.J. Res. 139 (73-1), 77 Cong. Rec. 1156 (1933); H.J. Res. 145 (73-1), 77 Cong. Rec. 1240 (1933); *see also* Lloyd K. Garrison, *The Constitution and Social Progress*, 10 Tul. L. Rev. 333 (1936) (proposing an amendment enhancing federal power); Charles Bunn, *Production, Prices, Incomes, and the Constitution*, 11 Wis. L. Rev. 313, 321–22 (1936) (same); Charles E. Clark, *The Supreme Court and the N.R.A.*, 83 New Republic 120, 122 (1935) (same).

[40] *See, e.g.*, S.J. Res. 22 (75-1), 81 Cong. Rec. 113 (1937); S.J. Res. 26 (75-1), 81 Cong. Rec. 113 (1937); S.J. Res. 134 (75-1), 81 Cong. Rec. 3575 (1937); H.J. Res. 166 (75-1), 81 Cong. Rec. 542 (1937); H.J. Res. 327 (75-1), 80 Cong. Rec. 3673 (1937); *see also* H.R. 299 (75-1), 81 Cong. Rec. 31 (1937) and H.R. 6629 (75-1), 81 Cong. Rec. 3813 (1937) (prescribing ratification by convention for all subsequent constitutional amendments); *Opponents of Court Plan Draft Counter-Proposals*, L.A. Times, June 28, 1937, 5; Osmond K. Fraenkel, *What Can Be Done about the Constitution and the Supreme Court?*, 37 Colum. L. Rev. 212, 225–26 (1937) (proposing such an amendment); Lynn I. Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 8 Rocky Mt. L. Rev. 161, 185 (1936) (supporting such an amendment). Such proposals similarly had been anticipated in the preceding Congresses. *See, e.g.*, S.J. Res. 186 (74-2), 80 Cong. Rec. 190 (1936); S.J. Res. 15 (74-1), 79 Cong. Rec. 139 (1935); S. 198 (74-1), 79 Cong. Rec. 103 (1935); H.J. Res. 34 (74-1), 79 Cong. Rec. 57 (1935); H.J. Res. 196 (74-1), 79 Cong. Rec. 3066 (1935); H.R. 2900 (74-1), 79 Cong. Rec. 125 (1935); H.R. 6463 (74-1), 79 Cong. Rec. 3066 (1935); S.J. Res. 69 (73-2), 78 Cong. Rec. 305 (1934); H.J. Res. 307 (73-2), 78 Cong. Rec. 5469 (1934); H.R. 9869 (73-2), 78 Cong. Rec. 10768 (1934); S.J. Res. 44 (73-1), 77 Cong. Rec. 2064 (1933); H.J. Res. 12 (73-1), 77 Cong. Rec. 154 (1933); H.J. Res. 15 (73-1), 77 Cong. Rec. 154 (1933); H.J. Res. 47 (73-1), 77 Cong. Rec. 155 (1933). For opposition to such proposals, see,

e.g., Editorial, *Changing the Constitution*, L.A. Times, Jan. 30, 1938, A4.

[41] H.J. Res. 509 (74-2), 80 Cong. Rec. 3202 (1936); H.J. Res. 565 (74-2), 80 Cong. Rec. 5321 (1936).

[42] H.J. Res. 190 (75-1), 81 Cong. Rec. 821 (1937).

[43] S.J. Res. 80 (75-1), 81 Cong. Rec. 1273 (1937).

[44] H.J. Res. 250 (75-1), 81 Cong. Rec. 1710 (1937); H.J. Res. 404 (75-1), 81 Cong. Rec. 5508 (1937).

[45] S.J. Res. 118 (75-1), 81 Cong. Rec. 2803 (1937).

[46] H.J. Res. 305 (75-1), 81 Cong. Rec. 2291 (1937). Editors at *The Commonweal* likewise praised the Wheeler-Bone amendment as one that "safeguards fundamental rights and eliminates the needs for too many additional revisions of the Constitution." Editorial, Commonweal, Mar. 26, 1937, 595.

[47] Charles A. Beard, *Rendezvous with the Supreme Court*, 88 New Republic 92, 94 (1936).

[48] Thomas Reed Powell, *The Next Four Years: The Constitution*, 89 New Republic 317, 321 (1937). A congressional override amendment also received support in Morris L. Ernst, The Ultimate Power (1937).

[49] Editorial, *A Program for the Judicial Power*, Nation, Jan. 23, 1937, 89, 90.

[50] Alpheus Thomas Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 85 U. Pa. L. Rev. 659, 676–77 (1937).

[51] Hearings, at 731; *see also* Fraenkel, *What Can Be Done about the Constitution and the Supreme Court?*, 225; Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 180; Ralph R. Martig, *New Glasses for Old Eyes to Use*, 3 L.J. Student B. Ass'n. Ohio St. U. 145, 154 (1937) ("under the terms of the proposed amendment, Congress could (by passing an act twice) alter the Constitution, limit or abolish any department, or change the form of government").

[52] Ralph R. Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 34 Mich. L. Rev., 652 (1936) (quoting Charles Warren, Congress, the Constitution, and the Supreme Court 139 (1925)). Warren offered an extensive critique of the proposal, *id*. 138–77. In 1936 an opponent of the proposal quoted Warren's conclusion at length:

> Each American citizen must consider whether he is willing to trust Congress with such proposed unlimited, uncontrollable, final power, and with the supreme authority to judge the extent of its own power, not only over the rights of individuals but over the rights of the states. He will certainly conclude that rights of liberty, of property and of state sovereignty are more likely to be guarded by a majority of a court than by a majority of a Congress—a Congress which may be swayed at any particular time by political, sectional or class appeal—a Congress which may be influenced 'by the power and wealth of vested interests on one day and by the passing whim of popular passion on another day'—a Congress which may be looking to see the influence of its decisions on party success and personal chances of re-election. He will certainly conclude that if any body of men is to possess final and uncontrolled power of ultimate judgment as to his constitutional rights, and as to the constitutional restriction imposed on the Legislature and Executive, such power can be more safely lodged in Judges not dependent for election on partisan issues in passionate political campaigns but guided only by their conscience and the Constitution, uninfluenced by hope of popular or Executive favor, undisturbed by fear as to their tenure of office, so long as they are honest, and under no obligation to Executive or Congressional desire or dictation.

Silas H. Strawn, *Congress and the Courts*, 11 Ind. L.J. 474, 477–78 (1936) (quoting WARREN, Congress, the Constitution, and the Supreme Court 176).

[53] Howard Lee McBain, *Some Proposals for Altering Judicial Review*, 16 B.U. L. Rev. 874, 882 (1936).

[54] James B. Newman, *Judicial Control under the Federal Constitution*, 14 Tenn. L. Rev. 1, 6 (1935); *see also* Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 180.

[55] Hearings, at 988.

[56] *Ibid*., 776–77.

[57] *Id.*, 1049–50.

[58] James V. Oxtoby, *Power of the Courts to Declare Act of Congress Unconstitutional*, 6 Det. L. Rev. 145, 167–68 (1936).

[59] Carr V. Van Anda, *Dilemmas in Norris Plan*, L.A. Times, Mar. 27, 1937, A4.

[60] *The Big Debate*, Time, Mar. 1, 1937, 10, 12.

[61] Hearings, at 1451–52.

[62] Hearings, at 1451–52. For similar reasons, Professor McBain agreed that the proposal "would lead to endless confusions and complications" in the law. McBain, *Some Proposals for Altering Judicial Review*, 883. Dean Lloyd Garrison of the University of Wisconsin Law School voiced similar objections. Lloyd K. Garrison, *The Form of a Constitutional Amendment*, 27 Am. Lab. Legis. Rev. 11, 12–13 (1937). The proposal also was opposed by Yale Law School Dean Charles Clark, a proponent of Court expansion. Hearings, at 1874.

[63] Arthur Krock, *In Washington: Wheeler-Bone Amendment Derives from T.R.'s Platform*, N.Y. Times, Feb. 26, 1937, 20.

[64] *Excerpts from LaFollette's Address on Court*, Wash. Post, Mar. 9, 1937, 12; William G. Ross, A Muted Fury 194–208 (1994).

[65] In late 1935, Roosevelt himself appeared to favor a constitutional amendment requiring the Court to give advisory opinions on congressional legislation. Roosevelt would have added to the amendment a congressional

override feature, authorizing Congress to re-enact any measure on which the Court had given an adverse advisory opinion after an intervening congressional election. Such reenactment would have purged the statute of its unconstitutionality. 1 The Secret Diary of Harold Ickes: The First Thousand Days 1933–1936 (1954) 467–68, 494–95.

[66] H.J. Res. 317 (74-1), 79 Cong. Rec. 8920 (1935); H.J. Res. 344 (74-1), 79 Cong. Rec. 10907 (1935); H.J. Res. 374 (74-1), 79 Cong. Rec. 12605 (1935); H.J. Res. 132 (75-1), 81 Cong. Rec. 313 (1937). Democratic Representative John H. Tolan of California offered a spirited defense of his proposal, H.J. Res. 317 (74-1), in a coast-to-cast radio address delivered over NBC on July 5, 1935. For the text, see 79 Cong. Rec. 10759–60 (1935). Democratic Representative Oliver H. Cross of Texas also introduced a bill in 1935 that would have required the Attorney General to submit the Court "all legislation, the constitutionality of which is in his opinion doubtful" for an advisory opinion concerning its constitutionality, and for the Court to supply such a written opinion within 90 days thereafter. H.R. 8309 (74-1), 79 Cong. Rec. 8603 (1935).

[67] S.J. Res. 118, 81 Cong. Rec. 2803 (75-1). Senator Bilbo had announced his intention to offer such an amendment in the preceding Congress. 80 Cong. Rec. 9899 (1936).

[68] S. Res. 103 (75-1), 81 Cong. Rec. 2804 (1937).

[69] *See, e.g.*, Hearings, at 1025 (Sommer); *id*. at 1223–24 (Hartman); *see also* E.F. Albertsworth, *Advisory Functions in Federal Supreme Court—A Realistic Study in Judicial Administration*, 23 Geo. L.J. 643, 668–70 (1935) (favoring a constitutional amendment authorizing the Court to issue advisory opinions).

[70] *See, e.g.*, Hearings, at 827, 850–51 (Borchard); *id*. at 1223–24 (Hartman); *id*. at 1448 (Andrews); *see also id*. at 1999 (ABA) ("an advisory system . . . is probably impracticable"). The idea also received an unfavorable reception in New York City newspapers. Note, *The Advisory Opinion and the United States Supreme Court*, 5 Ford. L. Rev. 94, 95 n.8 (1936). For a more favorable assessment, *see id*. at 108–14.

[71] Felix Frankfurter, *Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924).

[72] F.R. Aumann, *The Supreme Court and the Advisory Opinion*, 4 Ohio St. L.J. 21, 42–44 (1938).

[73] Frankfurter,1003.

[74] Aumann 45–46; *see also* Willis S. Siferd, Note, *Proposals to Limit the Power of the Supreme Court in the Seventy-Fourth Congress*, 4 Geo. Wash. L. Rev. 381, 388 (1936).

[75] Aumann 46–48.

[76] Aumann 48. *See also* Siferd, 388.

[77] Aumann 48-49, citing Henry Maine, Popular Government 223 (1885).

[78] Aumann 49, citing, Alexis De Tocqueville, 1 Democracy in America 129.

[79] McBain, *Some Proposals for Altering Judicial Review*, 877–79; *see also* Lynn I. Perrigo, *The Federal Judiciary: An Analysis of Proposed Revisions*, 21 Minn. L. Rev. 481, 488 (1937); Oxtoby, *Power of the Courts to Declare Act of Congress Unconstitutional*, 166–67.

[80] Lerner, *The Fate of the Supreme Court*, 380; *see also* Perrigo, *The Federal Judiciary: An Analysis of Proposed Revisions*, 488; Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 Wis. L. Rev. 313, 317 (1937).

[81] *Attempts to Interfere with Powers of Federal Courts to Declare Laws Unconstitutional Condemned*, 22 A.B.A. J. 740, 742 (1936).

[82] Raymond G. Carroll, *Washingtonia*, Saturday Evening Post, Nov. 23, 1935, 92.

[83] David Lawrence, *The Supreme Court*, 3:24 U.S. News 18, June 17, 1935.

[84] Editorial, *A Specious Shortcut*, Saturday Evening Post, January 11, 1936, 26.

[85] H.R. 7997 (74-1), 79 Cong. Rec. 7343 (1935); H.R. 8054 (74-1), 79 Cong. Rec. 7545 (1935); H.R. 8100 (74-1), 79 Cong. Rec. 7740 (1935); H.R. 8123 (74-1), 79 Cong. Rec. 7781 (1935); H.R. 8168 (74-1), 79 Cong. Rec. 8032 (1935); S. 3739 (74-2), 80 Cong. Rec. 553 (1936); S. 3912 (74-2), 80 Cong. Rec. 1334, 1360–61 (1936); H.R. 10196 (74-2), 80 Cong. Rec. 411 (1936); H.R. 50 (75-1), 81 Cong. Rec. 24 (1937); H.R. 2265 (75-1), 81 Cong. Rec. 139 (1937); S. 437 (75-1), 81 Cong. Rec. 110 (1937); S. 1098 (75-1), 81 Cong. Rec. 411 (1937); H.R. 3895 (75-1), 81 Cong. Rec. 542 (1937); S. 1276 (75-1), 81 Cong. Rec. 611 (1937). S. 1098 (75-1) in addition provided that "the Justices shall consider the question of constitutionality raised in the case at bar without reference to . . . decisions heretofore rendered by the Supreme Court of the United States." West Virginia Democratic Representative Robert Lincoln Ramsay delivered extended arguments in support of his bills, H.R. 7997 (74-1) and H.R. 8054 (74-1), at 79 Cong. Rec. 7729-30 (1935) and 80 Cong. Rec. 854–59 (1936), respectively.

[86] H.R. 5172 (75-1), 81 Cong. Rec. 1709 (1937); H.R. 5485 (75-1), 81 Cong. Rec. 2069 (1937); S. 1890 (75-1), 81 Cong. Rec. 2196 (1937); H.R. 7154 (75-1), 81 Cong. Rec. 4896 (1937).

[87] *See, e.g.*, Hearings, at 14, 89, 1599, 1607–08 (Sen. Norris); 81 Cong. Rec. 2140–44 (1937) (Sen. Norris). Norris introduced his bill, S. 1890, on March 15, 81 Cong. Rec. 2196, but he had advocated for such a measure as an alternative to Roosevelt's bill as early as February 9. Robert C. Albright, *Californian Backs Borah in Opposing Plan for New Justices*, Wash. Post, Feb. 9, 1937, 1, 2. Norris' view of the constitutional issue was shared by Joseph L. Lewinson, *Limiting Judicial Review by Act of Congress*, 23 Cal. L. Rev. 591, 598–99 (1935).

[88] See Hearings, at 14 (statement of Attorney General Homer S. Cummings); *id*. at 562 (Moley); *id*. at 955 (Dodd); *id*. at 1208-11 (Hartman); Letter from Franklin Roosevelt to Felix Frankfurter (Feb. 9, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–1945, at 382 (Max Freedman, ed., 1967); Memorandum from W.W. Gardner to the Solicitor General, on the Congressional Control of Judicial Power to Invalidate Legislation 29–30, 64 (Dec. 10, 1936) (unpublished manuscript) (on file with the University of Virginia); FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT [1937 THE CONSTITUTION PREVAILS] lxiv (1941); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 386–87 (1967); ALSOP & CATLEDGE, THE 168 DAYS, 29; MCKENNA, FRANKLIN D. ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR, 440; Fraenkel, *What Can Be Done about the Constitution and the Supreme Court?*, 216–17; Siferd, 384–86; Powell, *The Next Four Years: The Constitution*, 319. Utah Democratic Senator William King observed that "when the Constitutional Convention met and the Constitution was drafted, the founders of the Republic were conversant with the rule which prevailed in Great Britain and in the States, the Colonies, that in the courts the majority of the judges render the decision." Hearings, at 1298; *see also* Katherine B. Fite & Louis Baruch Rubenstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 769–70 (1937); Epaphroditus Peck, *The Power of the Courts of the United States to Hold Statutes Void as Not Authorized by the Constitution*, 10 CONN. B. J. 192, 205 (1937) ("It would seem to me quite as appropriate for the Supreme Court to announce its decision that Congress should pass no statute unless by a two-thirds majority"); Oxtoby, *Power of the Courts to Declare Act of Congress Unconstitutional*, 165 ("There is no more reason why the decision of the Court in a case involving a constitutional question should be unanimous, rather than that the passage of an Act by the Congress in the first instance should be unanimous"). Chancellor Newman made a similar point: "If the Constitution invests the judicial power in the Supreme Court, how can the Congress, without a constitutional amendment, tell the court by what method to decide a case any more than the court can tell the Congress what laws it shall pass and by what majorities they shall be passed?" Newman, *Judicial Control Under the Federal Constitution*, 7; *see also* Thomas Raeburn White, *Disturbing the Balance*, 85 U. PA. L. REV. 678, 681, 683 (1937) ("Congress may give or withhold jurisdiction over a case or class of cases, but it seems fundamental that if jurisdiction is granted to the courts, they have full judicial power over that case, and there can be no interference with the manner in which they exercise it, not only because they have the judicial power but because no other department has *any* judicial power, all of it having been vested in the courts") (emphasis in original); M.A. Kline, *The United States Supreme Court and the Federal Constitution*, ANNUAL PROCEEDINGS OF THE WYO. ST. B. ASS'N 80, 92 (1936) (characterizing such proposals as inconsistent with the vesting of the judicial power in the Supreme Court); WARREN, 181–82, 208–15.

[89] For earlier proposed constitutional amendments, see H.J. Res. 277 (74-1), 79 Cong. Rec. 7106 (1935); H.J. Res. 287 (74-1), 79 Cong. Rec. 7546 (1935); S.J. Res. 149 (74-1), 79 Cong. Rec. 9415 (1935). Proposals to require more than a simple majority of the Court to declare state or federal statutes unconstitutional dated back to the Chief Justiceship of John Marshall, and had been advocated at various times throughout the late-19th and early-20th Centuries. ROSS, A MUTED FURY, 218–22, 231–32.

[90] S.J. Res. 98 (75-1), 81 Cong. Rec. 2103, 2104 (1937); S.J. Res. 100 (75-1), 81 Cong. Rec. 2138 (1937); H.J. Res. 276 (75-1), 81 Cong. Rec. 2133 (1937); H.J. Res. 286 (75-1), 81 Cong. Rec. 2414 (1937); H.J. Res. 293 (75-1), 81 Cong. Rec. 2731 (1937); H.J. Res. 303 (75-1), 81 Cong. Rec. 2933 (1937); H.J. Res. 307 (75-1), 81 Cong. Rec. 3057 (1937); H.J. Res. 333 (75-1), 81 Cong. Rec. 3772 (1937); S.J. Res. 86 (75-1), 81 Cong. Rec. 4322 (1937); H.J. Res. 360 (75-1), 81 Cong. Rec. 4476 (1937); H.J. Res. 372 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 496 (75-1), 81 Cong. Rec. 9683 (1937) (authorizing Congress to require the concurrence of eight of eleven justices to declare an Act of Congress unconstitutional).

[91] *See, e.g.*, Hearings, at 560, 566 (Moley); *id*. at 768, 775–76 (Griswold); *id*. at 988–89 (Stokes); *id*. at 1698, 1704 (Rosenblum); *id*. at 1824 (Wayland). The American Federation of Labor supported such an amendment and encouraged the Republican and Democratic parties to include a pledge to enact it in their 1936 platforms. *Labor to Urge Plank Curbing Supreme Court*, N.Y. HERALD TRIBUNE, June 9, 1936, 4. Columbia University Law School Professor Karl Llewellyn, a supporter of the president's proposal, also expressed support for "provision for a two-thirds' vote, at least, to wipe out an act of the two constitutionally coordinate powers." K.N. Llewellyn, *A United Front on the Court*, NATION, Mar. 13, 1937, 288–89. Professor D.O. McGovney, a professor in the School of Jurisprudence at the University of California, likewise supported both the President's proposal and Norris' amendment requiring a supermajority vote of the justices to invalidate an act of Congress. D. O. McGovney, *Reorganization of the Supreme Court*, 25 CAL. L. REV. 389, 407–8, 412 (1937). The Norris amendment received further support from Victor S. Yarros, Editorial, *"Doubt" in Constitutional Cases*, 2 J. MARSH. L.Q. 414, 415–17 (1937); *see also* John W. Brabner-Smith, *Congress vs. Supreme Court—A*

Constitutional Amendment, 22 Va. L. Rev. 665, 669, 675 (1936) (supporting a unanimity requirement). The editors of *The World Tomorrow* lamented as "intolerable the present practice of placing the validity of legislation at the mercy of a mere majority of the Supreme Court," and contended that either "a unanimous decision should be required in order to invalidate legislation, or at least seven votes out of nine." *Toward Pacific Revolution*, 17 The World Tomorrow 27 (1934).

[92] Hearings, at 731–32. *Accord*, *id*. at 1092 (Adams); 80 Cong. Rec. 4079 (1936) (Sen. Walsh); *see also Stop-Gap*, 27 Time 14, 15 (1936) ("If a unanimous vote of the Court were required to declare a law unconstitutional, a man could contest an act and lose his case because of a 'majority' decision written by one reasonable doubter although a 'minority' of eight Justices might declare the litigant quite right"); Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 653 ("such an act would invest in a minority of the Court the power to control the Court's decisions").

[93] Hearings, at 72–74; *United States v. Butler*, 297 U.S. 1 (1936). *Accord*, *id*. 256–57, 282 (statement of Leon Green, Dean, Northwestern University Law School); *id*. at 261 (Sen. Hughes); Editorial, *Curbing the Court*, Saturday Evening Post, Aug. 17, 1935, 22. William Draper Lewis maintained that the President's proposal was "infinitely more conservative" than such proposals to alter the Court's voting rules, which he considered "unwise." *Ibid*., 311, 314, 316. Political Science Professor Charles Groves Haines of the University of California at Los Angeles likewise opposed alteration of the Court's voting rules, *id*. at 347, as did *St. Louis Star-Times* editor Irving Brant. *Id*.,413.

[94] 79 Cong. Rec. 9980 (1935).

[95] Theodore Frances Green, *The Supreme Court and the President's Proposal*, 23 A.B.A. J. 420, 423 (1937).

[96] *Attempts to Interfere with Powers of Federal Courts to Declare Laws Unconstitutional Condemned*, 742.

[97] Martig, *New Glasses for Old Eyes to Use*, 155 (quoting 77 Cong. Rec. 1185 (1933).

[98] Pepper, *The President's Case Against the Supreme Court*, 250.

[99] Van Anda, *Dilemmas in Norris Plan*, L.A. Times, Mar. 27, 1937, A4.

[100] Eldridge Hart, *Is It Really Constitutional Cruelty?*, 11 Fla. L.J. 157, 158 (1937).

[101] Beard, *Rendezvous with the Supreme Court*, 94.

[102] Editorial, *A Program for the Judicial Power*, 89, 90.

[103] Powell, *The Next Four Years: The Constitution*, 320. Professor Mason thought it would be desirable, but unlikely, for the justices themselves to adopt such an internal voting rule. Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 675.

[104] Hearings, at 1450.

[105] Hearings, at 1290. Masterson reported that Dean Ira Hildebrand of the University of Texas School of law had asked him to state before the Committee that his views on the Court issue were "in accord" with Masterson's. *Ibid*., 1304. Charles Clark opposed this proposal as well. *Id*. at 1874. A concise summary of arguments for and against supermajority voting requirements may be found in Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 178–79.

[106] W. Rolland Maddox, *Minority Control of Court Decisions in Ohio*, 24 Am. Pol. Sci. Rev. 638 (1930).

[107] State ex rel. Jones v. Zangerle, 117 Ohio St. 507, 511 (1927) (quoted in Maddox, *Minority Control of Court Decisions in Ohio*, 642).

[108] Maddox, *Minority Control of Court Decisions in Ohio*, 643–45.

[109] *Ibid*., 645–46.

[110] *Ibid*., 646 (citing Warren, 182–208, 217–18).

[111] *Ibid*., 647–48.

[112] White, *Disturbing the Balance*, 684; *see also* Robert L. Hausser, *Limiting the Voting Power of the Supreme Court: Procedure in the States*, 5 Ohio St. U. L.J. 54, 82 (1939).

[113] Newman, *Judicial Control Under the Federal Constitution*, 7; *see also* Kline, *The United States Supreme Court and the Federal Constitution*, 91–92.

[114] Fite & Rubenstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 781–82. On the custom of justices in the conference minority ultimately acquiescing in and joining the majority opinion on the Hughes Court, *see* Barry Cushman, *Vote Fluidity on the Hughes Court: The Critical Terms, 1934–1936*, 2017 U. Ill. Rev. 269 (2017); Barry Cushman, *The Hughes Court Docket Books: The Late Terms, 1937–1940*, 55 Am. J. Leg. Hist. 361 (2015); Barry Cushman, *The Hughes Court Docket Books: The Early Terms, 1929–1933*, 40 J. Sup. Ct. Hist. 103 (2015).

[115] *See, e.g.*, Hearings, at 74 (Devaney); 672–73, 1227 (Sen. King); *id*. at 1299 (Masterson). Professor Griswold, by contrast, believed that the Ohio provision "on the whole" had "worked well," and could be revised to eliminate the possibility of circuit splits. *Ibid*., 768, 775–76, 803–04. Senator Burke commented that a similar provision in the Nebraska constitution had "worked very satisfactorily." *Id*. at 804.

[116] Hearings, at 72–73, 90–92, 95 (Devaney); *id*. at 95, 256 (Sen. Dieterich); *id*. at 257 (Leon Green); *id*. at 744–45 (Young B. Smith); *id*. at 1298 (Sen. McCarran); *id*. at 1300 (Masterson, Sen. McCarran, Sen. Connally); *id*. at 1450 (Andrews); *The Big Debate*, Time, Mar. 1, 1937, 10, 11; Van Anda, *Dilemmas in Norris Plan*, L.A. Times, Mar. 27, 1937, A4; Green, *The Supreme Court*

and the President's Proposal, 423; Charles E. Carpenter, *The President and the Court*, 71 U.S. L. Rev. 139, 147 (1937); Garrison, *The Form of a Constitutional Amendment*, 2.

[117] *See, e.g.*, Hearings, at 566 (Moley); *id*. at 671 (Taber). *See also* Carpenter, *The President and the Court*, 147.

[118] H.J. Res. 333 (75-1), 81 Cong. Rec. 3772 (1937).

[119] Memorandum to Supreme Court File, May 21, 1937, Box 119, Norris MSS, LC; *All Compromises Rejected as Both Sides Stand Firm in Test*, Christian Science Monitor, May 18, 1937, 1; *Democrats Divide in Committee Poll*, N.Y. Times, May 19, 1937, 1, 18; *Van Devanter Retires at 78*, N.Y. Herald Tribune, May 19, 1937, 1, 2; Charles S. Groves, *Court Bill Foes See Victory*, Daily Boston Globe, May 19, 1937, 1, 15.

[120] S. J. Res. 58 (73-1), 77 Cong. Rec. 4629 (1933). In fact, proposals to limit the duration of federal judicial tenure dated back at least to 1894, and generated considerable controversy over the ensuing twenty years. ROSS, A Muted Fury 94–103.

[121] H.J. Res. 267 (75-1), 81 Cong. Rec. 1964, 1992 (1937).

[122] 81 Cong. Rec. 1964 (1937).

[123] S.J. Res. 103 (75-1), 81 Cong. Rec. 2196 (1937). Senator Norris spoke in favor of such an amendment on the Senate floor on March 12. 81 Cong. Rec. 2144 (1937); *see also* Hearings, at 122 (Sen. Norris suggesting approval of term limits). Norris had floated the idea of a term-limits amendment as an alternative to Roosevelt's proposal as early as February 9. Robert C. Albright, *Californian Backs Borah in Opposing Plan for New Justices*, Wash. Post, Feb. 9, 1937, 1. Albright later noted that Norris' proposal "had not been pressed." Robert C. Albright, *Party Loyalty Appeal Rings in Court Row*, Wash. Post, July 8, 1937, 1.

[124] H.J. Res. 373 (75-1), 81 Cong. Rec. 4896 (1937); *see also* Hearings, at 997 (statement of Detroit lawyer William S. McDowell proposing an amendment limiting judicial tenure to twenty-one years).

[125] H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937). This proposal, the consideration of which was supported by Harvard Law Professor Erwin Griswold, was reportedly the brainchild of Samuel H. Ordway, Jr., Civil Service Commissioner of New York City. Hearings, at 769, 802. It was supported as well in a letter to the editor from Richard E. Wellford of Washington, D.C., *New Court Plan*, Wash. Post, Mar. 13, 1937, 9.

[126] Hearings, at 1153.

[127] Burke Shartel, *Retirement and Removal of Judges*, 20 J. Am. Jud. Soc. 133, 133–34 (1936).

[128] Paul R. Kach, *On Judicial Terms in Office*, 42 Com. L.J. 267, 268 (1937).

[129] *Ibid*. at 269 (quoting William H. Taft, *The Selection and Tenure of Judges*, 7 Me. L. Rev. 203, 213 (1914)).

[130] *Id*. (quoting W.F. Willoughby, Principles of Judicial Administration 386 (1929)).

[131] John Perry Wood, *Judicial Selection and Tenure*, 9 Rocky Mt. L. Rev. 197, 200 (1937) (quoting James Bryce, 1 The American Commonwealth 513 (1911)).

[132] *Ibid*. at 200; *see also* Frank Swancara, *Short Terms as Debilitators of the American Judiciary*, 11 Rocky Mt. L. Rev. 217 (1939).

[133] Henry T. Lummus, *Our Heritage of Impartial Justice*, 19 B.U. L. Rev. 2, 8–10 (1939).

[134] Robert C. Albright, *Party Loyalty Appeal Rings in Court Row*, Wash. Post, July 8, 1937, 1.

[135] S.J. Res. 86 (75-1), 81 Cong. Rec. 1273 (1937); S.J. Res. 100 (75-1), 81 Cong. Rec. 2616 (1937); S.J. Res. 143 (75-1), 81 Cong. Rec. 4224 (1937); H.J. Res. 360 (75-1), 81 Cong. Rec. 4476 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937).

[136] S. J. Res. 77 (75-1), 81 Cong. Rec. 1195 (1937); H.J. Res. 307 (75-1), 81 Cong. Rec. 3057 (1937).

[137] H.J. Res. 293 (75-1), 81 Cong. Rec. 2731 (1937).

[138] H.J. Res. 303 (75-1), 81 Cong. Rec. 2933 (1937).

[139] *See, e.g.*, Hearings, at 406 (statement of *St. Louis Star-Times* editor Irving Brant); *id*. at 560 (Moley); *id*. at 611 (Rep. Lemke); *id*. at 636 (Dodds); *id*. at 720–21, 723, 726, 728–29, 735, 742–44 (Young B. Smith); *id*. at 769 (Griswold); *id*. at 845 (Borchard); *id*. at 953–54 (Dodd); *id*. at 988–89 (Stokes); *id*. at 1029 (Villard); *id*. at 1045, 1061 (Burlingham); *id*. at 1085–86, 1098 (Adams); *id*. at 1139, 1153 (Wilkinson); *id*. at 1350, 1352 (Patterson); *id*. at 1683 (Sen. M.M. Logan); *id*. at 1728–29 (Lee); *id*. at 1818, 1821 (Schurman); *id*. at 1934 (McConaughy); *id*. at 1936 (Sills); 81 Cong. Rec. 3174–75 (1937) (Rep. Bigelow); *see also* Hearings, at 451 (statement of Judge Ferdinand Pecora of the Supreme Court of New York) ("views in favor of the adoption of some method which would provide for the compulsory retirement of the judges at 70 are entertained by some very prominent critics of the President's present plan"); *Mayor Sees Delay in Tax Reduction*, N.Y. Times, Feb. 7, 1937, 39 (Rep. Hamilton Fish rejecting FDR's bill as "a plan to invest the executive with control of the Supreme Court," but supporting "mandatory retirement of Supreme Court justices at the age of 70 or 75"); *An Amendment*, Time, Apr. 5, 1937, 12, 13 (Senator Hatch announced on March 25 "that he was ready to go whole hog" for such an amendment). Cummings insisted that Roosevelt's proposal was "less drastic" than such an amendment, Hearings, at 5, though as late as December 17, 1936, he regarded such an amendment favorably. On that date he wrote to Edward S. Corwin, "Quite apart from immediate consideration, and as a mere matter of general policy, I have often thought that much was to be said for a constitutional amendment requiring retirements when

the age of 70 is reached. I am wondering if there would be much opposition to such an amendment if it were so framed as not to affect the present judiciary by making it apply to future appointments only." Cummings to Corwin, Dec. 17, 1936, Corwin MSS (quoted in Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 390).

[140] Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 Buff. L. Rev. 7, 68–73 (2002).

[141] Walter Lippmann, *Today and Tomorrow: Concerning Compromise*, L.A. Times, May 15, 1937, A4.

[142] Leach, *The Supreme Court: Editorial Forward*, Forum and Century, June, 1937, 6, 7. In a radio address delivered on April 7, 1937, Former Illinois Governor Frank Lowden maintained that an amendment requiring retirement at seventy might have achieved ratification easily, unless "the people read between the lines, as well they might, a secret design on the part of the President to pack the Court," in which case it would have been "overwhelmingly defeated." Indeed, Lowden believed that this was "the reason why the method of amendment was not employed." Frank O. Lowden, *An Independent Judiciary the Bulwark of the People's Liberties*, 42 Com. L. J. 227, 228 (1937); *see also* Perrigo, *The Federal Judiciary: An Analysis of Proposed Revisions*, 487.

[143] Shartel, *Retirement and Removal of Judges*, 137–38.

[144] *The Big Debate*, Time, Mar. 1, 1937, 10, 11.

[145] Hearings, 330, 333.

[146] *Ibid*., 1449, 1452–53, 1455.

[147] *Id.*, 1455–56.

[148] Shartel, *Retirement and Removal of Judges*, 137–38; *see also* Perrigo, *The Federal Judiciary: An Analysis of Proposed Revisions*, 487.

[149] Kalman, FDR's Gambit, 117.

[150] 2 Merlo J. Pusey, Charles Evans Hughes 760 (1951); The Autobiographical Notes of Charles Evans Hughes 302 (David J. Danelski & Joseph S. Tulchin, eds., 1973); Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv. L. Rev. 4, 23 n.64 (1967).

[151] Baker, Back to Back, 67–68.

[152] H.R. 5161 (74-1), 79 Cong. Rec. 1356 (1935); H.R. 7782 (74-1), 79 Cong. Rec. 6595 (1935); H.R. 7911 (74-1), 79 Cong. Rec. 7022 (1935); *see also* S. 3529 (73-2), 78 Cong. Rec. 7969 (1934) (introduced by Tennessee Democratic Senator Kenneth McKellar, repealing the reduction in pay of retired justices imposed by Section 13 of the Independent Offices Appropriation Act, 1934 and 1935).

[153] H.R. 11299 (74-2), 80 Cong. Rec. 2402 (1936).

[154] William F. Swindler, Court and Constitution in the Twentieth Century: The New Legality 38 (1970). H.R. 5161 (74-1) was defeated in a floor vote. 79 Cong. Rec. 3060 (1935); *Supreme Court Justices' Retirement Defeated*, 21 A.B.A. J. 252 (1935). None of the other bills was reported out of committee. In 1936 the ABA adopted a resolution in favor of Sumner's bill, and approved its enactment in 1937. Hearings, at 1459 (Sylvester C. Smith); *Bill on Rights of Supreme Court Justices on Retirement Approved*, 22 A.B.A. J. 741 (1936).

[155] H.R. 5956 (73-1), 77 Cong. Rec. 5225 (1933); H.R. 5616 (74-1), 79 Cong. Rec. 1889 (1935). Two joint resolutions introduced in 1933 would have amended the Constitution to permit Congress to fix (and thus to reduce) the compensation of federal judges. H.J. Res. 144 (73-1), 77 Cong. Rec. 1240 (1933); H.J. Res. 164 (73-1), 77 Cong. Rec. 2431 (1933).

[156] H.R. 2518 (75-1), 81 Cong. Rec. 169 (1937).

[157] S. 1475 (75-1), 81 Cong. Rec. 1132 (1937).

[158] 81 Cong. Rec. 1127 (1937).

[159] 81 Cong. Rec. 1649 (1937).

[160] Act of Mar. 1, 1937, ch. 21, 50 Stat. 24. American Federation of Labor President William Green testified to his belief that this statute would produce regular turnover of the Court's membership. Hearings, at 102, 108, 122.

[161] H.R. 2284 (75-1), 81 Cong. Rec. 139 (1937); H.R. 4279 (75-1), 81 Cong. Rec. 820 (1937).

[162] H.R. 44 (75-1), 81 Cong. Rec. 24 (1937).

[163] See H.J. Res. 329 (74-1), 79 Cong. Rec. 9506 (1935); H.J. Res. 301 (74-1), 79 Cong. Rec. 8213 (1935); H.J. Res. 296 (74-1), 74 Cong. Rec. 7890 (1935); H.J. Res. 462 (74-2), 80 Cong. Rec. 770 (1936); H.R. 9478 (74-2), 80 Cong. Rec. 32 (1936). H.R. 10764 (74-2), 80 Cong. Rec. 1290 (1936) would have prohibited any federal judge from declaring unconstitutional the act creating the Tennessee Valley Authority, and deemed any judge doing so to have vacated his office). Similar bills were introduced concerning the Railroad Retirement Act of 1935, H.R. 10663 (74-2), 80 Cong. Rec. 1143 (1936), the Carrier Taxing Act of 1935, H.R. 10664 (74-2), 80 Cong. Rec. 1143 (1936), the Guffey Coal Act, H.R. 10765 (74-2), 80 Cong. Rec. 1290 (1936), the Securities Exchange Act, H.R. 10804 (74-2), 80 Cong. Rec. 1328 (1936), and the Public Utility Holding Company Act of 1935, H.R. 10805 (74-2), 80 Cong. Rec. 1328 (1936). For a favorable discussion of various jurisdiction-stripping proposals, see 79 Cong. Rec. 10404-05 (1935) (Rep. Lewis of Maryland). Representative Cross of Texas defended his proposal, H.R. 9478 (74-2), at 80 Cong. Rec. 1095–1100 (1936). In an editorial published in early 1935, the editors of *The Nation* called for "a constitutional amendment depriving the Supreme Court of its self-arrogated right to invalidate legislation duly enacted by Congress." Nation, Feb. 27, 1935, at 233. The editorial board later opined that removing "certain types of cases from the court's appellate jurisdiction" was "less desirable than other proposals," such as the congressional override. Editorial, *A Program for the Judicial Power*, 89, 90.

[164] H.R. 4900 (75-1), 81 Cong. Rec. 1390 (1937); *see also* H.R. 10128 (74-2), 80 Cong. Rec. 366 (1936); H.R. 10315 (74-2), 80 Cong. Rec. 549 (1936).

[165] Hearings, at 1595–96, 1603, 1607–08, 1614, 1642, 1644. Princeton President Dodds, to the consternation of some members of the Committee, insisted that any such jurisdiction-stripping measure should be done by constitutional amendment rather than by statute. *Ibid*., 623, 629.

[166] Beverly Smith, *Nine Men Who Hold in Their Hands the Fate of the New Deal*, 118 Am. Magazine 74, 74–75 (1934).

[167] *Toward Pacific Revolution*, 28.

[168] Editorial, 140 Nation 233 (1935).

[169] Editorial, 140 Nation 669 (1935); Editorial, *A Constitutional Plutocracy*, 140 Nation 672, 673 (1935); *see also* Heywood Broun, *Nine Against Labor*, 140 Nation 687 (1935).

[170] Editorial, *The Supreme Issue*, 22 Commonweal 169 (1935).

[171] John L. Lewis, *The Next Four Years for Labor*, 89 New Republic 234, 236 (1936).

[172] Osmond K. Fraenkel, *The Value of Judicial Review*, 141 Nation 42 (1935). *See also* Fraenkel, *What Can Be Done about the Constitution and the Supreme Court?*, 223.

[173] Edward S. Corwin, *Curbing the Court*, 26 Am. Lab. Legis. Rev. 85, 86 (1936) (emphasis in original). Corwin also opposed proposals to "pack" the Court, reasoning that "The Court is already large enough." *Ibid*. Of course, it would not be long before Corwin would change his tune on Court-packing. *See, e.g.*, Kalman, FDR's Gambit, 69, 173.

[174] Martig, *New Glasses for Old Eyes to Use*, 153–54; *see also* Fraenkel, *What Can Be Done about the Constitution and the Supreme Court?*, 216 ("The only effect of a law affecting the appellate jurisdiction of the Supreme Court would be to leave final determination of constitutional issues with the lower federal courts. This would result in a wholly unsatisfactory situation. . . . only confusion and probable failure would result"); White, *Disturbing the Balance*, 684 (it would bring about "a chaotic condition of conflicting decisions which would be intolerable").

[175] Beard, *Rendezvous with the Supreme Court*, 93; *see also* Siferd. 388 (characterizing judicial review as "essential to the maintenance of a Federal, three-branch government," and the wisdom of total abolition of the Court's power of review as "extremely doubtful"); Merrill E. Otis, *The Constitution and the Courts*, 4 Kan. City L. Rev. 51 (1936); Clark, *Some Recent Proposals for Constitutional Amendment*, 320.

[176] Charles A. Beard, *What about the Constitution?*, Nation, Apr. 1, 1936, 405, 405–06. *See also* Perrigo, *Proposals to Restrict Judicial Nullification of Statutes*, 182.

[177] Garrison, *The Form of a Constitutional Amendment*, 12.

[178] Damian Cummins, *Amending the Constitution*, 23 Commonweal 709, 711 (1936).

[179] Hearings, at 313, 317.

[180] Hearings, at 347, 351. *See also* Charles Groves Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 Yale L.J. 816, 850–51 (1936). Haines favored the adoption of a system of legislative supremacy. *Ibid*., 853–56. Senator Logan suggested that it was better to "pack" the Court than to "muzzle" it by curtailing its jurisdiction. Hearings, at 348.

[181] Powell, *The Next Four Years: The Constitution*, 320. *See also* Oxtoby, *Power of the Courts to Declare Act of Congress Unconstitutional*, 162.

[182] Carpenter, *The President and the Court*, 146–47.

[183] Hearings, at 775. Compare Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 654, 669–70 (Congress "can deprive the Court of appellate jurisdiction in a case. . . . From this, it is not necessary to conclude that Congress can deprive the Court of all appellate jurisdiction, though there is authority to support an inference to that effect").

[184] Hearings, 764.

[185] Hearings, 914, 1039, 1595. A resolution of the Society of Colonial Wars in the District of Columbia similarly opposed "any legislation in any manner . . . destroying [the Court's] right to pass upon the constitutionality of acts of Congress." *Ibid*., 1939.

[186] Roosevelt, The Public Papers and Addresses of Franklin D. Roosevelt, lxii; Alsop & Catledge, The 168 Days, 28–29; Baker, Back to Back, 130–31; Letter from Franklin Roosevelt to Felix Frankfurter (Feb. 9, 1937), *in* Roosevelt and Frankfurter: Their Correspondence, 1928–1945, at 381–82; Memorandum on Policy (unpublished manuscript) (on file with the University of Virginia); Memorandum on Expediting the Amendment Procedure (unpublished manuscript) (on file with the University of Virginia); McKenna, The Great Constitutional War, 440; Shesol, Supreme Power, 328, 348; Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 384–86; William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* Essays on the New Deal 73 (Harold F. Hollingsworth & William F. Holmes, eds., 1969).

[187] *Reorganizing the Federal Judiciary*, Address by the President of the United States, Mar. 9, 1937, reprinted at S. Rept. 711 (75-1) (1937), 44–45.

[188] Hearings, 12, 17, 21–22, 30 (Cummings); *id*. at 68–70, 72, 74–75, 94 (Devaney); *id*. at 168–69 (statement of Princeton University Professor of Jurisprudence Edward S. Corwin); *id*. at 231 (Leon Green); *id*. at 297 (statement of Thomas F. Konop, Dean, University of Notre Dame School of Law); *id*. at 385 (Brant); *id*. at 425 (Pecora); *id*. at 1874, 1877–78 (Clark); *see also* T.R.B., *Washington Notes*, New Republic, Mar. 10, 1937, 137;

Purging the Supreme Court, Nation, Feb. 13, 1937, 173–74.

[189] Hearings, 12, 22 (Cummings); *id*. at 69 (Devaney); *id*. at 168–69 (Corwin). *See also* 81 Cong. Rec. 1726 (1937) (Sen. Logan); *id*. at 6797 (Sen. Robinson).

[190] Hearings, 69 (Devaney).

[191] Hearings, 293 (Konop).

[192] Hearings, 548 (Moley); *id*. at 1031–32 (Villard). In questioning Judge Devaney, Senator O'Mahoney gathered that there was no "unity of mind" concerning which of the many proposed constitutional amendments ought to be adopted. O'Mahoney then asked whether there was "any unity of mind" with respect to the president's plan. Devaney answered that there was not, leading O'Mahoney to conclude that "with respect to both propositions opinions are divided." Id. at 89–90.

[193] Hearings, 505.

[194] Hearings, 497–98; *see also id*. at 509–10.

[195] Hearings, 509–10.

[196] Hearings, 1074 (Sen. O'Mahoney); Sidney Olson, *Court Change Foes Combine on Amendment*, Wash. Post, Apr. 6, 1937, 1; *Amendment Put Forth by Court Packing's Foes*, Chicago Daily Tribune, Apr. 6, 1937, 8; *House Move Begun to Push Court Bill; Senate Held Slow*, N.Y. Times, Apr. 6, 1937, 1.

[197] Sidney Olson, *Court Change Foes Combine on Amendment*, Wash. Post, Apr. 6, 1937, 1, 4; *Amendment Put Forth by Court Packing's Foes*, Chicago Daily Tribune, Apr. 6, 1937, 8.

[198] Farley similarly insulted Senator McCarran, who likewise elected to withdraw his proposal to increase the size of the Court to eleven, and instead to join O'Mahoney in blanket opposition. Sidney Olson, *Bloc of 15 Senate Democrats Announces Last-Ditch Fight Against Roosevelt Court Bill*, Wash. Post, May 18, 1937, 1; *Van Devanter Retires at 78*, N.Y. Herald Tribune, May 19, 1937, 1.

[199] Hearings, 495. *Accord*, *id*. at 986 (Stokes); Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2.

[200] Hearings, 619, 638–39; *see id*. at 21 (Sen. Austin); *id*. at 699 (Brenckman); *id*. at 722 (Young B. Smith); id at 957 (Dodd); *id*. at 1067 (Burlingham); *id*. at 1093 (Adams); *id*. at 1288 (Masterson); *id*. at 1500 (Hannah); *id*. at 1923 (Dorr); *id*. at 1987 (ABA); 81 Cong. Rec. 1875 (1937) (Rep. Michener, Rep. Wadsworth); Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2; Robert G. Dodge, *The Supreme Court Issue*, 7 L. Socy. J. 824, 828 (1937).

[201] Hearings, 498 (Sen. Wheeler); *id*. at 721 (Young B. Smith); *id*. at 1500 (Hannah); *id*. at 1987 (ABA); 81 Cong. Rec. 3174–76 (1937) (Rep. Bigelow): Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2; Charles P. Taft, "*More Than This Would Be Revolution*," Saturday Evening Post, Apr. 10, 1937, 18, 110; Henry Goddard Leach, *The Supreme Court: Editorial Forward*, Forum and Century, June, 1937, 6, 7.

[202] Hearings, at 619 (Dodds).

[203] Hearings, at 563, 566 (Moley).

[204] Hearings, at 730 (Young B. Smith); *see also id*. at 498 (Sen. Wheeler); *id*. at 612 (Lemke); *id*. at 619 (Dodds); *id*. at 1030, 1033 (Villard); *id*. at 1674, 1681 (Gallagher); Leach, *The Supreme Court: Editorial Forward*, 6.

[205] Hearings, at 21 (Sen. Austin); *id*. at 602–03 (Rep. Lemke); *id*. at 619 (Dodds); *id*. at 699 (Brenckman); *id*. at 986 (Stokes); *id*. at 1288 (Masterson); *id*. at 1674 (Gallagher); *id*. at 1987 (ABA); 81 Cong. Rec. 1874–75 (Rep. Wadsworth); 81 Cong. Rec. 6969 (Sen. Wheeler); Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2; *Merchants Oppose High Court Plan*, N.Y. Times, Feb. 23, 1937, 5.

[206] Hearings, at 1162–69.

[207] Hearings, at 94.

[208] *O'Mahoney's Speech*, Wash. Post, May 6, 1937, 9.

[209] Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 659–60.

[210] Hearings, at 549.

[211] Hearings, at 93.

[212] Hearings, at 699.

[213] Hearings, at 563.

[214] Hearings, at 602–03.

[215] Hearings, at 986–87. *Accord*, Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2.

[216] Hearings, at 94.

[217] Hearings, at 549.

[218] Hearings, at 957.

[219] Hearings, at 730.

[220] Hearings, at 1450.

[221] Hearings, at 549.

[222] Hearings, at 548, 553–55, 558, 560. Masterson agreed. *Ibid*., 1288. *See also* Pepper, *The President's Case Against the Supreme Court*, 250 ("If a year ago he had proposed constitutional amendments to empower Congress to reinstate N.R.A. and A.A.A. . . . he would by now have had his answer from the people").

[223] Hearings, at 602.

[224] Hearings, at 687.

[225] Hearings, at 544.

[226] Barry Cushman, *The Judicial Reforms of 1937*, 61 Wm. & Mary L. Rev. 995, 999–1020 (2020).

[227] Hearings, at 544.

[228] Hearings, at 1987–88.

[229] Hearings, at 1500.

[230] Franklyn Waltman, *Politics and People*, Wash. Post, Feb. 18, 1937, 2.

[231] Hearings, at 85 (Sen. King, Devaney); *id*. at 133 (Sen. Burke); *id*. at 143–44 (Sen. Connally); *id*. at 147–48 (Sen. Van Nuys); *id*. at 148 (Sen. Norris); *id*. at 502 (Sen. Wheeler); *id*. at 554, 575 (Moley); *id*. at 597–98 (Rep. Lemke); *id*. at 670 (Taber); *id*. at 765, 766, 801

(Griswold); *id*. at 825, 830, 839, 856 (Borchard); *id*. at 868 (Thompson); *id*. at 887, 894 (Bates); *id*. at 924–25 (Flynn); *id*. at 952, 959, 961 (Dodd); *id*. at 960 (Sen. Ashurst); *id*. at 1023 (Sommer); *id*. at 1272 (Coudert); *id*. at 1291 (Masterson); *id*. at 1544 (Freeman); *id*. at 1675, 1687 (Gallagher); *id*. at 1845 (J.F. Smith); *id*. at 1928–29 (Taft); *id*. at 1937 (Angell); *id*. at 1965, 1977, 1981, 1983–84, 1998–99 (ABA); 81 Cong. Rec. 3266 (1937) (Rep. Ditter); 81 Cong. Rec. 3267 (1937) (Rep. Church); 81 Cong. Rec. 3268 (1937) (Rep. Sumners of Texas); 81 Cong. Rec. 7022 (1937); (Sen. McCarran); 81 Cong. Rec. App. 2116 (1937) (Rep. Sumners of Texas). *Accord*, Walter Lippmann, *A Way to Commit Suicide*, Today, July 27, 1935, 3; David Lawrence, *Within the Constitution*, 3:31 U.S. News 18, Aug. 5, 1935.

[232] Hearings, at 611; *see also id*. at 101–03 (Sen. Austin); *id*. at 838 (Borchard); *id*. at 889, 894 (Bates); *id*. at 1202–03, 1207–09, 1211–12 (Hartman); *id*. at 1291–92 (Masterson); *id*. at 1478–79 (Sylvester C. Smith).

[233] Hearings, at 611 (Rep. Lemke); *id*. at 671 (Taber); *id*. at 766 (Griswold); *id*. at 825 (Borchard); *id*. at 1087–88 (Sen. O'Mahoney); *id*. at 1202, 1207 (Hartman); *id*. at 1843–44 (J.F. Smith); *O'Mahoney's Speech*, Wash. Post, May 6, 1937, 9 (Sen. O'Mahoney).

[234] Hearings, at 765 (Griswold); *id*. at 887 (Bates); *id*. at 948, 959 (Dodd); *id*. at 960 (Sen. Ashurst); *id*. at 1223 (Hartman); *id*. at 1291 (Masterson); *id*. at 1720 (Lee); *id*. at 1925 (Taft).

[235] Hearings, at 341 (Sen. King); *id*. at 1223 (Hartman).

[236] Hearings, at 1291 (Masterson); *id*. at 1331 (Sen. Austin). For discussion of these examples, see Barry Cushman, *The Hughes Court and Constitutional Consultation*, 23–1 J. Sup. Ct. Hist. 79 (1998).

[237] Hearings, at 765 (Griswold).

[238] Hearings, at 507.

[239] Hearings, at 1663 (Limburg).

[240] *O'Mahoney's Speech*, Wash. Post, May 6, 1937, 9.

[241] Hearings, at 766.

[242] The Supreme Court Justices 315 (Clare Cushman, ed., 1993); James Morgan, *F.D. has Remade the Court After All*, Daily Boston Globe, Jan. 23, 1938, C4; Charles S. Groves, *Gives Liberals Court Control*, Daily Boston Globe, Jan. 6, 1938, 1, 13; *Sutherland Retires Giving High Court Liberal Balance*, Christian Science Monitor, Jan. 5, 1938, 1; Robert C. Albright, *Sutherland, 75, Quits U.S. Supreme Court*, Wash. Post, Jan. 6, 1938, X1, X5.

[243] Ross, A Muted Fury 255, 303, 306 (1994).

[244] *See, e.g.*, Hearings, at 14, 89, 1599, 1607–08; 81 Cong. Rec. 2140–44, 2196 (1937); Robert C. Albright, *Californian Backs Borah in Opposing Plan for New Justices*, Wash. Post, Feb. 9, 1937, 1, 2.

[245] See S.J. Res. 134 (75-1), 81 Cong. Rec. 3575 (1937).

[246] See Cushman, *Mr. Dooley and Mr. Gallup, 72–74*.

[247] Catledge, *Court Debate Looses Flood of Amendments*, N.Y. Times, Mar. 21, 1937, 72.

[248] *Ibid*.

[249] 81 Cong. Rec. 6788 (1937).

[250] 81 Cong. Rec. 3575 (1937) (McCarran amendment); 81 Cong. Rec. 4229 (McCarran amendment); 81 Cong. Rec. 3575 (Hatch amendment); S.J. Res. 100 (75-1), 81 Cong. Rec. 2138 (1937); S.J. Res. 143 (75-1), 81 Cong. Rec. 4224 (1937); 81 Cong. Rec. 4332 (1937) (McGill amendment); H.J. Res. 404 (75-1), 81 Cong. Rec. 5508 (1937); S.J. Res. 118 (75-1), 81 Cong. Rec. 2803 (1937); H.R. 7154 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 303 (75-1), 81 Cong. Rec. 2933 (1937); H.J. Res. 307 (75-1), 81 Cong. Rec. 3057 (1937); H.J. Res. 333 (75-1), 81 Cong. Rec. 3772 (1937); H.J. Res. 360 (75-1), 81 Cong. Rec. 4476 (1937); H.J. Res. 372 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 373 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937).

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

[252] 81 Cong. Rec. 3575 (1937) (McCarran amendment); 81 Cong. Rec. 4229 (McCarran amendment); 81 Cong. Rec. 3575 (Hatch amendment); S.J. Res. 100 (75-1), 81 Cong. Rec. 2138 (1937) (Andrews resolution); S.J. Res. 143 (75-1), 81 Cong. Rec. 4224 (1937) (McAdoo resolution); 81 Cong. Rec. 4332 (1937) (McGill amendment). These proposals sought to make Court-packing more appealing in various ways. The McCarran and Andrews proposals would have reduced the number of additional justiceships; the Hatch and McGill proposals would have slowed the pace at which additional justiceships could be filled; the McAdoo and Andrews proposals would have required ratification of a constitutional amendment; and the McGill proposal would have raised the age at which a sitting justice's failure to retire triggered the creation of an additional justiceship.

[253] H.J. Res. 404 (75-1), 81 Cong. Rec. 5508 (1937); H.R. 7154 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 333 (75-1), 81 Cong. Rec. 3772 (1937); H.J. Res. 360 (75-1), 81 Cong. Rec. 4476 (1937); H.J. Res. 372 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 373 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937).

[254] *NLRB v. Jones & Laughlin Steel Corp*. 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co*., 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); Associated *Press Co. v. NLRB, 301 U.S.* 103 (1937); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937).

[255] H.J. Res. 404 (75-1), 81 Cong. Rec. 5508 (1937); H.R. 7154 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 372 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 373 (75-1), 81 Cong. Rec. 4896 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937).

[256] cushman, ed., The Supreme Court Justices 315.

[257] H.J. Res. 404 (75-1), 81 Cong. Rec. 5508 (1937); H.J. Res. 383 (75-1), 81 Cong. Rec. 5096 (1937).

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

[259] Baker, Back to Back, 179, 191; James MacGregor Burns, Roosevelt: The Lion and the Fox 303 (1956); Alsop & Catledge, The 168 Days 147, 152, 163; William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, 97, 100–01; Shesol, Supreme Power, 428, 435, 441–42, 447–48, 451–53, 464 (2010); McKenna, Franklin Roosevelt and the Great Constitutional War, 420, 430–31, 441.

FDR's Court-packing and the Struggle for Civil Rights

Zach Jonas

On April 16, 1937, a radical young lawyer named John P. Davis testified before the United States Senate Committee on the Judiciary in favor of President Roosevelt's Court-packing plan.[1] As the only Black witness to testify over nearly five weeks of hearings, Davis argued that increasing the size of the Supreme Court would push the United States towards racial equality while protecting the civil rights of Black Americans.[2] When white witnesses touched briefly on Black issues, they almost uniformly argued against Court-packing and advocated the so-called bulwark theory of civil rights, expressed in some quarters of the Black community, that the Court was a final refuge for vindicating the rights of individual Black Americans targeted by the oppressive racial violence of Southern states and denied justice by Southern courts.[3] But Davis represented a very different vision of civil rights, originating in left-wing parts of the Black community, that integrated labor and economic issues, citizenship rights, and safety from racial violence into a coherent package.

Davis, a thirty-two-year-old Harvard Law graduate and the first full-time civil rights lobbyist in American history, was no stranger to the ritualized sparring of congressional testimony.[4] Introduced by the Committee Chairman as "a witness who represents a large number of colored people," Davis was a widely recognized spokesman for the Black left and national secretary of the National Negro Congress (NNC).[5] Although little known today, he was a towering civil rights figure during the 1930s, described by one biographer as "inspir[ing] more excitement, energy, and protest at the black grassroots level than any African American since Marcus Garvey."[6] In his testimony, he laid out detailed arguments for his position, directly cited and harshly criticized specific Supreme Court precedents, and deftly parried the "vicious questions" of pro-segregation Southern senators.[7] Although his remarks, ignored by the

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white press, drew praise in the Black community, his vision of civil rights was hardly a consensus one; Davis represented one side of a critical debate raging within the Black community in the late 1930s about the proper meaning and scope of civil rights and how best to pursue those rights.

The NNC's muscular public support for Roosevelt's Court-packing plan also highlights the telling silence of another Black organization. The National Association for the Advancement of Colored People (NAACP), by that point the premier litigation-focused civil rights organization in the United States, released no public statement in favor of or against the plan and gave no testimony before Congress. A few key players in the Association, however, publicly expressed their opinions on the subject, most notably NAACP special counsel Charles Hamilton Houston. A renowned civil rights lawyer, father of the modern law school at Howard University, and mentor to Thurgood Marshall, Houston would later become famous for laying the groundwork of the NAACP's school desegregation campaign, which eventually culminated in *Brown v. Board of Education*.[8] During the 1930s, however, Houston's path to the racial, rights-based vision of civil rights represented by the *Brown* litigation was far from set, and he advocated that the NAACP speak out in favor of the plan for economic and class reasons similar to those advanced by Davis. Despite this, and although the White House exerted direct pressure on the Association, the NAACP steered clear of public comment and acknowledged the plan only insofar as it related to the Association's other legislative priorities.

This article examines debates in the Black press and the internal records of the NNC and NAACP to illuminate the strategic divergence within the Black community over how to respond to FDR's Court-packing plan. These debates reveal that Black lawyers and civil rights organizations struggled to balance new and sometimes radical ideas about the role of class and economics in civil rights advocacy with more racially focused theories of civil rights. It also confirms that the NAACP's path towards the conception of civil rights later defined by the *Brown* litigation was not set in stone by 1937 and that the NAACP was actively debating deeper involvement in class and economic issues more than four years before American entry into World War II. The battle over Roosevelt's Court-packing plan is thus a crucial and understudied milestone on the long road to developing, defining, and delimiting the meaning and scope of civil rights.

The National Negro Congress, Court-Packing, and the Debate Over the Role of Class and Economics in Civil Rights

The NNC's testimony on the Court-packing plan and the overall Black response to FDR's proposal have received little scholarly attention, but together they reveal that the plan contributed to an ongoing struggle within the Black community about the meaning of civil rights in the late 1930s. That the Court-packing plan generated widespread controversy and debate, however, is no secret. The Judicial Procedures Reform Bill, announced by the Roosevelt Administration on February 5, 1937, shocked the American public and initiated a vigorous debate over the proper scope of executive power and the role of the Supreme Court in the American constitutional system.[9] The most prominent reform—and the unmistakable message of the bill—was a proposal allowing the president to appoint a new Supreme Court justice for every current justice above the age of seventy, up to a maximum of six new justices, allowing the president to appoint liberal justices and alter the ideological balance on the Court in favor of upholding New Deal programs.[10] This led opponents to refer derisively to the bill as FDR's "Court-packing plan."[11]

Every part of the Black community was swept up in these conversations, revealing and highlighting longstanding political and ideological fault lines. Many of these discussions mirrored those in the broader public. The Black press eagerly authored editorials and columns debating the wisdom and practical utility of the plan, students at Morehouse College and Howard University debated separation-of-powers implications, and clergy thundered from the pulpit or church dinners.[12] Passions ran high: Rev. C. H. Williams skewered Roosevelt's "scheme" at a dinner in Chattanooga, "admonish[ing] the audience to protest the President's plan," which would "destroy the independency of the Judiciary" and thus "destroy the last vestige of hope of the minority group with special reference to the Negro Race."[13]

But the Black community's long, complicated relationship with the Court endowed the plan with particular importance. Before the Civil War, the Supreme Court had repeatedly ruled against Black people and for the interests of slaveholders. The antebellum Court ruled that American citizenship did not extend to Black people in *Dred Scott* and upheld the Fugitive Slave Act in *Prigg v. Pennsylvania*, helping legitimize the institution of slavery and its place in the United States.[14] After the war, the Court severely weakened the Reconstruction Amendments and Congress'

The only Black American to testify before the Senate Committee on the Judiciary in 1937, John Preston Davis (left), argued in favor of President Roosevelt's Court-packing plan. He is pictured here in 1940 with A. Phillip Randolph (center) and U. Simpson Tate (right), president and treasurer, respectively, of the National Negro Congress, the organization which Davis co-founded in 1935.

enforcement laws, hobbling federal efforts to protect freedmen in the former rebel states and subjecting Black southerners to economic discrimination, intimidation, and physical violence.[15] In the 1890s, the Supreme Court rejected numerous challenges to the system of racialized oppression known as Jim Crow, upholding segregation in public accommodations in *Plessy v. Ferguson* and allowing the blatant disenfranchisement of Black voters in *Williams v. Mississippi*.[16] These cases were decades old by 1937, but the Black community had not forgotten their racist holdings, reflecting the long historical memory of discrimination and oppression associated with the Court.[17]

Black observers in the 1930s also recognized that the Supreme Court's support for Jim Crow had not been monolithic. In 1915, the Black community celebrated *Guinn v. United States*, in which the Court invalidated a so-called grandfather clause in Oklahoma, which had effectively allowed the state to disenfranchise only Black voters through a discriminatory "literacy test" not applicable to poor, illiterate whites.[18] That decade, the Court also handed down rulings against convict labor in *Bailey v. Alabama* and one form of explicit, racially restrictive covenants that excluded Black people from white residential neighborhoods in *Buchanan v. Warley*.[19] The Court's rulings on segregation and disenfranchisement in the 1920s and early 1930s, however, frequently blessed discrimination against Black Americans. These cases included *Corrigan v. Buckley*, which upheld another form of racially restrictive covenant not addressed in *Buchanan*, and *Grovey v. Townsend*, which legitimized the system of "white primaries" that excluded African Americans from crucial Democratic party primaries in Southern states and effectively disenfranchised Black voters.[20]

The Court's racist jurisprudence on issues of segregation and disenfranchisement, however, were somewhat tempered by the Court's dramatic rulings against Jim Crow in the years immediately preceding FDR's Court-packing plan. In these internationally renowned cases, the Court pushed back against racist state repression or mob violence against Black men. Beginning in 1932, the Supreme Court repeatedly and forcefully ruled for the so-called Scottsboro Boys, a group of Black teenagers falsely accused of raping two white women on a train in Alabama who became an international cause célèbre.[21] In 1936, the Court overturned Mississippi's murder conviction of several Black defendants whose confessions had been obtained under brutal torture.[22] In late April, 1937, only a few months after the release of FDR's plan, the Court would reverse on First Amendment grounds the conviction of Black Communist Angelo Herndon, who had been arrested for organizing workers in Atlanta.[23] This very recent and internationally recognized shift in the Court's direction also impacted the Black community's debate about the plan. Many Black commentators recalled the Court's long support for racism, slavery, and Jim Crow, while others argued that the federal judicial system was a forum of last resort for vindicating their individual rights in the face of racist Southern state governments.[24]

John P. Davis, the Popular Front, and the Black Left: An Economic Vision of Civil Rights

But the debate within the Black community focused on issues well beyond segregation, voting, and racist violence. Other commentators raised the Court's treatment of the Roosevelt administration's economic and social programs, arguing that Black Americans were largely working class and would disproportionately benefit from government action to regulate the economy and strengthen the power of workers.[25] These analyses differed, not only by emphasizing different cases or

precedents, but more fundamentally over the meaning of civil rights and how to achieve them. John P. Davis' testimony before the Senate Judiciary Committee, and the NNC's broader position on the Court-packing plan, represented one extreme of this debate: that civil rights were inextricably linked with economic and class legislation, and that the plan would ultimately benefit Black Americans by supporting the Roosevelt administration's efforts to remake American society.

Davis' life was a microcosm of these tensions within the Black community. Born in Washington, D.C. in 1905 to comfortably middle-class parents, Davis was a capable orator, the first African American to represent the United States in international debating competition at Oxford and Cambridge, and a one-time literary editor at *The Crisis*, the NAACP's magazine.[26] He attended Harvard Law School and, following the example of his father (who had been a politically active Republican in Louisville, Kentucky in the 1890s), worked a patronage job at the highest levels of Republican politics supporting Herbert Hoover's 1932 reelection campaign.[27]

The coming of the New Deal and the rise of a more activist and populist left changed Davis' political path. A vehement critic of the early New Deal, he brought together a like-minded coalition of Black organizations, eventually called the Joint Committee on National Recovery (JCNR), to oppose early, corporatist New Deal policies and advocate for Black interests in recovery legislation.[28] Although his early work against the New Deal was driven by partisan antipathy to the Roosevelt administration, during his time at the JCNR Davis conducted fieldwork throughout the South, produced reports on labor and economic conditions, and repeatedly testified before Congress.[29] These experiences notably changed his political views about how to achieve Black equality, drawing him towards a conception of civil rights that included labor protections and antidiscrimination provisions for Black workers.

Davis was also influenced by the development of the "popular front."[30] The popular front was a political concept developed by the French Communist Party in the early 1930s.[31] The French communists viewed disunity on the left as a core factor enabling the rise of the fascists in Germany and Austria, and in response created a broad political coalition with liberals, socialists, and progressives to keep fascist elements out of power, a policy adopted by the Comintern (the central organizing body of international communism) in August, 1935.[32]

In the United States, the popular front had a significant effect on the conduct and activities of the Communist Party of the USA (CPUSA). Before the popular front-era, the CPUSA, although always explicitly antiracist, had only indirectly opposed racism, believing that the overthrow of capitalism would itself end racial oppression.[33] After the announcement of the popular front, communist organizers began to cooperate with liberals and to directly challenge racist policies *in addition* to traditional labor organizing and agitation.[34] These developments built upon existing efforts in the South, where communist organizers, operating independently of direction from Moscow or CPUSA, had already established connections with liberals, socialists, and others to achieve racial equality and overthrow capitalist oppression.[35]

The popular front was not always popular in the Black community. It failed to satisfy some Black moderates like Walter White of the NAACP, who continued to view the mass politics espoused by the communists with suspicion.[36] Conservative Black commentators also took this view; columnist Kelly Miller, for example, criticized mass action by the popular front in support of the Court-packing plan.[37] On the other side of the Black political spectrum, some anti-imperialist Black communists were also disillusioned by the newfound

alliance with the imperialist democracies of Britain, France, and the United States.[38]

But the popular front did increase the reach and power of left-wing movements in the United States, attracting Black and white workers to a vision of interracial working-class unity and resulting in a more-than three-fold expansion of CPUSA membership, from 26,000 in 1934 to 85,000 in 1939.[39] The broadly anti-fascist coalition of the popular front, moreover, allowed some Black liberals, like Charles Hamilton Houston and other lawyers in the orbit of the NAACP, to expand their vision of economic civil rights and find common cause with avowed leftists through the 1950s.[40]

John P. Davis' leftward drift, and the rapid rise of the National Negro Congress, were paradigmatic of these trends. As with many Black activists, Davis had encountered left-wing elements long before he formally joined the popular front. His explicit focus on labor issues through the JCNR had facilitated close relationships with Communists including James W. Ford (a prominent Black leader of the popular front and three-time Communist Party vice-presidential candidate) and Harold Ware (an agricultural expert and alleged Soviet spy).[41] As the popular front gained popularity, Davis worked in concert with Ford to establish a new Black organization that would embody the popular front concept: the National Negro Congress.

The NNC grew from a 1935 conference at Howard University that Davis organized, which focused on Black economic issues.[42] The Congress' primary contribution to civil rights discourse during this era was an aggressive focus on labor organizing and multiracial appeals to the working class, which set it

Charles Hamilton Houston (pictured) and William H. Hastie, both Harvard Law graduates and brilliant young lawyers, invigorated the NAACP's litigation team and supported Roosevelt's Court-packing plan.

apart from both the less-radical NAACP and the lawyer-focused National Lawyers Guild.[43] Unlike the predominantly racial program targeting anti-Black discrimination adopted by some civil rights organizations including the NAACP, the NNC, like the Communist party, considered multiracial class and labor organizing key to overturning the oppressive capitalist system that also produced racial discrimination.[44] Moreover, the NNC adopted, and in some respects led, the explicit popular front effort to combat racial discrimination *in addition* to class and labor concerns, rather than focusing solely on the latter to solve the former.[45]

This popular-front vision of civil rights, incorporating racial, class, and economic concerns, drove the NNC to immediately and strongly support President Roosevelt's Court-packing plan. At a meeting of the NNC's Committee on Legislation held in late February 1937, only weeks after the announcement of the plan, members of the Committee unanimously agreed that the Congress must join with other left-wing organizations in full support of Roosevelt's efforts.[46] The Committee noted that "[t]he [Communist] Party wants to have a concentration of efforts at the present moment" to shape public opinion in favor of the plan and shore up wavering progressives in Congress.[47] It also flagged the statement of Earl Browder, the General Secretary of CPUSA, who described the plan as "fragmentary and inconclusive" but nonetheless called it a step "down the road" which would help "break down . . . the judicial veto over progressive legislation" and should thus receive "unanimous labor and progressive support."[48] The Committee also discussed how to harmonize the NNC's efforts with other labor and Communist bodies including labor's Non-Partisan League, which planned and held a series of mass meetings in support of the Court-packing plan.[49] The NNC directly supported these efforts by providing a four-page folder with arguments in favor of the plan to individual chapters of the League.[50] In addition to this discussion of social and labor legislation, however, the Legislation Committee spent significant time discussing "the Supreme Court['s] . . . attitude toward the Negro," arguing that racial issues and Black voices must be highlighted to maintain and build Black support for the plan.[51]

Davis's Testimony and the Court Packing Debate in the Black Press

Davis' testimony before the Senate Judiciary Committee reflected this racial emphasis, as did his aggressive political maneuvering to appear before the Committee. On March 29, almost two months after the introduction of the plan, Davis reached out to Judiciary Committee member Senator Matthew Neely of West Virginia, a New Deal liberal, advocate for labor, and sponsor of several anti-lynching bills.[52] Davis described himself as "representing six hundred affiliated organizations, many of which are in West Virginia," and noted that he would like to testify on behalf of the NNC to

> present to the Senate Judiciary Committee evidence concerning the attitude of the United States Supreme Court towards the civil rights of Negroes . . . particularly in view of the fact that strenuous efforts are being made by opponents of the President's plan to win Negro support against the bill.[53]

Another letter on April 7, accompanying Davis' written testimony, pressured the Senator to publicly support the plan by alleging that "[o]ur local branches, representing many thousands of your constituents" demanded to know the Senator's position on the bill and "would like to be able to state" at "several mass meetings in key [West Virginia] cities . . . that you will vote in favor of the President's proposals."[54] Notably absent from

these communications, however, was any discussion of economic or class issues.

Davis' opening statement before the Judiciary Committee was similarly devoid of economic issues and relatively subdued, given Davis' aggressive posture in his letter to Neely and the militant stance of the NNC. Davis focused his prepared remarks on the failure of the current Supreme Court to uphold federal civil rights laws protecting African Americans from discrimination in the face of hostile state governments. Laced with direct case citations ("Jim Crow laws were validated in *Plessy v. Ferguson* (163 U.S. 537) . . . . Such is the only reasonable conclusion to be drawn from the decision in the case of *McCabe v. Atchison, Topeka, and Santa Fe Railway Co.* (235 U.S. 151)."), Davis' testimony systematically made the case that the Court had been a consistent supporter of Jim Crow and hostile to Black interests on "separate-but-equal" accommodations, education, voting rights, and other core citizenship rights. The closest Davis came in his prepared testimony to discussing economic issues was his disclaimer that he would not discuss the Supreme Court's jurisprudence on "labor and social legislation, which are just as harmful to Negroes as a minority group as they are to all labor and all farmers," because "other persons have [already] discussed this subject." Instead, Davis' messaging largely echoed mainstream Black commentators, arguing that "there is need for a Supreme Court whose judicial temper can accurately reflect the social trends of the period in which we live" and better defend the civil rights of Black Americans.[55]

Davis was a shrewd political actor—he likely understood that he would never convince the white Southern senators on the Committee to support the plan. Instead, per the suggestion of the NNC Legislation Committee, he was likely targeting a national Black audience through the Black press, attempting to build support for both his organization and the Court-packing plan. His prepared statement thus had two related goals: building support for the plan by emphasizing areas of widespread agreement within the Black community while simultaneously countering the arguments of the plan's Black opponents.

Indeed, parts of the Black community actively criticized the Court-packing plan (and defended the Court) in the Black press. Black commentators argued that, in its recent cases, the Supreme Court had defended the rights of African Americans against oppression by Southern state governments.[56] The NNC Legislation Committee derisively described this argument as "the misconception that the Supreme Court has been the last holy safeguard of the Negro people against the Bourbon south," but many Black commentators subscribed to this interpretation of the Court's role in protecting Black Americans.[57] One author argued that the Reconstruction Amendments and the Supreme Court had "saved many from the mobs whether these mobs are in the streets, woods or courts" even while admitting that the Court had directly undermined those amendments at various times.[58] Others explicitly acknowledged that earlier Courts had undermined racial equality with the *Dred Scott* and *Plessy* rulings but argued that the current Court had ruled in favor of Black defendants in more recent cases.[59] A columnist for the *Associated Negro Press* argued that

> [t]hese are the men who protected the Scottsboro defendants . . . who saved the lives of Mississippi's three torture case victims. . . . Our Rock of Gibraltar is a Supreme [C]ourt with power to enforce the constitution as it now stands with regard to the 13th, 14th, and 15th amendments . . . instead of at the command of a president who has packed it to serve his own broad ends and with no regard for minority groups.[60]

This echoed the sentiments of many Black public figures who believed the current Supreme Court was better left alone, justifying this position by emphasizing recent rulings, like the *Scottsboro*, *Herndon*, and Mississippi torture cases, where the Court found in favor of individual Black defendants who had been subjected to patently unfair or inhumane treatment by Southern state governments. Davis' testimony was partly a response to these arguments.

But Davis was hardly the only Black American unconvinced by this position, and his prepared testimony appealed to a broad swath of Black public opinion. A particularly searing indictment of those who would defend the Court was delivered in a satirical column by Nat D. Williams, an educator, journalist, radio DJ, and widely read columnist, published in late February 1937.[61] "When a man of colour is put off a bus in some lone stretch of woods because the white passengers don't like his presence," Williams wrote, "he has consistently had the right to appeal to the Supreme Court to do something about his wounded feelings."[62] Lawyers quoted by Black newspapers listed the same recent Court rulings that Davis cited in his testimony as evidence in support of Court-packing.[63] Raymond Pace Alexander, a prominent Black Philadelphia lawyer and close ally of the NAACP, whose prestigious firm was known as the "Black Cravath" echoed Davis when he criticized the white primary cases and recent rulings upholding restrictive neighborhood covenants that excluded Black people from white neighborhoods.[64] An attorney from North Carolina summed up this position by writing, "[i]n view of past . . . Supreme Court decisions, the Negro has nothing to lose and everything to gain" from Court-packing.[65] These commentators, like Davis in his prepared testimony, implicitly or explicitly articulated a racial vision of

The economic hardships of the Great Depression hit African American workers especially hard. Above are workers, many of them migrants, grading beans at a canning plant in Florida in 1937.

civil rights fundamentally focused on citizenship rights like voting, formal desegregation, and protection from physical violence. Indeed, Davis' testimony successfully emphasized these areas of broad agreement with a large swath of Black public opinion, and coverage of his testimony in the Black press, the NNC's primary target audience, focused exclusively on these popular messages.[66]

While Davis' prepared testimony was carefully calibrated for mass appeal, his verbal sparring with segregationist Senators was more revealing of the NNC's position on economic civil rights. Committee members opposed to the bill, including Democrats Tom Connally of Texas and Edward Burke of Nebraska, "vicious[ly]" questioned Davis for much of his time before the Committee. Connally, who owed his seat in Congress to the racist white primary system that Davis criticized in his testimony, was especially and unsurprisingly hostile. Repeatedly swearing that he was "not a hater of your race" with "no antagonism toward the colored race as such" and "many friends among them," Connally pushed Davis to admit that he favored desegregation, which Davis happily agreed to.[67] But Connally's questioning also revealed the NNC's deeper economic vision of civil rights. In response to Senator Connally's questions about social equality, Davis responded:

> [I would like to see] the fair interpretation and construction of [the Thirteenth, Fourteenth, and Fifteenth] amendments, that the present social and economic retardation of a whole group of people, which has led to the impoverishment of the South, the impoverishment of not only the Negroes but of the larger percentage of the white people of the South, the white workers and farmers in the South, which has led to that type of economic maladjustment which makes the South today the poorhouse of the whole Nation . . . be changed. It is my hope that . . . there will be in the South the development of the type of economic and social improvement which will mean not only an improvement of the economic and social status of my people but will mean an improvement of the social and economic status of your people.[68]

Davis' focus on workers and the "economic and social" conditions in the South expressed a position held by some, but not all, Black civil rights activists. This was a vision of civil rights that included not only basic citizenship rights like the franchise and protection from physical violence but also economic and class rights like the right to organize and participate in labor unions, strikes, and boycotts. Davis and the NNC, closely aligned with the Communists on class and economic issues, were unsurprising advocates of this position.

But throughout the debate over the Court-packing plan, other lawyers and activists not aligned with the Communist party or the NNC expressed a similar conception of civil rights that included class and economic issues, often in response to the crushing poverty of Black workers during the Great Depression.[69] Raymond Pace Alexander put it best when he wrote, in a missive telegraphed to several newspapers, that the "[p]urpose of the change is to liberalize the Supreme [C]ourt, long too conservative. Such court will support laws to give working people greater share in national wealth, more security in future life—Negro race preponderantly working class people."[70] Other commentators criticized the "corporation lawyers" on the Court or slammed opponents of the plan as "well-fed gentlemen" and capitalists who offered only platitudes about "the American way."[71] One activist wrote that Roosevelt, whose administration had "not 'specially' dispensed favors for Negroes," had nonetheless buoyed the Black

community through his economic and social programs: "From my window," he wrote, "I see in the process of erection a great Negro high school made possible" by New Deal-era public works programs.[72] These public statements by prominent, mainstream Black figures suggest that Davis' conception of economic and class issues as central to racial equality were widespread throughout the Black community in the 1930s and helped drive significant Black support for the Court-packing plan.

Importantly, key players at the NAACP also adopted this view during the Depression. Charles Hamilton Houston's involvement in the successful Black Boycott Movement during the 1930s was illustrative of these shifting views on the role of economic rights in achieving civil rights. The Boycotts called for Black consumers to stop patronizing stores located in Black neighborhoods that would not hire Black workers.[73] Under the tutelage of prominent attorneys like Houston, the Boycotts found success in the Supreme Court (in a case decided a little more than a year after the announcement of the Court-Packing plan), assisting the boycotters by pressuring reluctant employers to hire Black workers and resulting in real gains for the African American community.[74] A number of key young attorneys in the NAACP's orbit, including Houston, William Hastie, and Raymond Pace Alexander, participated in the Boycott litigation; their

Some NAACP leaders thought anti-lynching legislation should take priority over support for the controversial Court-packing plan. This flag was flown from the New York headquarters of the NAACP between 1936 and 1938 as the Association continued its fight against lynching.

victories revealed the potential power of collective economic action to fight discrimination and segregation and suggested that labor and employment issues could advance the interests of civil rights and racial equality.[75] These NAACP attorneys were thus aligned with Davis' economic position in support of the plan, helping to explain their support for FDR's proposal.

Could Roosevelt "Do No Wrong" or Would His Plan "Reward Southern Friends?"

These young lawyers also agreed with Davis' formulation of how and why a packed Court would benefit the Black community. First, Davis assumed that "the type of men" Roosevelt would select to pack the Court would be progressive or at least liberal rather than "reactionary."[76] Second, Davis assumed that this general liberalization of the court would be sufficient to advance the cause of African Americans regardless of the new justices' position on issues of race.[77]

These arguments, subject to fierce debate in the Black community, were shaped by the confidence that President Roosevelt engendered among Black Americans. FDR had won the Black vote by a substantial margin in the 1936 election, and this support seemingly extended to any policies on the Court that the president chose to pursue.[78] One reporter, interviewing Black Americans about the Court-packing plan at the YMCA in St. Louis, Missouri, recorded that "[t]he feeling among Negroes now is that President Roosevelt can do no wrong. 'Anything he does is all right with me.'—say many Negroes."[79] The NNC Legislation Committee similarly attributed the relative openness of the Black press to the plan (in contrast to widespread opposition in the white press) to a "very great faith in Roosevelt."[80] Many Black commentators couched their support for the plan in reference to FDR; the Chicago Democratic Lawyers club was typical in arguing that they had "confidence in the disposition of the President" to implement the plan to support the interests of Black people.[81] One editorial even speculated that FDR might use this opportunity to appoint a Black man to the newly packed Court.[82]

Even opponents of the plan had to grapple with Roosevelt's popularity and trust in the Black community. Black critics frequently pointed out that while *this* President could be trusted to appoint race liberal justices, entrusting future presidents with increased power over the Court would leave African Americans vulnerable to the vagaries of politics; one former president of the National Bar Association, the primary national Black legal-professional organization, argued that "since it is impossible to know who will succeed President Roosevelt minority groups should fight to prevent full control of government becoming centralized in the hands of one man."[83]

Some prominent Black commentators went further, questioning whether Roosevelt, beholden to a national political coalition that included Southern Democrats, would, in fact, appoint race liberals to an expanded Court. The NNC Legislation Committee was sensitive to this criticism, acknowledging that the NNC's publicly supportive statements on the plan had to be tempered with the explicit caveat that the NNC would "carefully scrutinize Presidential appointees to the enlarged Supreme Court."[84] Opponents of Court-packing also recognized that highlighting the president's perceived willingness to sacrifice the interests of Black Americans for his broader New Deal policy objectives was a potent attack against the plan. One Black lawyer in New York City argued that the Court-Packing plan, "[f]or the Negro, . . . will be only evil" because the plan's main congressional champions were Southern "Negrophobes" who would

"segregate[e Blacks] out of American productive life by federal legislation and decree."[85] "This race cannot afford," wrote another columnist, to have a Court "packed with six men chosen by a Democratic president who is under obligation to the Democratic South and would be forced to reward Southern friends."[86] These fears were so acute that following the death of Arkansas Senator Joe Robinson (the Democratic Majority Leader and primary legislative backer of the plan to whom Roosevelt had promised a Supreme Court seat), a Black priest wrote, "old Joe Robinson was such a bitter enemy of the Race and too he was set to go on the Supreme Court Bench . . .'THANK GOD [for his death].'"[87] These fears were arguably confirmed by President Roosevelt's later appointment to the Court of then-Alabama Senator Hugo L. Black, a former member of the Ku Klux Klan, following the retirement of Justice Van Devanter in May 1937. Commentators from the Black community were furious at the appointment, with the Reverend J. Raymond Henderson describing Black as "a cheap Alabama lawyer" and criticizing FDR's "desire to add a justice whom he knew would be favorable to [his social and economic policies]" as a "classic error of the new deal."[88] Still, proponents of the plan were undeterred by these arguments. Many simply ignored FDR's political reliance on Southern Democrats or the long-term speculation about what future presidents might do.

Davis, however, countered with a broader answer in line with his expansive economic vision of civil rights: regardless of the racial predilections of Roosevelt's nominees, his plan would undoubtedly liberalize the Supreme Court, and this would be good for Black Americans.[89] The NNC would push Roosevelt to appoint race liberals, but a Court willing to uphold New Deal social and economic legislation, in Davis' estimation, would collectively promote the economic interests and thus civil rights of African Americans.[90] While Davis had seen firsthand how Black Americans were harmed by the discriminatory implementation of earlier New Deal programs (like the National Recovery Administration codes), his earlier successes in mitigating some of those problems during his career as a lobbyist for the JCNR had shown that vigorous advocacy could push the administration in a more equitable direction.[91] His testimony on the Court-Packing plan revealed his continuing belief that the New Deal was, on balance, good for African Americans. Davis thus simultaneously agreed with the Communist Party's position on the plan (and the broader New Deal), recognized its limitations for Black workers, and believed in his own ability to correct or mitigate those limitations. His assertion that a rising tide of economic gains and labor rights would lift all boats revealed a class-oriented vision of civil rights in stark contrast to the views of some Black civil rights advocates whose more racially focused vision of civil rights did not endorse class legislation to the detriment of race legislation.

Thus, Davis' testimony, although calibrated to appeal to a national Black audience with race-based arguments, also exemplified an explicitly economic and class-based vision of civil rights, reflecting an ongoing debate within the Black community. His testimony is notable because it was a highly public expression of that vision, which was still competing with the race-based vision that would eventually solidify in *Brown*. Davis' testimony, and the larger debate around the Court-Packing plan, shows that this economic vision was shared across the Black community in the late 1930s and that other Black lawyers and activists agreed that civil rights should include an economic and class dimension. But Davis' testimony also highlighted the absence of another important organizational actor from the debate over the

plan: The National Association for the Advancement of Colored People.

The NAACP Remains Silent

Other scholars have examined the NAACP's struggle to incorporate economic and class issues during the 1930s, but none have examined its response to the Court plan in this light. This might be a result of the NAACP's conspicuous silence on Court-packing, which is particularly notable given the contemporary controversy surrounding the plan. The political battles over the proposed legislation were filled with dramatic twists and turns that covered newspaper front pages and dominated conversations in Washington and across the country from February well into the fall.[92] Despite this widespread debate, the NAACP never took any public position for or against the plan. Although the NAACP's records provide some clues about this decision to remain on the sidelines, the full discussions which led to the decision were not recorded. Instead, an internal conflict between race-based and class-based visions of civil rights, highlighted by the organizational priorities that the NAACP did pursue in 1937, foreclosed the possibility of a public statement for or against the plan.

The White House Calls for Help

The NAACP's records reveal that serious consideration was given to issuing a public statement on the Court plan. This process began on February 23, 1937, eighteen days after the plan was unveiled, when the White House reached out for help.[93] The national reaction to the Court-packing plan had been largely negative, including in some conservative elements of the Black community, and the administration was looking for friendly voices to help rally support. On the 23rd, Aubrey Williams, a white civil rights activist and administration official, spoke with Mary McLeod Bethune, a prominent activist and leader of Roosevelt's "Black Cabinet" of African American advisors. Williams asked Bethune to relay a request from the White House to the NAACP: would the NAACP issue a public statement in support of the plan? Shortly afterward, Bethune called NAACP Executive Secretary Walter White to relay the request.

The timing was auspicious. Bethune's call to White occurred just before a meeting of the NAACP's Administration Committee. That body was composed of important actors, including Joel and Arthur Spingarn, Walter White, and Special Counsel Charles Hamilton Houston; William Hastie, another prominent Black attorney and member of the NAACP's National Legal Committee, was also in attendance that day, presumably for his input on the Court issue.[94] This group of important individuals represented, in microcosm, the different internal pressures buffeting the NAACP during the late 1930s. The Spingarns, for example, were white progressive reformers and old hands who had been with the Association almost since its founding.[95] Joel was then President of the NAACP, and Arthur had run the Legal Committee (and thus directed much of the NAACP legal strategy) until Charles Hamilton Houston became the first Black Special Counsel in 1935. Walter White, by 1937 the Executive Secretary of the Association, had joined the NAACP in 1918 as part of an expansion of Black staff under James Weldon Johnson.[96] White had a close relationship with Eleanor Roosevelt, had publicly battled with NAACP founder W.E.B. Du Bois over the importance of integration, and was highly skeptical of the Communists and left-wing movements.[97]

Houston and Hastie represented new blood at the NAACP. Both Harvard Law graduates and brilliant young lawyers, their experiences during the Depression with Black economic issues placed them much closer to the popular front consensus on the

importance of class and labor in civil rights advocacy.[98] The debate between these different actors over how to respond to the White House's request was not recorded in the Administration Committee minutes. Instead, the minutes note only that after "lengthy discussion as to whether or not this matter came within the scope of the Association's activities," the Committee voted to recommend to the National Board that Houston draft a public statement on behalf of the NAACP addressing the issue.[99]

The minutes from that initial Administration Committee meeting contain two radically different copies of that proposed statement, which Houston drafted, likely with input from the rest of the committee. These draft public statements, preserved in the meeting minutes, provide a window into the NAACP's position on the Court-Packing plan and reveal a conflict between the increasingly class-based, economic civil rights vision of lawyers like Houston and the race-based stance on civil rights held by some in the Association.

The first draft of the statement mirrored Houston's more class-focused conception of civil rights. Although it began with an acknowledgement of "favorable things done" and "unfavorable action" by the Court, likely in response to the public debate over whether the Court's precedents had been good or bad for Black people, it proceeded to echo a race *and* class-based narrative that might be found in an NNC communique: "It is to the interest of the Negro as a Negro and also as a member of the disadvantaged peoples of this country," wrote Houston, "that there be a liberal Supreme Court."[100] The final part of the statement hedged on the overall effects of the plan, arguing that "each individual" must decide whether the plan would permanently liberalize the Court. Nonetheless, the inclusion of explicitly multiracial class rhetoric in the statement and the unambiguous assertion that a liberalized Court would benefit Blacks via both racial *and* class empowerment showed the extent to which some staff of the NAACP, including Houston, had shifted toward the class-based vision of civil rights articulated by popular front organizations like the NNC and lawyers like John P. Davis during the 1930s.[101]

Houston's favorable view of Court-packing is further confirmed by his public, personal support for the plan only four days later. "Not speaking for the National Association for the Advancement of Colored People but personally," Houston wrote in the Norfolk *Journal and Guide* on February 27, "I favor the proposal to increase the number of judges of the Supreme Court."[102] Although Houston's response was entirely devoid of his reasoning and did not express the organizational position of the NAACP, his comment comports with his increasingly economic orientation and his earlier willingness, including at the 1933 annual convention, to push the NAACP towards a more class-oriented vision of civil rights.[103]

In contrast to the first draft statement and Houston's publicly supportive comments in the *Journal and Guide*, the second statement drafted by the Administration Committee expressed an explicitly racial vision of civil rights. Echoing language common to more conservative commentators, the second statement called the Supreme Court "one place where Negroes have looked for ultimate justice" and then proceeded to set up a direct conflict between race and class issues.[104] On race issues, including NAACP priorities like the "Educational Program" and the "Anti-Lynching Bill," the statement argued that the plan would not "change the complexion of the Court so far as Negroes are concerned, but certainly cannot help it." While the statement admitted that a newly liberalized Supreme Court would likely uphold "social legislation" on class and economic interests, it dismissed these benefits as "incidental."[105] By downplaying working-class issues as "incidental"

and emphasizing the race-oriented policy goals of the NAACP, the second statement explicitly rejected a class-based approach to achieving equality and adopted an unmistakably racial vision of civil rights.

These statements reveal a clear conflict within the NAACP between the economic and racial conceptions of civil rights. The first statement, focused on both race and class and implicitly favorable towards the plan, represented the popular front view of civil rights held by lawyers like Charles Houston. The second statement, which downplayed the importance of class and emphasized the role of race, argued that the plan would not improve the Court's outlook on racial issues and would thus fail to advance the cause of civil rights. Despite the inherent contradiction of these two statements, the Administration Committee voted to send both to the National Board of Directors to allow the Board to choose its preferred position.[106] But the Board took another path instead: silence.

The NAACP Does Not Respond

On March 8, 1937, two weeks after the Administration Committee meeting, the NAACP National Board of Directors convened for its regular meeting.[107] Houston reported on the recommendation of the Administration Committee that the Association make a statement on the Court-Packing plan; he may also have presented similar versions of the draft statements discussed above.[108] The Board minutes do not record what was discussed or who took what position, but "[a]fter lengthy discussion," the Board voted against issuing any statement on the plan. Instead, it requested that Houston write a general article for the NAACP magazine, *The Crisis*, on the Supreme Court (which was never published) and referred action on the Court plan back to the Association's Legal Committee for further consideration.

The Board records for the rest of 1937 show no indication that NAACP leadership ever again considered publicly weighing in on the issue. Although public reports and internal correspondence contain frequent mention of the Court bill's impact on other legislation, especially on the prospects for a federal anti-lynching bill, the Court-packing plan was otherwise absent from many of the NAACP's official events and publications.[109] For example, on July 15, National Secretary Walter White privately described the death of Senate Majority Leader Robinson as a "tragedy," not because this was widely seen as dooming the plan, but because Robinson's death would delay consideration of the federal anti-lynching bill also before Congress.[110] The NAACP annual conference in June and July contained official discussions and panels covering the anti-lynching bill, the Wagner Labor Relations Act, relief and social security, the rise of the CIO and the role of Black workers in industrial unionism, the problems of Southern tenant farmers, and speakers covering numerous other topics—but not a single mention of the Court-packing plan.[111] Even President Roosevelt's opening greeting to the conference made no reference whatsoever to the plan.[112] Although the opening session made specific reference to recent Supreme Court cases, including the work of the legal defense team on the *Scottsboro* and *Herndon* cases, the official agendas and notes contain no mention of the judiciary reorganization.[113] The notes of the concurrent Youth Conference also did not contain any references to the plan, and *The Crisis* was similarly devoid of any mention of the plan except when discussing how the plan might affect the chances of a federal anti-lynching bill.[114] Thus, despite direct political pressure from the White House and some of its own staff, NAACP leadership made a clear decision to remain silent on the largest legal and political story of 1937 and stuck to that choice throughout the year.

Without more specific information on the "lengthy discussion" between the members

of the National Board at their March 8 meeting, it is difficult to conclusively say why the leadership of the NAACP decided to stay silent. However, the two draft statements from the Administration Committee and Houston's public support show that there was clear division within the Association as to the efficacy of the plan. The two statements directly conflicted and revealed different visions of what civil rights were and how best to achieve them. The decision to remain silent may have resulted from an inability to agree on which of these two paths to take.

Divisions over the plan mirrored other cleavages within the NAACP between racial and economic conceptions of civil rights. Public support for the plan could have alienated funders and members who held more racialized views of civil rights advocacy.[115] It may also have angered the Supreme Court; unlike the NNC, which had relatively little involvement in court cases, the NAACP was often involved in litigation and could ill afford a bad reputation in the nation's courts.[116] A statement against the plan, on the other hand, might have alienated some of the best attorneys in the NAACP's orbit, like Houston, Hastie, and Raymond Pace Alexander, who had moved towards the popular front's economic vision of civil rights during the Great Depression and publicly supported Roosevelt's plan. Rather than attempt to settle this conflict, which involved serious political costs and implicated ideological disagreements between staff, members, and funders, refusing to comment allowed the National Board to avoid the issue.

This split over the plan also reflected practical debates about whether Court-packing would help achieve civil rights. Many

Some NAACP leaders worried that Senator Joseph Robinson of Arkansas (above) might deliver Southern votes for the Court-packing plan in exchange for the president quietly killing the anti-lynching bill.

commentators in the Black community questioned whether a Court packed by Roosevelt would be friendly to Black interests; many were skeptical that a Court liberalized on economic and social issues would necessarily be liberalized on race issues. Unlike the NNC's conception of civil rights, which assumed that economic liberalization would necessarily benefit Black Americans, the NAACP's posture as a civil rights organization pursuing race-based litigation and policy initiatives (like educational desegregation and a federal anti-lynching bill) increased the relative importance of an explicitly race-liberal Court. The racially focused stance of the NAACP thus increased the salience of arguments about whether Court-packing would liberalize the Court on race issues and likely contributed to the Association's silence.

The racial civil rights focus of the NAACP also hints at another possible explanation for its silence on the Court-packing plan: clear internal and external prioritization of the federal anti-lynching bill working its way through Congress.[117] Black leaders and their progressive allies in Congress had been attempting to implement federal anti-lynching legislation for decades.[118] Vehemently opposed by Southern Democrats, the 1937 version of the bill was strongly supported by all segments of the Black community including the NNC, the NAACP, and Black columnists, editors, and public intellectuals.[119] The anti-lynching bill, unlike the Court plan, appealed to the sensibilities of all civil rights activists: it targeted particularly egregious physical abuses of Black Americans, was broadly popular with the Black public, and did not threaten to overturn the economic structure of the United States.

The NAACP focused much of its federal legislative work on supporting the anti-lynching bill, suggesting that its silence on the plan may have been intended to conserve staff and organizational resources for a higher priority bill. The prospects for passage and the potential of a Southern filibuster were frequently discussed at National Board meetings, in public and private reports, at conferences, and in the pages of *The Crisis*.[120] The 1937 incarnation of the legislation was widely seen as the best shot in decades to achieve the goal of a federal anti-lynching law, which also contributed to a strong focus on the bill.[121] National Secretary Walter White was so concerned with the prospects of the bill that he repeatedly implored the editors of *Congressional Intelligence*, a newsletter focused on congressional rumor and news, to conduct a poll on the anti-lynching bill, even to the exclusion of reporting on the Court plan.[122] Only after a series of letters from White did the editors conduct the requested poll.[123] This focus on the anti-lynching bill shows that the NAACP, with one of its long-term priorities in reach, may simply have decided to concentrate scarce resources on finally achieving that goal rather than focusing on the controversial Court-packing plan.

NAACP leadership also viewed the judicial reorganization bill as possibly in competition with the success of the anti-lynching bill. Internal NAACP correspondence expressed concerns that Senate Majority Leader Joe Robinson, a Southern Democrat, might deliver Southern votes for the Court plan in exchange for the president quietly killing the anti-lynching bill.[124] The Black press helped fuel this perception that the bills were in opposition by reporting that the two bills might be jockeying for space on the legislative calendar.[125] This likely added to the belief among members of the NAACP's National Board that staying out of the conversation around the Court plan would be beneficial to the overall interests of the NAACP and Black Americans, and it aligned with concerns about the efficacy of the plan noted above.

Moreover, many in the Black community believed that the president was likely to pack the Court with conservative Southern Senators who would reject Black priority

Members rushed out of the Capitol after the first session of the 75th Congress ended on August 21, 1937. They had reacted to President Roosevelt's proposed Supreme Court re-organization by stalling most of his legislative program.

legislation, including the anti-lynching bill. Although John P. Davis argued in his testimony before the Senate Judiciary Committee that a packed Court would be more likely to uphold an antilynching bill, other commentators were skeptical of such claims.[126] These concerns were not idle ones—later in the year, FDR would appoint Alabama Senator Hugo Black, a New Deal liberal who nonetheless had led a filibuster of an anti-lynching bill in 1935.[127] The choice to focus on the anti-lynching bill while remaining silent on Court-packing showed an organizational commitment to long-term priorities and signaled that, despite serious internal debates, a race-based civil rights vision remained the primary focus of the NAACP in the late 1930s.

Court-packing as Civil Rights Crossroads

FDR's Court-packing plan prompted important debates within the civil rights community about how best to achieve civil rights and what, exactly, those civil rights entailed. These debates mirrored contemporary divisions within important civil rights organizations and the Black community. Moreover, for the NAACP, the plan represented a decision point; should the Association remain focused on achieving a race-based vision of civil rights, or should it move towards the class-based vision championed by the popular front?

The National Negro Congress' very public stance on the plan made clear where it stood in this debate. Its foundational belief in class-based civil rights helps explain why the NNC and its cofounder, John P. Davis, took an unambiguous position in support of FDR's plan. An economic conception of civil rights allowed the NNC to neutralize concerns about whether the Court had been good for Black Americans while ignoring arguments about the efficacy of the plan in creating positive change for working-class Black Americans. This also highlights a crucial facet of civil rights history: the race-based vision eventually expressed in *Brown v. Board of Education* was still up for debate in the 1930s, and this debate strongly influenced

Black reactions to President Roosevelt's Court-packing plan.

The silence of the NAACP also reflects this conflict between the relative importance of race and class in civil rights. The Court plan presented a difficult challenge to an organization that had traditionally promoted a race-based vision of civil rights. Unable to ignore changing Black public opinion or the economic civil rights vision of its own popular-front-oriented lawyers, like Charles Hamilton Houston, the NAACP struggled to define and express a position on the plan that would satisfy its various constituencies. The Association's eventual silence, despite the efforts of the White House and internal actors like Houston, was a compromise between these competing visions of civil rights that allowed the NAACP to focus on its long-term legislative and judicial priorities without alienating some segment of its staff, leadership, or funders. This strategic ambiguity allowed Houston and other Black lawyers within the NAACP's orbit to pursue casework targeting economic equality and labor rights, enabling important victories, including *New Negro Alliance v. Sanitary Grocery Co.* and *Steele v. Louisville & Nashville Railway Co.*, while simultaneously laying the groundwork for the desegregation cases that resulted in *Brown*.[128] But despite these successes, the internal debate highlighted in the competing unpublished statements drafted by Houston for the Administration Committee nonetheless shows that the NAACP of the late 1930s, like many Black organizations, was struggling to balance the role of race and class in civil rights.

These trends also illustrate a larger debate over the role played by the Supreme Court in Black progress towards equality and civil rights. In the late 1930s, many segments of the Black community lauded the Court for its rulings against racist Southern state governments, and these very recent cases influenced contemporary perceptions of the Court-packing plan and its value to Black Americans. Other commentators, however, remembered the Court's abysmal record on Jim Crow segregation and Black disenfranchisement. The emerging economic view of civil rights championed by popular front organizations like the NNC bolstered these assessments, arguing that the Court's regressive economic rulings hurt working-class Black people.

For modern observers, the Black community's reaction to the Court-packing plan highlights the complicated relationship between Black Americans, the Court, civil rights, and racial justice. It suggests that the neat story constructed about the Court and civil rights after *Brown* does not reflect the tumult and turmoil of the interwar period. It shows that the actors within these stories had evolving, complicated views about the Court. Witness John P. Davis, the former anti-New Deal Republican, advocating vigorously for Court-packing to defend and advance Roosevelt's class legislation. Hear Charles Hamilton Houston, the father of the desegregation litigation that would culminate in *Brown*, calling on the NAACP to support FDR's plan for much the same reason. Perhaps most pressingly, it reminds us that debates over the proper role of the Supreme Court in American society are often about much than the Court itself: in 1937 as now, arguments about the Court reflect competing visions of how American social, economic, and political life are fundamentally structured, how they ought to be reformed, and how the United States might strive to achieve justice for all its people.

ENDNOTES

[1] *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 1644–59 (1937) [hereinafter *Davis Testimony*] (testimony of John P. Davis, National Secretary of the National Negro Congress). This paper will use the terms "Black" and "African American," and will avoid using the term

"Negro," which was a standard descriptor for Black Americans during this period, unless directly quoting historical sources or referring to the National Negro Congress.

[2] *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. (1937). The author attempted to determine the racial identity of the more than eighty witnesses who spoke at the hearings by comparing their names and biographical information against available historical evidence, primarily photos from the Library of Congress and other online sources. Although this is, at best, an imperfect measure of race, Davis was, in any case, the only witness who appeared at the hearing to represent a Black organization and discuss Black issues at length. *See generally Davis Testimony*.

[3] *See, e.g.*, *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 815–16 (1937) (testimony of John D. Miller, President of the National Cooperative Council) ("Only recently in a case where the rights of humble Negroes were involved, and also in a case where the rights of a humble Communist were involved, the Supreme Court protected the rights of both."); *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 1300 (1937) (testimony of William E. Masterson, Dean of the School of Law, University of Missouri) (arguing that the Court had "protected the rights of a most ignorant Negro when they were being refused in the State courts").

[4] Hilmar Ludvig Jensen, *The Rise of an African American Left: John P. Davis and the National Negro Congress*, 8–9, (May 1997) (Ph. D. dissertation, Cornell University) (ProQuest).

[5] *Davis Testimony*, 1644; Jensen, *The Rise of an African American Left*, 4.

[6] *Id.*, 3–4.

[7] *Davis Testimony*; *Davis Tells Senate Judiciary That Present 'Biased Supreme Court' Robs Race of Rights*, Chi. Defender, May 1, 1937, 3 [hereinafter *Davis Tells Senate Judiciary*].

[8] *See generally* Genna Rae McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1983).

[9] William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 129, 132–35 (1995).

[10] *See ibid.*

[11] *Id.*

[12] *Compare* Opinion, *Go On, Mr. President!*, Atlanta Daily World, May 22, 1937, 2 (urging the President to pack the Court) *with* Lucius C. Harper, Opinion, *Has the Supreme Court Been Fair to Our Race?*, Chi. Defender, Feb. 13, 1937, 4 (opposing the Court plan). *See, e.g.*, *Morehouse-Howard Argue Supreme Court Plan*, New J. & Guide, Apr. 24, 1937, 5; *Memory of Two Men Feted*, Atlanta Daily World, Feb. 19, 1937, 6; *Lawyers Split on Roosevelt's Court Plan*, Chi. Defender, Feb. 13, 1937, 1.

[13] *Memory of Two Men Feted*, Atlanta Daily World, Feb. 19, 1937, 6.

[14] *See Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[15] Orville Vernon Burton & Armand Derfner, Justice Deferred: Race and the Supreme Court 83 (1995); *The Slaughter-House Cases*, 83 U.S. 36 (1873); *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank,* 92 U.S. 542 (1876).

[16] Burton & Derfner, 84–85; *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898).

[17] *See, e.g.*, Harper, *Has the Supreme Court Been Fair to Our Race?*, (discussing *Plessy*); *Davis Testimony* 1645–46 (discussing *The Civil Rights Cases*, *The Slaughter-House Cases*, and *Plessy*).

[18] *Guinn v. United States,* 238 U.S. 347 (1915); *U.S. Supreme Court Annuls Oklahoma and Maryland Laws Restricting Suffrage*, Chi. Defender, June 26, 1915, 1 ("The effect of this decision is far-reaching. . . . It is gratifying to find the United States Supreme Court unanimous against these infamous methods [of disenfranchisement] . . .").

[19] *Bailey v. Alabama,* 219 U.S. 219 (1911); *Buchanan v. Warley* 265 U.S. 60 (1917).

[20] *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Grovey v. Townsend*, 295 U.S. 45 (1935).

[21] *Powell v. Alabama*, 287 U.S. 45 (1932); Glenda Elizabeth Gilmore, Defying Dixie 118 (2008).

[22] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[23] *Herndon v. Lowry*, 301 U.S. 242 (1937); Gilmore, Defying Dixie, 161.

[24] Harper, *Has the Supreme Court Been Fair to Our Race?*

[25] Raymond Pace Alexander, Letter to the Editor, *Alexander O.K.'s President's Plan*, Chi. Defender, Feb. 13, 1937, 1.

[26] Jensen, *The Rise of an African American Left*, 29, 118–20, 147, 153.

[27] *See ibid.*, 22–25, 222–23, 263–64.

[28] *See id.*, 330–31, 354.

[29] *See id.*, Chapter Five.

[30] *See id.*, 490; Kenneth W. Mack, *Law, Mass Politics, and the Civil Rights Lawyer*, 93 J. Am. Hist. 37, 54–56 (2006).

[31] Mohammed Elnaiem, *Black Americans in the Popular Front Against Fascism*, JSTOR Daily, Nov. 12, 2020, https://daily.jstor.org/black-americans-in-the-popular-front-against-fascism/.

[32] *See ibid.*; Gilmore, Defying Dixie, 185.

[33] Jensen, *The Rise of an African American Left*, 491–98
[34] *See ibid.*; Gilmore, Defying Dixie, 185.
[35] *Id.*, 173–74.
[36] *Id.*, 122–23.
[37] *See* Kelly Miller, *Passing Views*, Atlanta Daily World, Mar. 2, 1937, 6.
[38] Elnaiem, *Black Americans in the Popular Front Against Fascism.*
[39] *See* Gilmore, Defying Dixie, 185.
[40] *Ibid.*, 8–9.
[41] Jensen, *The Rise of an African American Left*, 491–98
[42] August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909–1965: "To Reach the Conscience of America,"* 59 J. S. Hist. 3, 18 (1993).
[43] Mack, *Law, Mass Politics, and the Civil Rights Lawyer*, 56.
[44] *See* Meier & Bracey, *The NAACP as a Reform Movement, 1909–1965*, 42.
[45] Jensen, *The Rise of an African American Left*, 491–98. *Compare* Fraser M. Ottanelli, The Communist Party of the United States (1991) (arguing that the NNC was subordinate to CPUSA) *with* Jensen, *The Rise of an African American Left* (arguing that the NNC was entirely independent of CPUSA).
[46] Minutes of a Meeting of the Committee on Legislation (Feb. 22, 1937), 5 *in* The National Negro Congress Records, 1933–1947, Box 10, folder 7 Exec. Board Minutes 1937 (on file with the Schomburg Center for Research in Black Culture, New York City, N.Y.) [hereinafter Legislation Committee Minutes].
[47] *See ibid.*, 5.
[48] Earl Browder, *Roosevelt Proposal on Supreme Court is Not Radical But is Step Forward Against its Usurpation of Power, Browder Says*, Daily Worker, Feb. 20, 1937, 3.
[49] *See* Legislation Committee Minutes, 7.
[50] Letter from John P. Davis to Curtis Garvin (Apr. 1937), *in* The National Negro Congress Records, 1933–1947, Box 10, Folder 9 "G" (on file with the Schomburg Center for Research in Black Culture, New York City, N.Y.).
[51] Legislation Committee Minutes, 5.
[52] Letter from John. P. Davis to Senator Matthew M. Neely, (Mar. 29, 1937), *in* The National Negro Congress Records, 1933–1947, Box 11 folder 18 "N" (on file with the Schomburg Center for Research in Black Culture, New York City, N.Y.).
[53] *Ibid.*
[54] Letter from John. P. Davis to Senator Matthew M. Neely, (Apr. 7, 1937), *in* The National Negro Congress Records, 1933–1947, Box 11 Folder 18 "N" (on file with the Schomburg Center for Research in Black Culture, New York City, N.Y.).
[55] *Ibid.*
[56] J. Mercer Burrell, *Supreme Court Last Bulwa9rk* [sic], Chi. Defender, Mar. 27, 1937, 16.
[57] Legislation Committee Minutes, 6.
[58] E.S. Cowan, Letter to the Editor, *Supreme Court One of Race's Bulwarks, Correspondent Feels*, New J. & Guide, Mar. 20, 1937, 8.
[59] *Lawyers Split on Roosevelt's Court Plan*, 1, 5.
[60] Frank Marshall Davis, *World In Review: Borah's Proposal and thhe Supreme Court* [sic], Atlanta Daily World, Mar. 2, 1937, 6.
[61] Nat. D. Williams, *Down On Beale: Woodman, Spare That Tree*, Atlanta Daily World, Feb. 26, 1937, 6.
[62] *Ibid.*
[63] *See, e.g.*, *Lawyers Split on Roosevelt's Court Plan*, 5 (listing recent cases, including the "white primary" case, cases involving "private contracts," and cases "depriv[ing the Negro] of life, liberty, or franchise," as reasons for Black Americans to support the plan).
[64] Alexander, *Alexander O.K.'s President's Plan*, 25.
[65] Bernard Young Jr., *Fourteen Lawyers Divided Fifty-Fifty in Comments on President F. D. Roosevelt's Judiciary Reforms*, New J. & Guide, Feb. 27, 1937, 8.
[66] *Davis Tells Senate Judiciary*.
[67] *Davis Testimony*, 1651–52.
[68] *Ibid.*, 1654.
[69] *See, e.g.*, Nancy J. Weiss, Farewell to the Party of Lincoln: Black Politics in the Age of FDR 44–46 (1983) ("As the census of 1930 had made clear, economic adversity was nothing new for blacks. For decades, they had been stuck at the bottom of the economic ladder . . . . For more than two-thirds of [Black cotton farmers], cotton farming in the early 1930s yielded no profits. . . . In the cities, those blacks who managed to hold onto their jobs suffered crippling declines in wages. . . . Wages aside, employment of any sort for blacks in the cities was increasingly hard to come by.").
[70] Alexander, *Alexander O.K.'s President's Plan*.
[71] Richard H. Bowling, *The Guide Post: On Packing the Court*, New J. & Guide, Mar. 6, 1937, 8; Opinion, *Go On, Mr. President!*, Atlanta Daily World, May 22, 1937, 2.
[72] Gordon B. Hancock, *Between the Lines: Lock-Step Loyalty*, New J. & Guide, Mar. 27, 1937, 8.
[73] Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 Yale L.J. 256, 318 (2005).
[74] *Ibid.*, 329; *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).
[75] Mack, *Rethinking Civil Rights Lawyering*, 330; Risa L. Goluboff, The Lost Promise of Civil Rights 180 (2007).
[76] *Davis Testimony*, 1655.

[77] *Id.*, 1645–48.
[78] Dewey R. Jnoes [sic], *Pointed Paragraphs From the Nation's Capital*, Chi. Defender, Feb. 13, 1937, 17.
[79] *d.* ("I guess Negroes have decided to do their own thinking, however, since the record shows now that they voted 70 percent for Roosevelt . . . .").
[80] Legislation Committee Minutes, 6.
[81] *Chi Lawyers Endorse FDR Court Plan*, Atlanta Daily World, Apr 26, 1937, 1.
[82] Editorial, *Supreme Court Timber*, Chi. Defender, Feb. 27, 1937, 16.
[83] *Lawyers Split on Roosevelt's Court Plan*, 5.
[84] Legislation Committee Minutes, 6.
[85] *Lawyers Split on Roosevelt's Court Plan*, 5.
[86] Davis, *World In Review: Borah's Proposal*.
[87] Leuchtenburg, The Supreme Court Reborn, 145; J. G. Robinson, Letter to the Editor, "*Thank God*", Chi. Defender, Aug. 7, 1937, 16.
[88] Editorial, *Sen. Black is 'Black Eye' to Hope of Race*, Chi. Defender, Aug. 21, 1937, 1; Rev. J. Raymond Henderson, *Hugo Black Expose and the Negro*, Atlanta Daily World, Sep. 18, 1937, 4. On Justice Black's participation in the Ku Klux Klan, the Klan's involvement in his electoral career, and his opposition to federal anti-lynching legislation, see Roger K. Newman, Hugo Black: A Biography 89–142, 201–03 (1997).
[89] *Davis Testimony*, 1647, 1655.
[90] *See ibid.*; Legislation Committee Minutes, 6.
[91] Jensen, *The Rise of an African American Left*, 389, 402, 474–75 and n.29.
[92] Leuchtenburg, The Supreme Court Reborn.
[93] Minutes of the Meeting of the Committee on Administration (Feb. 23, 1937), 1, *in* National Association for the Advancement of Colored People Records, Box I:A26, Committee Corres. Admin. Comm. Jan.–Dec. 1937 (on file with the Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter Administration Committee Minutes].
[94] *Ibid.*
[95] Meier & Bracey, *The NAACP as a Reform Movement, 1909–1965*, 12, 23.
[96] *Ibid*., 10–12.
[97] *Id.*, 16–18.
[98] *Id.*, 14, 17–18; Mack, *Rethinking Civil Rights Lawyering*, sections IV.C.– D.
[99] Administration Committee Minutes, 1–2.
[100] *See* Re: (Draft of) Statement on the President's Proposal Re: the Supreme Court (First Draft) (Feb. 23, 1937), *in* National Association for the Advancement of Colored People Records, Box I:A26, Committee Corres. Admin. Comm. Jan.– Dec. 1937 (on file with the Manuscript Division, Library of Congress, Washington, D.C.).
[101] *Ibid.*
[102] Young, *Fourteen Lawyers Divided*, 65.
[103] Goluboff, The Lost Promise of Civil Rights, 180 (quoting Charles Hamilton Houston).
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[107] Minutes of the Meeting of the Board of Directors (Mar. 8, 1937), 1, *in* National Association for the Advancement of Colored People Records, Box I:A3, reel 2, Minutes of the Meetings of the Board of Directors 1937 (on file with the Manuscript Division, Library of Congress, Washington, D.C.).
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[116] Meier & Bracey, *The NAACP as a Reform Movement, 1909–1965*, 10; Eisenberg, *Only for the Bourgeois?*, 124 (discussing the NAACP's focus on litigation).

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[125] *See, e.g.*, *Committee Puts Approval on Lynch Bill*, New J. & Guide, June 26, 1937, 10.

[126] *Davis Testimony*, 1649.

[127] *See* Newman, Hugo Black, 89–142, 201–03 (discussing Black's association with the Ku Klux Klan and his opposition to federal anti-lynching legislation).

[128] *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Steele v. Louisville & Nashville Ry. Co.*, 323 U.S. 192 (1944).

Fortas' Nominations: One Era Ends, Another Begins

Michael Nelson

Abe Fortas' two Supreme Court nominations provide a study in contrasts. Although the same president, Lyndon B. Johnson, made both nominations within a single Term, they had sharply contrasting outcomes. In 1965, Fortas' appointment as associate justice was virtually waved through the Senate after a brief set of committee hearings, a cursory floor debate, and a voice vote. The entire process, from nomination on July 28 to confirmation on August 11, took fourteen days. In 1968, Fortas' nomination as chief justice on June 26 was met with extensive committee hearings, floor debate in the form of a filibuster, and a disappointing roll call vote on October 1 that led him to withdraw as a nominee after more than three months of consideration.

To some extent, the contrasting fate of Fortas' two nominations can be explained in terms specific to each one. In other ways, the two nominations told a larger story: the end of one era in the Court's history and the beginning of another.

This article chronicles Fortas' nominations, the one that succeeded and the one that failed. In doing so, it elaborates the argument that a turning point in the politics of Supreme Court appointments was reached.

Fortas and Johnson

Although history is replete with instances of presidents nominating friends to the Supreme Court, no president ever nominated a closer friend than Lyndon Johnson did when he chose Abe Fortas in 1965. As two young, ambitious, pragmatic southern liberals, Fortas of Memphis, Tennessee, and Johnson of Johnson City, Texas, forged their friendship in the 1930s, when both came to Washington as supporters of Franklin D. Roosevelt's New Deal. During the three decades that followed, the friendship flourished in the way of all Washington friendships, as a matter of mutual self-interest as well as mutual affection. Having grown up in families of modest

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means, the two men each developed a strong desire to help the poor and marginalized and an equally strong desire to prosper and gain prominence for themselves—to do well in the course of doing good.[1]

Fortas was the first to arrive in Washington. An excellent student at Yale Law School, he was recruited by two of his professors to join New Deal agencies: the Agricultural Adjustment Administration in 1933 by Wesley Sturges and, one year later, the Securities and Exchange Commission (SEC) by William O. Douglas, with time off in between to teach at Yale and marry fellow Agriculture Department employee Carol Agger. In 1939, after Douglas was appointed to the Supreme Court, Fortas joined the Interior Department at age twenty-nine, rising in just three years to become undersecretary, second only to Secretary Harold Ickes, who regarded him as "one of the most brilliant lawyers in Washington."[2] After FDR died in 1945, Fortas left government and formed a legal partnership with an even more prominent New Deal lawyer, former federal appeals court judge Thurman Arnold. Arnold and Fortas (soon Arnold, Fortas & Porter with the addition of outgoing Federal Communications Commission chair Paul Porter) soon became a leading Washington firm by helping corporate clients such as Coca Cola, Lever Brothers, and the American Broadcasting Company navigate the complex federal bureaucracy that the three partners' work in the Roosevelt administration had helped to create. On a pro bono basis, the partners preserved their liberal bona fides by representing several individuals who were accused of communist subversion, despite pressure from some of the firm's clients not to do so.[3]

Johnson was just two years older than Fortas when he was elected to the House of Representatives from Texas as the most ardently pro-New Deal candidate in a 1937 special election. Along with other young and mostly southern New Dealers in Washington, the two became close personal friends and political allies. "In those days," Fortas later wrote, "it was hard to draw a line between social manners and the affairs of government."[4] Weekend drinks and dinners in each other's homes bled easily into mutual backscratching during the work week. For example, when the Texan's main financial backers, George and Herman Brown of the Brown and Root construction company, became snarled in Interior Department red tape while trying to build a dam in Johnson's district, Fortas found an ingenious way to unsnarl it. In turn, when Fortas needed support for the department on Capitol Hill, Johnson would, in Fortas' words, "figure it out—how so and so would vote. Who were the swing votes. What in each case—what, exactly—would swing them."[5]

In 1948, Fortas demonstrated that, even in private practice, he could be of enormous assistance to his friend. Johnson's closely fought bid for a Senate seat that year appeared stymied when a federal judge certified that former governor Coke Stevenson had won the Democratic primary and would appear as the party's candidate on the November ballot. In late September, after learning that Fortas was in Dallas taking a deposition in an antitrust case, Johnson asked him to make his way to nearby Fort Worth, where a large team of lawyers was getting nowhere in its effort to devise a legal strategy that would persuade the Fifth Circuit Court of Appeals to overturn the judge's decision before the general election ballots were printed. After listening to the lawyers wrangle unproductively for an hour, Fortas announced his solution: to lose, not win, the emergency appeal before a Fifth Circuit Court judge as the predicate to immediately taking the case to the Supreme Court justice who handled such requests from that circuit, fellow southern New Dealer Hugo L. Black.[6] (Neither court was yet in session for its 1948 Term.) The strategy of losing to win unfolded exactly as Fortas planned. Johnson

Associate Justice Abe Fortas (right) and Senator Albert Gore, Sr. (D-TN) pictured on July 16, 1968 as Fortas waited to testify before the Senate Judiciary Committee during hearings on his nomination to be chief justice.

was awarded the nomination, won the election, and became a senator in January 1949. What had been a close relationship between an obscure government lawyer and a back bench congressman became an even closer bond between a leading private attorney and, with Johnson's selection as Democratic whip in 1951 and party leader two years later, a prominent senator.

Johnson and Fortas' relationship flourished during the ensuing decade. On matters personal and professional, "check it with Abe" became the watchword among Johnson's aides during his tenure both as Senate majority leader and, starting in 1961, as vice president in the John F. Kennedy administration.[7] Fortas' firm rose in wealth and prominence, aided by his abilities as a lawyer and his well-known influence with Johnson, which according to biographer Bruce Murphy, became "a selling point to potential clients."[8]

Johnson's elevation to the presidency when Kennedy was assassinated on November 22, 1963, intensified his relationship with Fortas. Initially surrounded in his administration by Kennedy holdovers, the new president relied on Fortas for everything from redrafting his first speech to Congress to placing his family's considerable wealth in a not-quite-blind trust to devising a strategy for freezing out Attorney General Robert F. Kennedy from consideration as Johnson's vice-presidential running mate in 1964. When RFK resigned to run for the Senate, Johnson's choice to replace him at the Justice Department was Fortas. Fortas declined, aware from the experience of others in the president's orbit that when one went from serving as a Johnson adviser to working as a Johnson employee, one's independence—and, as a government functionary, one's income—severely declined. By 1963 the Fortases had

grown accustomed to living large: a house in Georgetown, a summer home in Westport, Connecticut, overlooking the Long Island Sound, and a 1950 Rolls Royce.

While maintaining his independence, Fortas was closely involved in Johnson's bid for a full term as president in 1964. When one of Johnson's closest aides, Walter Jenkins, was arrested for "disorderly conduct" in a YMCA bathroom, Johnson deputed Fortas and Clark Clifford, another fabled Washington lawyer, to arrange for Jenkins to be hospitalized and to persuade the city's newspaper editors to suppress the story. They succeeded in the former effort but not the latter. More generally, throughout the campaign Fortas was one of only three men—Clifford and New Deal alumnus James Rowe were the others—whom Johnson felt he "could trust with his own inner ruminative thinking" concerning "any major speech, any major appearance, any major television show, any major change of schedule, any decision of policy."[9] In the aftermath of Johnson's landslide election, Fortas remained a close and frequent presidential adviser, even on matters of foreign policy such as an April 1965 coup in the Dominican Republic, during which "Fortas was in practically constant contact with Johnson."[10] The 1965 edition of **Who's Who in the South and South West** actually listed Fortas' occupation as "Presidential adviser" and his work address as "c/o the White House, 1600 Pennsylvania Avenue."

1965: Fortas' Successful Nomination as an Associate Justice

Having failed to persuade Fortas to join his administration, Johnson resolved to place him on the Supreme Court, where, he assumed, his friend would have even more discretionary time to advise him than he had as a busy lawyer with a booming private practice. The idea that such a relationship would be inappropriate did not occur to the president. As a New Dealer, Johnson was aware that as many as six of the nine justices whom FDR appointed to the Court had been either occasional or "frequent off-the-record White House callers," especially Felix Frankfurter, with whom Roosevelt was especially close and who "showed no inclination whatever to withdraw from his accustomed position" as a presidential adviser after becoming a justice in 1939.[11] Similarly, as a senator, Johnson had witnessed President Harry S. Truman's ongoing relationship with his appointee as chief justice, Fred Vinson. The chief was known to be "one of the real inner circle at the White House" and "continued to advise Truman about various matters of politics and state."[12]

Too impatient to wait for a vacancy on the court to occur naturally, Johnson engineered one. At the time, it was widely understood that the seat occupied by Justice Arthur Goldberg was the Court's "Jewish" seat, having been filled until Goldberg occupied it by Frankfurter and, before him, Benjamin Cardozo.[13] In hopes of persuading Goldberg to leave the Court so that he could appoint Fortas, Johnson offered to make him attorney general or secretary of health, education, and welfare—without success. Then, on July 16, 1965, while casting about for a replacement for United Nations ambassador Adlai Stevenson two days after Stevenson suddenly died, Johnson was told by Harvard economist John Kenneth Galbraith that Goldberg was "a little bored on the Court."[14]

True or (as it turned out) not, that was all Johnson needed to invite Goldberg to resign as justice and take Stevenson's place at the United Nations. Resignation from the Court to take another position, which no justice since Goldberg has done, was not unheard of at the time. Charles Evans Hughes and James F. Byrnes did so, both of them during Goldberg's lifetime. Like Hughes, who ran for president in 1916, and Byrnes, who was elected governor of South Carolina in 1950,

Goldberg had political ambitions (he became the Democratic nominee for governor of New York in 1970). With those examples in mind, Johnson persuaded Goldberg that only he had the skills needed to negotiate an end to the Vietnam War and hinted that after a brief tenure at the UN he might add him to the ticket in 1968 as the first Jewish candidate for vice president. "You can't get to the vice presidency from the Court," Johnson told him.[15] Both men knew that UN ambassador Henry Cabot Lodge had nearly been elected vice president just five years earlier.

Goldberg acquiesced. "Vanity" led him to believe he "could influence the president to get out of Vietnam," he later realized. Instead, after accepting Johnson's offer, he found himself as marginalized within the administration as Stevenson had been.[16] Johnson didn't care; he had achieved his goal of opening a seat on the Court for Fortas.

Nor did Johnson care when Fortas twice declined his offer to nominate him to replace Goldberg. The president knew that his friend's main concern about accepting the appointment was one of timing, not ambition. Aware that Chief Justice Earl Warren, already in his seventies, probably would retire in a few years, Fortas hoped to take his place when the time came. In the meantime, he had a law firm to run as managing partner, one that was rapidly signing up new clients who assumed that having the president's friend as their lawyer would be good for business.[17] In addition, the Fortases had just bought a larger house in Georgetown that required substantial work and would be staffed, they planned, by a housekeeper, two maids, a cook, and a laundress.[18] The prospect of immediately taking a roughly 80 percent cut in salary, from about $200,000 per year (nearly $2 million in 2023 dollars) as a lawyer to the $39,500 he would earn as a justice was, from his and his wife's perspective, untimely.

Having worn down Goldberg until he vacated his seat on the Court, Johnson now wore down Fortas to accept it. Finally, on July 28, as they walked along a White House corridor en route to a press conference at which the president planned to announce the first major deployment of American troops to Vietnam, Johnson ambushed his friend. Like it nor not, "I'm going to send your name to the Supreme Court, and I'm sending fifty thousand boys to Vietnam," he firmly told Fortas, whom he had invited to accompany him to the meeting with reporters; "and I'm not going to hear any argument on either of them."[19] "They're giving their life for their country and you can do no less," Johnson added, piling on. "If your president asks you to do something for your country, can you run out on him?" "To the best of my knowledge, and belief, I never said yes," Fortas ruefully recalled.[20] He simply surrendered in the face of Johnson's *fait accompli*, which the president announced on national television along with the troop commitment.

Johnson had every reason to believe that Fortas' nomination would sail through the Senate. During the previous seven decades, forty-three of forty-four nominees to the Court had been confirmed, dating back to President Grover Cleveland's nomination of Edward D. White in 1894. Thirty of these confirmation votes—70 percent in all, including sixteen of the last twenty-two—were *viva voce*, a certain mark of consensus within the Senate. Other than John J. Parker's narrow rejection in 1930, even the roll call votes that occurred were overwhelmingly positive, with confirmation by majorities ranging from 66 percent of senators (Mahlon Pitney in 1912) to 94 percent (Douglas in 1939).[21]

If recent history was favorable to Fortas' confirmation in 1965, political conditions in Washington were even more so. Johnson had accumulated considerable political capital in the previous year's presidential election, which he won in a 486 to 52 electoral vote landslide. The 1964 election also resulted in a sixty-eight to thirty-two Democratic

controlled Senate that included enough northern Democrats to outvote the conservative coalition of midwestern Republicans and southern Democrats for the first time since that coalition's formation in the late 1930s. On Capitol Hill, Fortas' confirmation would be yet another item on the long list of significant Johnson-initiated measures that legislators approved as part of the president's Great Society agenda.

Fortas' lack of judicial experience—he was a former executive branch official and, more recently, a prominent Washington lawyer—also was typical of the era. At the time of his appointment in 1965, thirteen of the previous nineteen nominees, including both of President Kennedy's, had never served on a federal court, and ten had no judicial experience at all.[22] And with Goldberg leaving, Fortas would be filling the widely acknowledged Jewish seat.

Senate Judiciary Committee hearings on Fortas' nomination opened on the morning of August 5. They lasted just three hours, culminating in a unanimous vote, including all of the committee's conservatives of both parties, to forward the nomination to the Senate for confirmation. Only one potentially awkward moment occurred during the hearing when Republican Sen. Roman Hruska of Nebraska asked Fortas half-apologetically (because others "requested me to do so") if there was "anything in your relationship with the president that would militate in any way against your being able to sit on that bench and pass judgment on cases that come along."[23]

Fortas, who just the week before had written to the president that "I can only hope that you will continue to see me and to call upon me for anything I can do to help," answered that "the extent to which I am a presidential adviser . . . has been exaggerated out of all connection with reality."[24] It wasn't true, but certainly nothing Fortas had done for Johnson as a private attorney could be considered improper. "Special interest groups stayed on the sidelines," noted Supreme Court correspondent Michael Bobelian, "and the media didn't bother to rummage for scandals."[25] Fortas was confirmed six days after the hearing on a voice vote of the Senate, with only three Republican senators expressing any disapproval: Carl Curtis of Nebraska, Strom Thurmond of South Carolina, and John J. Williams of Delaware.

Fortas' confirmation was the last in which, in historian Laura Kalman's phrase, the Senate "functioned as presidential lapdogs with respect to Supreme Court confirmations." Never again would the understanding prevail that "a president appropriately appointed anyone he wished to the court, as long as the person possessed good credentials and character."[26] Never again would the Senate approve a nomination by a voice vote or within fourteen days of its being submitted by the president. Nor would the seat Fortas filled ever again be regarded as the Jewish seat, much less the only seat that Jews could occupy on the Court.

Fortas' First Three Years on the Court

Fortas' first three years as a justice, which spanned the start of the 1965 Term on October 4 and the Senate's rejection of his nomination as chief justice on October 1, 1968, had three remarkable qualities: a much-priased record as a jurist, an unhealthy openness to outside income, and an unprecedentedly extensive role as a wide-ranging presidential adviser.

Fortas as jurist. Fortas was widely regarded as an accomplished jurist during his three full terms on the Court, rated "near-great" in a 1970 survey of eminent legal scholars. Of the twelve justices they rated as great and the fifteen as near-great (out of ninety-six in all at the time), only Fortas earned his professional reputation after serving for such a brief period. Further, "of the twentieth-century justices rated as

near-great," the authors of the survey noted, "the experts expressed the opinion that Abe Fortas had had the best chance to achieve greatness."[27]

Fortas made his mark on the Warren Court not by changing its direction but by extending its expansive Bill of Rights and Fourteenth Amendment-grounded jurisprudence to additional areas of the law, especially due process protection for juveniles accused of crimes.[28] Just as Goldberg's votes had coincided with Warren's between 85 percent and 89 percent of the time, so did Fortas' coincide with the chief justice's in 83 percent to 92 percent of all cases. In nearly 90 percent of cases, Fortas and Warren were in the majority, often joined on matters that divided the justices by liberal colleagues Black, Douglas, William J. Brennan, and, after Tom C. Clark retired in 1967, Thurgood Marshall.[29] When Fortas parted ways with his fellow liberals, it was usually in business-related cases, where his experience representing corporate clients against the government made him more open to voting in business' favor in alliance with the court's conservatives: John Marshall Harlan II, Potter Stewart, and Byron White.

Outside income. Fortas felt burdened by the substantial loss of income that accompanied his move from private practice to the bench. When Johnson's domestic affairs adviser, Joseph Califano, visited the newly appointed justice in his recently purchased R Street home, Fortas pointed to a hole in the ceiling and said, "That, my friend, was to have been our central air conditioning. Now we can't afford it." This, Califano recorded, was "the first of several complaints I heard Fortas make about the income that he would forfeit from his private law practice."[30]

Louis Wolfson, a financier and recent client of Fortas' who was undergoing an SEC investigation for illegal stock manipulation, was eager to help. Hearing in July 1965 that Fortas might be appointed to the court, Wolfson wrote him a letter offering that "if you accept this appointment, I would like to arrange for the Wolfson Family Foundation to assist you financially for as long as you are in public service."[31] Fortas initially declined the offer but, three months later, decided to accept it, spelling out the terms of the agreement in a letter he drafted and Wolfson signed. In return for providing the foundation with unspecified consulting services, Wolfson pledged to pay Fortas $20,000 per year, not just for the duration of his career in public service but "for your life" and, beyond that, "to Mrs. Fortas for her life if she should survive you."[32] The first $20,000 check arrived in January 1966. It represented a 51 percent addition to Fortas' $39,500 salary as a justice.

The arrangement was confidential at the time, and Fortas had every reason to keep it that way. Even assuming that his services as a consultant were worth what Wolfson's foundation was paying, how could continuing those payments to his widow be justified? More alarming was that Fortas was traveling to Florida for foundation board meetings (now as a member) in 1966, at the very time when his former employer, the SEC, was about to indict Wolfson. So alarmed was one of Fortas' clerks, Daniel Levitt, when he learned in July that the justice was being paid by the foundation that he placed a copy of the federal statute that made it a "high misdemeanor" for a justice to practice law on Fortas' desk. Tell Levitt "to mind your own business," Fortas testily told his secretary before, on reflection, quietly resigning from the foundation.[33] But he held onto the $20,000 payment until the end of the year, by which time Wolfson had been indicted, soon to be convicted and sentenced to prison.

To replace the lost income from Wolfson, Fortas began giving paid lectures around the country, an enjoyable but time-consuming and physically draining activity. Wanting to help his friend and former law partner, Paul Porter arranged with American University law

Chief Justice Earl Warren held a news conference in the Supreme Court building on July 5, 1968, to announce that he would stay on as chief justice if the Senate failed to confirm Fortas as his successor.

school dean B. J. Tennery for Fortas to teach an eight session-long weekly seminar on law and society during the summer of 1968. Porter made the offer irresistible to both Fortas and Tennery by personally raising the money to fund the seminar: $30,000, with half going to the justice and half to the law school.[34]

Two problems attended the arrangement, to which all of the parties, including Fortas, were insensitive. One was that Fortas' $15,000 fee (a 38 percent addition to his judicial salary) was much higher than the $2,000 or so usually paid for such seminars. The other was that two-thirds of the money was provided by three of Fortas' former corporate clients: Paul Smith of Philip Morris, who donated $10,000; Maurice Lazarus of Federated Department Stores ($5,000), and Troy Post of Greatamerica Corporation ($5,000). The remaining $10,000 came from other corporate leaders who, like Smith, Lazarus, and Post, were friends of the justice and conceivably could have business before the Court.[35]

Presidential adviser. Within Washington political circles, Fortas' friendship with Johnson was well-known, as were at least some of his comings and goings to the White House while on the Court. Most assumed that, as with previous close president-justice relationships such as Frankfurter's with FDR and Vinson's with Truman, the contacts were occasional, not regular. In truth, the contacts were more than occasional and highly irregular.

"When he came to the court every morning," reflected Levitt, his broadly admiring clerk, "Fortas was tired because of his evening visits to the White House."[36] Other important Johnson aides such as Jack Valenti, Bill Moyers, Horace Busby, and Califano came and went during Johnson's five and a half years as president. Fortas was a constant.

Private phone lines connected the president to the justice's home and chambers. Fortas addressed letters to Johnson, "Dear Boss," once enclosing a photo of "your" Supreme Court.[37] He entered and left the White House through tunnels underneath the adjacent Executive Office Building and Treasury Department building to conceal the extent of his presence there. Presidential secretaries recorded that from October 1966 to December 1968, Fortas and the president were in personal contact 254 times—an average of ten contacts per month—not counting the endless meetings and phone calls between Fortas and White House staff members on Johnson's behalf.[38]

"Johnson obviously thought that Fortas had even more time for him as a justice than as an attorney," wrote Kalman.[39] Fortas did nothing to disabuse the president of that notion, making himself available at night, on weekends, and on vacation. In one October 1966 phone call with Fortas, Johnson asked, "Now, y'all going to do anything on law and order this session?" and complained that the issue was costing him 15 percent in the polls, "more than Vietnam, more than inflation, more than all of them put together." "I've been voting for us to take some of these cases . . . ," Fortas replied, "but old Hugo [Black] leads the opposition and they vote against us. But I'm going to try to get us one."[40]

The range of White House activities in which Fortas engaged was vast.[41] He helped draft Johnson's 1966 State of the Union address and other speeches. He was a frequent and welcome source of hawkish advice to the president on both his conduct of the Vietnam War and the public's response to it, two matters on which he had no particular expertise. (Ironically, Fortas was a far more influential adviser on Vietnam policy than Goldberg, who had left the Court with the understanding that he would be the administration's chief peace negotiator.) Fortas also recommended people for jobs in the administration, sometimes sounding them out on Johnson's behalf. He advised the president on legislation, some of which might well come before the Court. When Congress passed a bill in 1965 requiring that its chambers' armed services committees be given 120 days notice before any military installation was closed, Fortas advised Johnson that the justices would find it unconstitutional. In 1966 he told the president that the Court would rule some parts of a congressionally enacted crime bill constitutional and other parts unconstitutional and helped write his veto message. On one occasion, when Sen. Thruston Morton of Kentucky called the White House to find out what Johnson's position was on an issue, he was told, "Well, the president is away, but Mr. Justice Fortas is here and he's managing the bill for the White House."[42]

Late in 1966 Fortas advised Johnson "about what to put in a brief about to be filed with the Supreme Court in a pending case" involving the proposed merger of two major railroad companies, according to Califano.[43] Fortas participated in the case as a justice and, when the Court ruled against the administration's position, wrote a dissenting opinion. During the 1967 Detroit riots, when Gov. George Romney of Michigan, at the time the leading candidate for the 1968 Republican presidential nomination, requested that Johnson intervene by sending federal troops, Fortas wrote the president's public response, including barbs about Romney's "inability to restore order." In all, concluded historian and Johnson staff member Eric Goldman, Justice Fortas was the president's "confidant, legal sharpshooter, personal ambassador, and jack-of-all-advisers," known within the White House "as the man Lyndon Johnson would turn to when the problem was especially important or knotty, and as the only adviser he treated with a respect not untouched by awe."[44]

1968: Fortas' Unsuccessful Nomination as Chief Justice

Fortas' record as a justice was public knowledge when Johnson announced his nomination for chief on June 26, 1968. By itself, that record, at a time of rising criticism of the Warren Court's liberal jurisprudence and in the midst of an election year, would have made the nomination controversial but probably confirmable. No one doubted Fortas' professional credentials and competence, the criteria traditionally used by twentieth century senators when evaluating judicial appointments. The other aspects of his personal and professional conduct while on the court—the arrangement with Wolfson, the funding for the American University seminar, and the extent of the justice's involvement in the Johnson presidency—were not public. In ways damaging to Fortas' confirmation, however, most of them soon would be.

Johnson learned of the opportunity to appoint a new chief justice on June 13, when Warren privately informed him, in a face-to-face meeting and in writing, of his "intention to retire as Chief Justice of the United States, effective at your pleasure." Fortas had made the appointment for Warren to see the president and, after their meeting, helped to draft Johnson's formal reply to the chief, which the president sent nearly two weeks later. It stated that he would "accept your decision to retire at such time as a successor is qualified"—that is, nominated by the president and confirmed by the Senate.[45] Johnson's decision to appoint Justice Fortas as chief justice and Fifth Circuit Court of Appeals judge Homer Thornberry (another Johnson appointee) to replace Fortas as associate justice turned Warren's retirement into two nominations.

Both nominees were close friends of the president, Thornberry since childhood and Fortas for most of their adult lives. Both had passed muster with a unanimous Senate just three years before, and all but eleven of the one hundred senators who voted to approve their nominations in 1965 were still in office. In addition, Johnson calculated (too cleverly by half) that Warren's contingent retirement would neutralize potential conservative opponents by making them realize that if they rejected Fortas, they would be stuck, at least for a time, with Warren. Although not an entirely unprecedented arrangement, contingent retirements were highly unusual: only the dying Horace Gray's decision to leave the court pending the confirmation of a successor in 1902 and President Theodore Roosevelt's response to it (in language Fortas cut and pasted into Johnson's letter to Warren) represented something other than retirement on a date certain.

Warren was seventy-seven years old when he decided to step down. His reasons were clear: he did not think judges should serve much beyond age seventy-five; he was convinced, after the assassination of Robert F. Kennedy ended his candidacy for the Democratic presidential nomination, that Nixon would win the 1968 election; and he did not want Nixon to be the president who named his successor.[46] Nixon had accumulated many enemies during his twenty-two years in public life, but few who despised him longer and more intensely than his fellow Californian. One of Warren's clerks on the Court said later that when the chief justice talked about Nixon, he would use "terms that ordinarily would be reserved for someone who had proved to engage in serious violations of criminal law and ethical conduct."[47]

Johnson welcomed Warren's decision. He feared that the expected defeat of his party's candidate for president, Vice President Hubert H. Humphrey, would result in Nixon appointing conservative justices who would overturn Great Society legislation just as an earlier Court for a time had thwarted FDR's New Deal. The conditionality of both Warren's resignation ("effective at your pleasure") and Johnson's acceptance ("at such

time as a successor is qualified") meant the worst that could happen would be for Warren and Fortas to remain on the Court in their current capacities—or so Johnson thought.

During the thirteen days in June between Warren's decision and the president's public announcement of it, Johnson confidentially secured for his two nominees the endorsement of two senators whose support he regarded as crucial to keeping the Senate's conservatives at bay: Richard B. Russell of Georgia, the chamber's most influential southern Democrat, and Everett Dirksen of Illinois, the Senate Republican leader. Russell was a duck-hunting buddy of Thornberry, who had held Johnson's seat in the House of Representatives for fifteen years after LBJ was elected to the Senate in 1948. Russell assured the president: "I will support the nomination of Mr. Fortas, but I will enthusiastically support the nomination of Homer Thornberry."[48] Dirksen's friendship was less with either appointee than with the president, whom he believed had the right to expect Senate confirmation of any nominee who was professionally qualified, as Fortas manifestly was.

Johnson was confident that the combination of southern Democrats who would like the moderately liberal Thornberry, northern Democrats who already liked the liberal Fortas, and Dirksen's Republicans would easily put both nominees over the top. He seemed to think of the Fortas-Thornberry pairing as akin to a balanced ticket between a party's presidential and vice-presidential candidates—Fortas to sew up the northerners' votes and Thornberry to bring in the southerners—not unlike his own arrangement with JFK in 1960. Southern conservatives in particular would appreciate that the net effect of the two appointments would be that Warren was off the Court and the less conspicuously liberal Thornberry would be on it.[49] When the president announced Warren's contingent retirement, he also announced Fortas' intended promotion and Thornberry's appointment.

Johnson's optimism was unwarranted. None of the political conditions that made Fortas' confirmation as a justice in 1965 nearly automatic applied in 1968. Not associate justice, but chief justice was the position for which Fortas was nominated, with no presumption that it should be occupied by a member of any particular religious or other group. Far from riding a wave of popular support, Johnson's growing unpopularity within the Democratic Party and in the country as a whole had led him to withdraw as a candidate for reelection nearly three months before he nominated Fortas. Republican gains in the 1966 midterm congressional elections had already grounded Johnson's legislative program nearly to a halt. Alerted to rumors that the chief justiceship might soon become vacant, freshman senator Robert Griffin of Michigan had immediately lined up eighteen additional Republican colleagues—more than half of the chamber's thirty-five-member GOP caucus—to declare in advance that the next chief justice "should be designated by the next president," presumably Nixon.[50] The opponents included Sen. Howard Baker, who was Dirksen's son-in-law and, along with Fortas, a native Tennessean. What is more, the provisional terms of Warren's decision to retire led some conservative Democrats, notably Sam Ervin of North Carolina, to argue that because Warren would remain as chief if no successor was confirmed, there was no actual vacancy on the Court to fill.

Still, Johnson's cause seemed the farthest thing from hopeless. Fortas was not the first associate justice to be nominated as chief. Two others, White and Harlan Fiske Stone (the latter as recently as 1941) fit that category, and both were confirmed by acclamation without having to undergo committee hearings. Although the Senate now included sixty-four Democrats, not quite enough to overcome a filibuster in an era when a two-thirds vote for cloture was required, no nomination to the Court had ever been filibustered.

Nixon thought highly of Fortas, who the year before had dissented in favor of the argument Nixon made to the Court as a private lawyer in *Time v. Hill*.[51] As a presidential candidate, Johnson reasoned, Nixon would be loath to alienate Jewish voters by opposing the first Jewish nominee for chief justice in history.

News coverage of Johnson's June 26 announcement took note of his close friendship with both nominees, and the words "lame-duck" to describe the president and "cronies" to describe his nominees quickly entered the public debate. The coverage also featured Nixon's response while campaigning: "It would have been wise for the president to ask Chief Justice Warren to serve in the [Court's] fall term, thereby leaving selection of new justices to the next president."[52] Nevertheless, Johnson's legislative aides assured him the next day that Fortas already had at least sixty-seven votes (all but five of them solid), enough to impose cloture if Griffin and his allies tried to defeat him by filibuster—as Senate Judiciary Committee chair James O. Eastland of Mississippi told the president they would.[53] Although a tactic historically employed by southern Democrats, Republicans were already filibustering a proposed suspension of the equal time rule that would allow Nixon and Humphrey to debate on live television without including former governor George Wallace of Alabama and other third-party candidates. Still, clearly the safest course for a president in Johnson's situation would have been, as Clifford advised, to pair Fortas with a nonpolitical Republican nominee such as Albert Jenner, a prominent Chicago attorney.[54] Instead Johnson, with just half a year left in his presidency and despite his pledge when he announced his withdrawal from the election in March to govern in a nonpartisan manner for the remainder of his term, chose the riskiest and most partisan course possible by nominating two close personal and political associates. "I don't intend to put some damned Republican on the court," he blustered to Clifford, even though doing so would have muted the charge that "you are trying to pack the court with your friends."[55]

Contemporary developments were even more damaging to the president's cause. Like a series of tumbling dominos, one unfortunate event followed another. First, Johnson prevaricated in responding to his mentor Russell's strong endorsement in early 1968 of Alexander Lawrence for a federal district court judgeship in Georgia. Johnson's claim months later that Attorney General Ramsey Clark was refusing to sign off on the nomination was true but, in Russell's view, irrelevant: Johnson, not Clark, was the president. On July 2 the offended Russell, who felt he was "being treated as a child or a patronage-seeking ward heeler," wrote to Johnson serving notice that he no longer felt bound to support Fortas and Thornberry.[56] Johnson chewed out Clark and sent Lawrence's nomination to the Senate, where it was approved. But Russell was unmoved, unwilling to appear to have traded his vote for the appointment. After ascertaining from Senator Griffin that he and his Republican colleagues were serious about launching a filibuster against Fortas, Russell offered them his support.

Second, confident of his ability in such settings, Fortas broke all historical precedent for nominees as chief justice (and, for that matter, all previously confirmed members of the Court) by agreeing to testify at his confirmation hearings. From July 16 to July 19, he was raked over the coals by members of the Senate Judiciary Committee on a range of subjects. Taking their cues from a number of published reports, senators grilled Fortas about his alleged willingness, on a regular and frequent basis, to advise his friend Johnson on matters that ran the gamut from appointments to legislation to executive actions and the war in Vietnam.[57] Fortas dissembled and even lied at times in the course of minimizing or denying the extent and character of

his advice to and work for Johnson, and did so unpersuasively. At a minimum, his claims to have only occasionally "sum[med] up" the discussion at White House meetings on Vietnam for the president and to have merely "see[n]" rather than drafted Johnson's order sending troops into Detroit were transparently false, as was his statement that in mentioning those two matters, "I have made full disclosure."[58]

Those familiar with Fortas' activities were stunned by his testimony, which according to Califano "was so misleading and deceptive that those of us who were aware of his relationship with Johnson winced with each news report of his appearance before the Senate committee. Cronyism was now the least of the charges some of us feared."[59] When that subject was exhausted, Senator Thurmond challenged Fortas to defend a number of unpopular Warren Court decisions concerning the rights of accused criminals and pornographers—echoing campaign attacks that Nixon was regularly making against the Court even as he consistently withheld specific public comment on Fortas. In one prominent obscenity case, Fortas had been the only justice to vote in favor of allowing a porn flick called *Flaming Creatures* to be shown in theaters.[60] Thurmond arranged private screenings of it and what Louisiana Democrat Russell B. Long called the other "Fortas films."[61]

Fortas' frequently restated refusal—by one count he demurred fifty-nine times during two hours of questioning by Thurmond—to discuss these rulings on "separation of powers" grounds rang hollow in light of the many hours the justice had spent at the White House advising the president.[62] Nixon's refusal to announce a position on the nomination ("I don't support Fortas," he declared. "I don't oppose him") did not prevent him from privately urging Republican senators to oppose the nominee, even as he chastely claimed to "oppose any filibuster."[63] "Nixon wanted the Fortas nomination killed," wrote campaign aide Pat Buchanan, "but did not want our fingerprints on the murder weapon."[64] It did not help Fortas' prospects that during the previous nine months violent crime had risen 21 percent over the same period the year before, which drew attention to the Court's unpopular rulings broadening the rights of criminal suspects and defendants, most of which he had endorsed as an associate justice.[65] Public opinion polls on the nomination were "middling," according to Robert David Johnson, nut the large volume of anti-Fortas "congressional mail documented the intensity gap" between supporters and opponents.[66]

Meanwhile, Johnson used every wrench and hammer in his political toolbox on Fortas' behalf, rallying business executives such as Henry Ford II and Coca Cola president Paul Austin to lobby their states' senators, mobilizing Jewish and African-American interest groups to defend a Jewish nominee with a strong record on civil rights, and appealing to liberals in general to support their fellow liberal.[67] But the final blow came when committee hearings resumed in mid-September and it was revealed that Fortas had supplemented his income as a justice with money from American University for an activity that, however worthy, was extravagantly funded by former corporate clients likely to have at least occasional business before the Court. As for his relationship with the Wolfson foundation, it remained secret for the rest of the year, a ticking ethical timebomb that later would explode Fortas' judicial career.

On September 17 the Judiciary Committee favorably reported Fortas' nomination to the Senate by a vote of eleven to six, withholding any recommendation on Thornberry, whose appointment would be moot if Fortas was not confirmed as chief justice. Democratic committee members supported the nomination by eight to three and Republicans divided evenly, three to three. Five days later the committee received an anonymous letter urging it to investigate the justice's

relationship with Wolfson, but it did not attempt to do so. By then, just a week before the final Senate vote, Fortas' nomination was dead anyway. Griffin and other Republican senators began their filibuster as soon as it reached the Senate floor on September 25, and two days later Dirksen, whose support for Fortas had placed his leadership of the by now strongly anti-Fortas Senate Republican caucus in jeopardy, said he would not vote for cloture and was only "neutral" on the nominee himself.[68] With Russell leading his fellow southern Democrats in opposition, the nomination was dead.

As an intended kindness to Fortas, Johnson insisted that the Senate vote on a cloture motion before he withdrew the appointment. The president thought he had fifty-seven votes, not enough to end the filibuster but a face-saving endorsement of his friend nonetheless. "With a majority on the floor for Abe," Johnson told his staff liaison to the Justice Department, Larry Temple, "he'll be able to stay on the court with his head up. We have to do that for him."[69]

The vote on October 1, less than a week before the Court was scheduled to begin its 1968 Term, was well short of two-thirds and barely favorable: forty-five to forty-three, with twelve senators (nine of them Democrats) absent. Only nine senators spoke in favor of confirmation, less than half the twenty-two who spoke against it. Democratic senators from outside the South voted for cloture by thirty-three to four, but only two of the seventeen southern Democrats who were present supported the motion. Ten Republicans, all of them northerners, also supported cloture, but twenty-four voted against it, including all three of the GOP's southern members.

Ideology as well as party affiliation was an important factor in the cloture motion's defeat. As measured by their votes on twenty measures in 1968, the northern Democrats who voted for Fortas had an average liberalism score of 61.3 percent as compiled by the Americans for Democratic Action (ADA). The northern Republicans who voted for him had an even higher average ADA rating of 69.9 percent. The two southern Democrats who voted for cloture (Albert Gore Sr. of Tennessee and Ralph Yarborough on Texas) were the only ones from their region with liberalism scores above 40.0 percent,

President Johnson decided to ask the Senate to vote for a cloture motion before he withdrew Fortas' appointment. Johnson thought he had enough votes to help his friend save face, but would fall far short.

as compared with the 4.3 percent liberalism scores of the fifteen southern Democrats who voted against ending the filibuster. The twenty-four Republican senators who voted no averaged a liberalism score of 11.2 percent.[70]

After a week of toying with the idea, Johnson decided not to submit any further nomination for chief. With barely a month until the election and senators out campaigning, both the logistics and the politics of another nomination augured badly for a successful confirmation. Fortas remained on the Court as associate justice (as did Thornberry on the Fifth Circuit appeals court), but additional revelations concerning the full extent of Fortas' relationship with Wolfson forced him to resign on May 14, 1969. The revelations came in two parts. The first was an investigative story by *Life* magazine that unveiled the existence of his agreement with Wolfson. Fortas protested that he returned the money that Wolfson's foundation paid him but had a harder time explaining why he held on to it for nearly a year, sending it back only after Wolfson was indicted for stock fraud, perjury, and obstruction of justice. The second was the sharing of (initially) confidential information by Nixon administration attorney general John Mitchell with Chief Justice Warren about the lifetime nature of the promised payments, extending to Fortas' wife even after his death.[71] "He can't stay," Warren said and, within days, Fortas reluctantly agreed.[72]

A New Era

Fortas' two nominations succeeded in the first instance and failed in the second partly for reasons particular to their circumstances. But it's also the case that, in a larger sense, Fortas'selection in 1965 marked the end of one era in the history of Supreme Court appointments and his rejection in 1968 marked the beginning of a new one, which has lasted to this day.[73]

Starting with Fortas' nomination for chief justice, every nominee to the Court has been required to testify extensively before the Senate Judiciary Committee, including all three nominees for chief: Warren E. Burger, William H. Rehnquist (like Fortas, an associate justice at the time), and John G. Roberts. None has been confirmed by voice vote. Every nomination has actively engaged intense interest group lobbying and media scrutiny.[74] Six of the twenty-six nominees—nearly one-fourth—failed to be confirmed. Even those who succeeded were opposed by an average of twenty-two senators, an average that has risen to forty-three in the twenty-first century.

In addition, experience as a federal appeals court judge has become the rule for Supreme Court nominees, not the exception, as it was at the time of Fortas' first nomination. This trend has culminated in a court that by 2023 included only one exception: former solicitor general and Harvard Law School dean Elena Kagan. Ironically, the substitution of judicial experience for governing experience is an additional mark of the politicized nature of appointments in the new era. Presidents have wanted direct evidence that justices will rule on the Court as they and their fellow partisans prefer.

As for the Senate, in 1992 Senate Judiciary Committee chair Joseph Biden declared that in the event a vacancy on the Court occurred before year's end, the incumbent president, George Bush, should "not name a nominee until after the November election is completed."[75] No vacancy occurred in 1992, but when one did in 2016, Senate Republican leader Mitch McConnell vowed that the Senate would not consider anyone whom President Barack Obama nominated, a vow he fulfilled when Obama chose appellate court judge Merrick Garland in March. Thus did the argument that senators should not confirm an outgoing president's final-year nominees, which was fairly novel in 1968, become an unwritten rule afterward—unless the

Lyndon B. Johnson congratulated his successor Richard Nixon at his presidential inauguration in January 1969. Johnson's failed attempt to elevate Fortas to chief justice allowed Nixon the opportunity to fill the center chair.

president's party had the votes, as Donald J. Trump's GOP did when Justice Ruth Bader Ginsburg died in 2020 and the Republican Senate confirmed his nominee to replace her, Amy Coney Barrett.

The new era in Supreme Court nominations is the product of many factors, but none more important than the corresponding birth of a new era in the larger political system. The hallmarks of the new political era are divided party government and partisan polarization.

As late as 1968, united party government, in which the president's party also controlled Congress, was the normal governing situation in Washington. During the first two-thirds of the twentieth century, it prevailed for all but eight years—nearly 90 percent of the time. Both political parties knew that to reject a Supreme Court nominee when the other party controlled the White House would invite retaliation in kind when the tables were turned. A shared desire to avoid this form of mutually assured destruction encouraged Republican and Democratic senators alike to readily approve virtually all presidential nominations to the court. From 1900 to 1968, during the era of united party government, only three of forty-five Supreme Court nominations (7 percent) were rejected by the Senate.

Tellingly, two of these rejections were of Fortas and Thornberry in October 1968. Their rebuffs were exceptions at the time but foretold the new rule. Because Republicans firmly expected to win the presidency while losing the Senate in the following month's election, the two nominations occurred at a moment when a divided party government was anticipated. As expected, Nixon won the

election and, in doing so, became the first newly-elected president since Zachary Taylor in 1849 to take office without his party controlling either house of Congress.

Since 1968, divided government has ceased to be exceptional. Partisan division between the president and a majority of the Senate, the chamber involved in judicial nominations, has prevailed nearly half the time—twenty-five of fifty-four years from 1969 to 2023. The Supreme Court has been a major casualty of divided government, with appointments kicked around like political footballs in the battle between presidents and opposition-party senators—so much so that by 2023 many Democrats regarded four of the six Republican-appointed justices then on the Court as having secured their positions through illegitimate power plays.[76] In a real sense, the first two rejections of this new era—the Democratic Senate's refusal to confirm Nixon's nominations of Clement Haynsworth in 1969 and G. Harrold Carswell in 1970 even though neither was a presidential friend or crony—were payback for the Fortas and Thornberry rejections and Fortas' subsequent resignation.[77]

The new era's half-century-long trend toward partisan polarization, with previously Democratic southern conservative voters migrating into the Republican Party and previously Republican northeastern and Pacific Coast liberals migrating into the Democratic Party, has aggravated the effects of divided government. In 1968, ten northern Republican Senate liberals voted to end debate on Fortas' nomination and fifteen southern Democrats voted to extend it. Such a pattern of voting across party lines has become nearly inconceivable in the modern Senate, which includes no Republican liberals and no Democratic conservatives.[78] In the most extreme recent case, only one Republican senator, Susan Collins of Maine, crossed party lines to oppose appellate judge Amy Coney Barrett's nomination to the Court in October 2020, and not a single Democrat crossed party lines to support it.

Still more regrettably, polarization has impeded the bipartisan compromise and cooperation necessary to do the work of government, forcing the Court to move by default into more areas of public policy that properly should be handled by the elected branches—and fueling the vicious cycle that has made the political stakes attending nominations to the Supreme Court and other courts even greater and more bitterly contested. Fortas was shell-shocked by what happened to him in 1968. Today he wouldn't be a bit surprised.

ENDNOTES

[1] Fortas' formative years in Memphis are chronicled in Timothy S. Huebner, "Memphis and the Making of Justice Fortas," *Journal of Supreme Court History* 42 (Nov. 2017): 314–336. Johnson's experiences growing up in Johnson City are described in Robert Dallek, **Lone Star Rising: Lyndon Johnson and His Times, 1908–1960** (New York: Oxford University Press, 1991), chaps. 1–2; and Robert A. Caro, **The Years of Lyndon Johnson: The Path to Power** (New York: Alfred A. Knopf, 1982), chaps. 1–7.

[2] Bruce Allen Murphy, **Fortas: The Rise and Ruin of a Supreme Court Justice** (New York: William Morrow and Co., 1988), 34.

[3] Robert Shogan, **A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court** (Indianapolis: Bobbs-Merrill, 1972), 65.

[4] Dallek, **Lone Star Rising**, 162.

[5] Caro, **The Years of Lyndon Johnson: The Path to Power**, 455.

[6] Robert A. Caro, **The Years of Lyndon Johnson: Means of Ascent** (New York: Alfred A. Knopf, 1990), 371.

[7] For example, Fortas drafted an executive order for Johnson in the vice president's capacity as chair of the President's Committee on Equal Employment Opportunity and, at Johnson's request, represented former Senate aide Bobby Baker in a lawsuit. Shogan, **A Question of Judgment**, 90–91.

[8] Bruce Murphy and Scott Featherman, "Abe Fortas, (1910–1982)," in **Great American Lawyers: An Encyclopedia**, vol. 1, ed. John R. Vile (Santa Barbara, CA: ABC-CLIO, 2001), 278–283.

[9] Theodore H. White, **The Making of the President, 1964** (New York: Atheneum, 1965), 275, 367.

[10] Murphy, **Fortas**, 142.

[11] Robert H. Jackson, Frank Murphy, and Douglas also were frequent callers, and James F. Byrnes and Black were occasional ones. Grace Tully, **F.D.R.: My Boss** (New York: Charles Scribner's Sons, 1949), 290. On Frankfurter, see Noah Feldman, **Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices** (New York: Twelve, 2010), 213.

[12] Robert Scigliano, **The Supreme Court and the Presidency** (New York: Free Press, 1971), 76; and James E. St. Clair and Linda C. Gugin, **Chief Justice Fred M. Vinson of Kentucky: A Political Biography** (Lexington: University Press of Kentucky, 2002), 191.

[13] Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton**, rev. ed. (Lanham, MD: Rowman & Littlefield, 1999), 46–47.

[14] Murphy, **Fortas**, 165. In a meeting with the president on the afternoon of Stevenson's funeral, Galbraith suggested Goldberg for fear of being asked to become UN ambassador himself.

[15] *Ibid.*, 171.

[16] Laura Kalman, **Abe Fortas: A Biography** (New Haven, CT: Yale University Press, 1990), 241.

[17] David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (Chicago: University of Chicago Press, 1999), 237–238.

[18] Laura Kalman, **The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court** (New York: Oxford University Press, 2017), 61.

[19] Yalof, **Pursuit of Justices**, 85.

[20] Murphy, **Fortas**, 180.

[21] Calculated from data in United States Senate, *Supreme Court Nomination (1789–Present):* https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

[22] Calculated from data in Abraham, **Justices, Presidents, and Senators**, 40.

[23] Scigliano, **The Supreme Court and the Presidency**, 154.

[24] Nigel Bowles, **The White House and Capitol Hill: The Politics of Presidential Persuasion** (New York: Oxford University Press, 1987), 156.

[25] Michael Bobelian, **Battle for the Marble Palace: Abe Fortas, Earl Warren, Lyndon Johnson, Richard Nixon and the Forging of the Modern Supreme Court** (New York: Schaffner Press, 2019), 17.

[26] Kalman, **The Long Reach of the Sixties**, 45, 67.

[27] Albert P. Blaustein and Roy M. Mersky, **The First Hundred Justices: Statistical Studies on the Supreme Court of the United States** (Hamden, CT: Archon Books, 1978), 47.

[28] *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967).

[29] Lucas A. Powe, Jr., **The Warren Court and American Politics** (Cambridge, MA: Harvard University Press, 2000), 212. As he had with Goldberg in 1965, Johnson engineered Justice Clark's retirement two years later to create an opening for his preferred candidate, Thurgood Marshall. Johnson's pretense, widely regarded as of dubious necessity by the legal community, was that in order to appoint Clark's son, Ramsey Clark, as attorney general, the justice would have to resign in order to avoid any possible conflicts. Craig Alan Smith, "Make Way for Tomorrow: How Justice Tom C. Clark Departed from (and Almost Returned to) the Supreme Court," *Journal of Supreme Court History* 6 (Mar. 2021): 81–106.

[30] Joseph A. Califano, Jr., **The Triumph and Tragedy of Lyndon Johnson: The White House Years** (New York; Simon and Schuster, 1991), 50.

[31] Kalman, **Abe Fortas**, 323.

[32] *Ibid.*, 323–324.

[33] Todd C. Peppers, Chad Oldfather, and Bridget Tainer-Parkins, "Of Cert Petitions and LBJ: Clerking for Justice Abe Fortas," in **Of Courtiers and Kings: More Stories of Supreme Court Law Clerks and Their Justices**, eds. Todd C. Peppers and Clare Cushman (Charlottesville: University of Virginia Press, 2015), 280.

[34] Kalman, **Abe Fortas**, 326.

[35] *Ibid.*, 326–327.

[36] Peppers, Oldfather, and Tainer-Parkins, "Of Cert Petitions and LBJ: Clerking for Justice Abe Fortas," 275.

[37] Murphy, **Fortas**, 203, 236.

[38] *Ibid.*, 235.

[39] Kalman, **The Long Reach of the Sixties**, 74.

[40] Quoted in Rowdy Kowalik, "Serving at the Pleasure of the President: Justice Fortas's Failing as a Judge and the Continued Need for a Supreme Court Code of Ethics," *Georgetown Journal of Legal Ethics* 34 (Fall 2021): 1095.

[41] Unless otherwise noted, the information in this paragraph comes from Kalman, **Abe Fortas**, chap. 14; Murphy, **Fortas**, chap. 10; and Califano, **The Triumph and Tragedy of Lyndon Johnson**, passim.

[42] David M. O'Brien, **Storm Center: The Supreme Court in American Politics** (New York: W.W. Norton, 1986), 91.

[43] Califano, **The Triumph and Tragedy of Lyndon Johnson**, 162.

[44] Eric F. Goldman, **The Tragedy of Lyndon Johnson** (New York: Alfred A. Knopf, 1969), 39.

[45] John Massaro, "LBJ and the Fortas Nomination for Chief Justice," *Political Science Quarterly* 97 (Winter 1982–1983): 603–621; and Murphy, **Fortas**, 272–273.

[46] Bernard Schwartz, **Super Chief: Earl Warren and the Supreme Court** (New York: New York University Press, 1983), 680–682.

[47] Roger Morris, **Richard Milhous Nixon: The Rise of an American Politician** (New York: Henry Holt, 1991), 741.
[48] Lyndon Baines Johnson, **The Vantage Point: Perspectives on the Presidency, 1963–1969** (New York: Holt, Rinehart & Winston, 1971), 546.
[49] Robert David Johnson, "Lyndon B. Johnson and the Fortas Nomination," *Journal of Supreme Court History* 41 (2016): 107.
[50] Murphy, **Fortas**, 302.
[51] *Time v. Hill*, 385 U.S. 374 (1967).
[52] Murphy, **Fortas**, 302.
[53]Kyle Longley, **LBJ's 1968: Power, Politics, and the Presidency in America's Year of Turmoil** (Cambridge, UK: Cambridge University Press, 2018), 165.
[54] Yalof, **Pursuit of Justices**, 92.
[55] Longley, **LBJ's 1968**, 162.
[56] Robert Mann, **The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, and the Struggle for Civil Rights** (New York: Harcourt and Brace, 1996), 494–498.
[57] For example, Fred Graham, "The Many Sided Justice Fortas," *New York Times Magazine*, June 4, 1967.
[58] Murphy, **Fortas**, 390–391, 405.
[59] Califano, **The Triumph and Tragedy of Lyndon Johnson**, 313.
[60] Randall B. Woods, **LBJ: Architect of American Ambition** (New York: Free Press, 2006), 852.
[61] Murphy, **Fortas**, 448.
[62] Kalman, **Abe Fortas**, 358.
[63] John Ehrlichman, **Witness to Power: The Nixon Years** (New York: Simon & Schuster, 1982), 113.
[64] Patrick J. Buchanan, **The Greatest Comeback: How Richard Nixon Rose from Defeat to Create the New Majority** (New York: Crown Forum, 2014), 276.
[65] Jules Witcover, **The Year the Dream Died: Revisiting 1968 in America** (New York: Grand Central, 1997), 459.
[66] Johnson, "Lyndon B. Johnson and the Fortas Nomination," 114.
[67] To an unusual if not unprecedented extent, Johnson also mobilized his White House staff to lobby senators on Fortas' behalf. See Bowles, **The White House and Capitol Hill**, chap. 7.
[68] Murphy, **Fortas**, 521.
[69] Califano, **The Triumph and Tragedy of Lyndon Johnson**, 316–317.
[70] Calculated from data in "ADA 1968 Voting Record": https://adaction.org/wp-content/uploads/2017/11/1968.pdf.
[71] William Lambert, "Fortas of the Supreme Court: A Question of Ethics," *Life*, May 9, 1969. A full account of Fortas' resignation is beyond the scope of this essay, but excellent treatments may be found in Murphy, **Fortas**, chap. 24; Kalman, **Abe Fortas**, chap. 16; and Shogan, **A Question of Judgment**, passim.
[72] Kalman, **Abe Fortas**, 368.
[73] Johnson's intervening appointment of Thurgood Marshall in 1967 bore hallmarks of both eras. For example, it was approved by a bipartisan majority of 87 to 11, but on a roll call vote, not *viva voce*, and only after extensive and contentious Senate committee hearings.
[74] John Anthony Maltese, **The Selling of Supreme Court Nominees** (Baltimore: Johns Hopkins University Press, 1995).
[75] Mike DeBonis, "Joe Biden in 1992: No Nominations to the Supreme Court in an Election Year," *Washington Post*, Feb. 22, 2016.
[76] Democrats regarded Clarence Thomas and Brett Kavanaugh as illegitimate appointees because of allegations of sexual misconduct made against them in sworn Senate testimony; Neil Gorsuch because he filled a seat that Senate Republicans denied to Obama nominee Merrick Garland by refusing to consider his appointment in the 2016 election year; and Amy Coney Barrett because she occupies a seat that *was* filled during an election year.
[77] Carswell's rejection was overdetermined and included broad concerns about his judicial competence and views on segregation. Nonetheless, as Keith E. Whittington pointed out, what made his and Haynsworth's rejections historically unusual was that they occurred outside a presidential election year. Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," *2006 Supreme Court Review* (2007): 401–438.
[78] Americans for Democratic Action. "2021 Congressional Voting Record": https://adaction.org/wp-content/uploads/2022/11/2021.pdf. Susan Collins of Maine, the most liberal Republican senator, had an ADA score of 30 percent based on her votes in the Senate in 2021. The most conservative Democratic senator, Joe Manchin of West Virginia, scored 55 percent. Forty of the fifty Republican senators scored 0 percent, and six of the remaining ten scored 5 percent. Thirty-one of the fifty Democratic senators scored 100 percent, and ten of the remaining nineteen scored 95 percent.

BOOK REVIEW

Is There a Way Out of the Counter-majoritarian Difficulty?

Democratic Justice: Felix Frankfurter, The Supreme Court, and the Making of the Liberal Establishment by Brad Snyder. 2022. W.W. Norton & Company. 711 pp. $45.00

Reviewed by William Domnarski

Felix Frankfurter (1882–1965), the simultaneously diminutive and larger-than-life Supreme Court justice (1939–1962), has been looked at several times by legal historians, with the consensus view that he was a failure on the Court. Brad Snyder's biography of Frankfurter wants to change that. He also wants to contribute by way of Frankfurter his solution to that fulcrum issue of the anti-democratic nature of the Court and judicial review, the "counter-majoritarian difficulty" Alexander Bickel identified about unelected justices in his influential **The Least Dangerous Branch** (1962). Snyder starts where Bickel did, by following the path of judicial restraint—of deferring to the work of legislators and adjudicating issues only when necessary—to act as a governor on the Court's activist impulses. But to this Snyder adds a twist to change our view of Frankfurter. He wants to make Frankfurter into what he calls a "democratic justice" and to see his response to the Court's new interest at the beginning of his tenure in the protection of individual civil liberties not as a failure but as a triumph. If only we had Frankfurter now, the argument seems to go. *Really*, sayeth I?

The usual criticism of Frankfurter is that, even though he had achieved liberal icon status before his appointment to the Court, early on in his time on the Court he refused to go along with the Court's movement to protecting individual rights—set in motion by the famous footnote four in *Carolene Products.* He instead doubled down on judicial restraint and resisted his brethren in his many dissents, the most famous of which was his dissent in the Second Flag Salute case examining the First Amendment rights of school children compelled to salute the flag. The takeaway argument from that Frankfurter dissent was that while the local school officials could be stupid and wrong in what they did—though he saw merit in their reasoning—it was their mistake to make.

Frankfurter seemed to argue implicitly that, while his liberal brethren had popularity, he had virtue—pedigreed virtue—on his side. The guiding light of judicial restraint, James Bradley Thayer, was, of course, a Harvard man. And to this he did cling. Melvin Urfosky in writing about the strained and often volatile relationship between Frankfurter and William O. Douglas, cut to the bone when he explained that "[T]he tragedy of Mr. Justice Frankfurter is that he became a prisoner of the idea—judicial restraint—and failed to distinguish between the regulation of economic and property rights and limitations upon individual liberties."[1] The result was that, to use Joseph Lash's great description, Frankfurter "uncoupled himself from the locomotive of history."[2]

Frankfurter's bookend articulation twenty years later of his idea of judicial restraint in the reapportionment case *Baker v. Carr* helps make this point. For Snyder, here again Frankfurter showed his committed belief in democracy, that the people, in this case the state of Tennessee, could solve their own

problems as they saw fit. *Baker* was Frankfurter's last opinion, a dissenting opinion of course. The complaints of judicial activism, that the Court should not insert itself into the political thicket as part of the governing rule of judicial restraint, reads today like a tired complaint about the evils of judicial activism. Frankfurter's argument does not sit well because so much—voting rights—was at stake. Frankfurter did not get it that the First Amendment issue in the Second Flag Salute case was too big to leave to local school officials, and he did not recognize the same problem about voting rights in *Baker*. To his credit, he did get it right about school segregation in *Brown*—that is, he understood that the South could not be trusted to do the right thing on its own. This, though, only complicates what Frankfurter supposedly stood for jurisprudentially and what he has to offer us today.

The uncoupling Lash describes began at the very time Frankfurter angrily responded to his brethren when they thought better of following him and began in the early 1940s to follow the leadership of Hugo L. Black and Douglas instead. His arrogant, condescending personality got the better of him. For Frankfurter, it was the beginning of his free-flowing acting out and his alienation of pretty much all his brethren. Hell hath no fury as a Supreme Court justice scorned. I contributed, I should note at the beginning, to the argument that Frankfurter was a failed justice with what I dubbed as a "cut off your nose to spite your face" theory in my own book on Justices Black, Frankfurter, Jackson, and Douglas and the way they interacted on the Court.[3]

Snyder's has gone everywhere and seen everything related to Frankfurter. It is splendidly researched and an archival bonanza, seemingly tracking down each of the fifteen letters Frankfurter wrote each day. It is comprehensive and exhaustive. It is also exhausting, as was its subject. The book is 711 pages long and reads even longer because it often reads as though it were a first draft.

Snyder fully covers all the stops in Frankfurter's very active public life. We see him in full detail as a gifted student at the Harvard Law School, as a government employee and private practitioner after graduation, and as a liberal activist and gadfly before he returns to Harvard as professor spending considerable moonlighting and devoted time to Washington work, often working with his friend Franklin Roosevelt and advancing his causes. He was a vibrant, incessantly talking man who knew everyone he wanted to know. His was a vast web of like-minded contacts which covered the waterfront of the legal profession. A man with a mission to extend his influence wherever possible, he mentored his chosen best and brightest and used his contacts to place them throughout government to do the heavy lifting of what Snyder describes as Frankfurter's liberalism. These lawyers were known as Frankfurter's happy hot dogs.

That he was a Roosevelt intimate (plus his liberal credentials) got him onto the Court, with everyone expecting that he would continue to champion liberal causes. Those close to him, though, were bitterly disappointed by the justice he became. That their howls of disappointment and complaint seemed to have no effect on him is perhaps the first sign that something odd was going on.

Frankfurter's failures, as implied by Urofsky's reference to tragedy, came from within and had to win out. But did Frankfurter's story have to turn out the way it did? One take would be that Frankfurter needlessly backed himself into a corner in his dispute with his brethren on the Court's proper response to the individual rights cases. He had a liberal bent that should have responded sympathetically to the Court's post-*Carolene Products* individual rights jurisprudence and probably would have (pointing along the way

to his idols Holmes and Brandeis) but for his irritation and anger toward his brethren. To do so did not suit his purposes, which were obsessed with Court politics and personalities. What others saw on the Court as their job Frankfurter took personally. His was a jurisprudence shaped by narcissism.

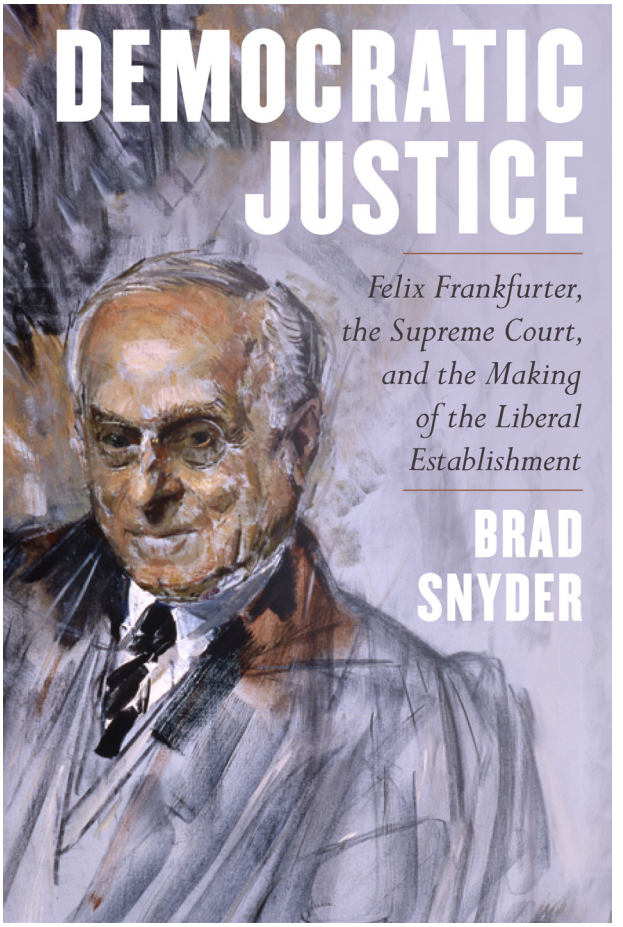
Joseph Lash comes as close as anyone in getting to Frankfurter's core with just the title of his biographical essay prefacing his **From the Diaries of Felix Frankfurter**: "A Brahmin of the Law." However modest Frankfurter's immigrant beginnings might have been upon arrival in the United States at the age of twelve, not speaking a word of English, Frankfurter through his success at Harvard Law School and then hobnobbing with giants such as Oliver Wendell Holmes and Louis D. Brandeis came to think that entitled elites should dominate law. They and he knew better and should be followed, if not honored. Frankfurter the immigrant was not dissenting in the Second Flag Salute case. It was Frankfurter the Brahmin. Douglas was fond of saying that each of his colleagues on the Court got there by their own steam as a way of according them respect and equal standing, something that Frankfurter could never contemplate. We can leave to psychiatrists the question of why having famous friends and having taught at an elite law school made Frankfurter think he was special, except to note that one of the consequences of Frankfurter's Brahmin attitude meant was that he did not play well with others. His Brahmin status meant nothing to them.

Frankfurter's behavior lies at the core of Frankfurter's relationship with the Court and his relationship to history. It is hard to see Frankfurter as the institutionalist he saw himself as and the institutionalist Snyder argues him to be. The Court's ethical rules seemed to have no effect on him. Consider politics. Frankfurter used to say, especially when he was criticizing Douglas, that justices needed to leave politics behind when they entered the monastery of the Court. As a first class hypocrite, though, Frankfurter continued to advise and assist Roosevelt from the time of taking his seat to Roosevelt's death. It is hard to distinguish, from what Snyder describes, which job meant more to Frankfurter, presidential advisor or justice.

Then there is Frankfurter discussing active cases with counsel for one of the parties. We've known for a few decades now, for example, that Frankfurter worked behind the scenes with his former law clerk Phil Elman of the Solicitor General's office during the time of the *Brown* decision, keeping himself informed and strategizing with Elman. Snyder, though, essentially skips over the outrageous ethical transgression. In his brief discussion, as a way of minimizing the transgression, he even quotes Elman saying he would do it all over again if he had the chance. Frankfurter's was hardly the behavior of an institutionalist.

And while Snyder does refer to Frankfurter's difficulties in working with his colleagues, he hardly describes the extent of Frankfurter's ugly behavior—in Conference, in the hallways, and in chambers. He was a terror everywhere. He would try flattery first to get the votes he wanted, and when that failed the true Frankfurter came out and he engaged in campaigns of insult, ridicule, condescension, intimidation, vitriol, and flat-out bullying. What he was writing about them behind their backs was even more revealing about Frankfurter's animating sense of superiority.

The clear impression from Snyder's book is that at times he is hiding more than he is revealing. When we look elsewhere we, for example, see overwhelming evidence that Frankfurter's behavior worked against the best interests of the Court. Here's one insider's description of Frankfurter's method. It's Douglas describing Frankfurter, writing that "he was utterly dishonest intellectually, that he was very, very devious . . . [H]e



Brad Snyder's definitive biography of Felix Frankfurter portrays him as a man devoted to democratic ideals.

spent his time going up and down the halls putting poison in everybody's spring, trying to set one justice against another, going to my office and telling me what a terrible person [Stanley] Reed was or Black, going to Reed's office telling Reed what a stupid person everybody else was, and so on."[4] Another insider account, though not from a justice, comes from Eugene Gressman, who clerked for Justice Frank Murphy for five years in the 1940s. He wrote in his review of H.N. Hirsch's revealing **The Enigma of Felix Frankfurter** about how he had on a few occasions "inadvertently overheard snatches of [Frankfurter's] shrill, table-pounding lectures to his brethren in Conference, as his cries emanated through the thick walls of the Conference room." "And I knew," he continued, "from the many weary complaints of my Justice that Frankfurter frequently reduced Conference discussions to little more than stream-of-consciousness soliloquy."[5]

Snyder, though, struggles for meaning in what he has uncovered and ends up in an awkward place. Snyder presaged his biography in a long 2013 law review article called "Frankfurter and Popular Constitutionalism."[6] The biography emerging a decade later drops the popular constitutionalism angle and instead, through its title, takes the democratic justice angle. He uses democratic justice in a special sense, though even by the book's conclusion

he is not very clear about what that sense is. It appears that he uses it to describe Frankfurter as a justice containing multitudes. All that's missing for Frankfurter is a barbaric yawp. He writes in his concluding paragraph, for example, that for him Frankfurter is a skeptic of judicial power and, in a reference to Frankfurter's role in *Brown*, had a willingness "to oppose a state-sponsored racial caste system but had an abiding faith in the American people to resolve their most pressing, hot-button issues."[7] "He loved America," Snyder writes in his book's final two sentences, "he loved Franklin Roosevelt, and he believed in government by and for the people and not by judges. Felix Frankfurter was a democratic justice."[8]

The apparent problem is that this just leaves the term undefined and lets Snyder use it to embrace what can charitably be called Frankfurter's multitudes. Multitudes to be sure, judicial restraint here, judicial activism there. Snyder seems to want to give a name to a kind of judicial restraint with benefits. It allows him to give Frankfurter's judicial restraint reputation jurisprudential cover and not have his activism, as seen in *Brown* for example, undermine if not embarrass that claim to judicial restraint. All this means, though, is that Frankfurter went where he wanted when he wanted. It can hardly be sold as a solid jurisprudential theory. There are no principles that way, just predilections.

As a general matter, our hyper-partisan political times hardly seem the setting for any version of judicial restraint, including Frankfurter's, as a way of solving the "counter-majoritarianism difficulty" Bickel describes. It wasn't even clear in Bickel's time that the theory fit his premised facts that legislatures built their legislative programs around majoritarian concerns or that they insisted that their legislative efforts reflect the popular will of the people. As has been pointed out, there's no evidence going this way. What is clear, though, is that this is not the time to have faith in legislatures. This leaves Frankfurter and the legislative deference prong of judicial restraint nowhere.

Frankfurter is worth writing about, but not for the judicial restraint with benefits approach Snyder seems to be choosing. Instead, reading about Frankfurter helps us understand what we want and do not want in our justices. Putting justices on the Court who are responsible both to history and to society is, some might argue, the only way out of Bickel's "counter-majoritarian difficulty." We must confront the idea that the only answer lies with appointing better people as a hedge against the Court's potentially distorting influence. That would, of course, require responsible nominations and responsible confirmations, both of which seem bridges too far in our current political climate. Then, of course, the electorate would need to become more responsible and do the right thing in electing their president and senators. Looking at Frankfurter's Supreme Court career, we know what to avoid.

ENDNOTES

[1] Melvin Urofsky, "Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities And Philosophies on the United States Supreme Court," 1988 *Duke Law Journal* 71, 95 (1988).

[2] Joseph P. Lash, **From the Diaries of Felix Frankfurter** (New York: W.W. Norton & Co., 1975), 73.

[3] William Domnarski, **The Great Justices 1941–1954: Black, Douglas, Frankfurter, and Jackson in Chambers** (Ann Arbor: University of Michigan Press, 2006).

[4] Quoted in Roger K. Newman, **Hugo Black: A Biography** (New York: Pantheon, 1994), 297.

[5] Eugene Gressman, "Psycho-Enigimatizing Felix Frankfurter," 80 *Michigan Law Review* 731, 738 (1982).

[6] Brad Snyder, "Frankfurter and Popular Constitutionalism," 47 *University of California, Davis Law Review* 343 (2013).

[7] Brad Snyder, **Democratic Justice: Felix Frankfurter, The Supreme Court, and the Making of the Liberal Establishment** (New York: W.W. Norton & Co., 2022), 711.

[8] *Ibid.*

Contributors

Christopher Brooks is a Professor of History at East Stroudsburg University.

Barry Cushman is John P. Murphy Foundation Professor of Law, University of Notre Dame.

William Domnarski is a lawyer and mediator who has written five books on federal judges and the federal courts. His most recent book is an intellectual biography of Richard Posner, published by Oxford University Press in 2016.

Zach Jonas wrote this article as a student at Georgetown University Law Center.

Michael Nelson is the Fulmer Professor of Political Science at Rhodes College and a Senior Fellow at the University of Virginia's Miller Center.

G. Edward White is David and Mary Harrison Distinguished Professor of Law at University of Virginia School of Law.

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