Introduction

Timothy S. Huebner

Just over a century ago, in 1923, Harvard legal scholar Charles Warren won the Pulitzer Prize in History for his magisterial work, **The Supreme Court in United States History**, published the year before. Later revised and updated, at the time of its publication Warren's history broke important new ground. "This book is not a law book," Warren began in the Preface of what amounted to a nearly 1,600-page work, spread over three volumes. "It is a narrative of a section of our National history connected with the Supreme Court and is written for laymen and lawyers alike. As words are but 'the skin of a living thought,' so law cases as they appear in the law reports are but the dry bones of very vital social, political, and economic contests." Warren was articulating the idea that if one really wants to understand the history of the Supreme Court, one cannot simply look at the Court's decisions. Instead, there is much to be gained from taking account of the external forces, broadly defined, that both go into and that result from the doctrines developed by the Court. It's a familiar idea to legal historians and to readers of this *Journal*. The field has come a long way since Warren wrote these words, of course, and this "externalist" approach—in new forms—is evident in the variety of articles in this issue.

Joseph A. Ranney starts us off with an insightful look at the unintended effects of the *Civil Rights Cases* of 1883. The cases are well known among scholars for declaring the Civil Rights Act of 1875 unconstitutional, thereby thwarting Congress's attempt to prohibit racial discrimination in public accommodations. Moving beyond the decision itself, Ranney shows how in the immediate aftermath ten Northern states enacted statutes, modelled on the Civil Rights Act of 1875, that protected Blacks' rights to enjoy places of public accommodation. The state legislative reaction to the decision, he concludes, might have been as significant as the decision itself. Ranney is Adrian Schoone Fellow and an adjunct professor at Marquette Law School.

The personal values and beliefs of individual justices also loom large in the history of the Court. Jonathan Lurie offers an expert evaluation of Chief Justice William Howard Taft, whose papers he has thoroughly mined over the years in the process of writing two books about the Taft Court. Here Lurie offers us an inside look at Taft's thinking through

letters to his family members. While the letters addressed a number of topics, including Taft's efforts to design and create a new Court building, the bulk of the commentary pertains to judicial colleagues and contemporary politics. The sum of the letters, according to Lurie, reveals that Taft became, by the last years of life, "almost addicted" to classical legal thought, the jurisprudential style that emphasized formalism and the protection of property rights. Lurie is professor emeritus of history at Rutgers University-Newark.

As much as individual justices have shaped Supreme Court history, journalism and media coverage have figured prominently in public perceptions of the institution. While the 2022 leak of the draft decision in *Dobbs v. Mississippi Women's Health Organization*, originally published online by *Politico*, violated the Court's established norms, it was not the first time the Court had experienced a leak of one of its decisions. Abby R. West's fascinating essay explores the career of 1930s and 1940s Washington political journalist Drew Pearson, whose published "predictions" of the outcome of Supreme Court decisions reflected both a divided Court and a changing media environment. As West explains, Pearson regularly revealed inside information about the work of the Court and even turned his gossipy reporting into a radio program. West is currently a J.D. candidate at the Georgetown University Law Center.

The international context is frequently also a useful frame for understanding American constitutional development. In a path-breaking essay, Leon Julius Biela provides a global perspective on the debate over President Franklin Roosevelt's Court-packing Plan. In particular, Biela shows that the international context of the 1930s—especially the erosion of democracy in some European nations in the years leading up to World War II—shaped the American public's reaction to the Plan. Both opponents and proponents of FDR's proposal claimed that, at a time of rising totalitarian threats, their respective positions on Court packing furthered the cause of democracy. Biela is a Graduate Student of Modern History at University of Freiburg (Germany).

As Biela's essay shows, Court-packing remains one of the most compelling issues on the minds of contemporary constitutional historians. One recent issue of the *Journal* contained three articles that in some way explored the topic, and in this issue Editor Emeritus Mel Urofsky reviews two recent books: Laura Kalman's **FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism** and Michael Nelson's **Vaulting Ambition: FDR's Campaign to Pack the Supreme Court.** With his typical erudition and insight, Mel offers a compellingly written evaluation of these two competing interpretations of Roosevelt and the Court fight. Both books—one by a historian and one by a political scientist—offer fresh insights into the topic. And both show that the field of Supreme Court history—which encompasses the variety of "externalist" approaches exemplified in this issue—is alive and well.

Finally, I would be remiss if I did not mention the recent passing of Justice Sandra Day O'Connor. She was a historic figure—as the first woman justice, of course, but also for having had the unique experience (in recent history) of having served as a state legislator prior to her service on the Court. As some commentators have noted, her experience in politics seemed to inform her judicial moderation. In 2003 in **The Majesty of the Law**, a collection of her essays, O'Connor wrote, "Rare indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus." While O'Connor was well known for occupying the ideological center of the Court, her post-retirement work on behalf of civic education was perhaps equally notable. The founder of iCivics, a non-profit devoted to expanding

high quality civic education in our schools, Justice O'Connor believed deeply in educating each generation about how to sustain the American experiment, a goal shared by the Supreme Court Historical Society. "If we want our democracy to thrive," she wrote in her final public remarks, "we must commit to educating our youth about civics, and to helping young people understand their crucial role as informed, active citizens in their communities and in our nation."

Rest in peace, Justice O'Connor.

"This Law, Though Dead, Did Speak": The Civil Rights Cases and their Unforeseen Aftermath

Joseph A. Ranney

In the ironically named *Civil Rights Cases* (1883), the Supreme Court of the United States struck down the heart of the federal Civil Rights Act of 1875, which provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."[1] The Court's decision ended nearly two decades of debate over whether the Thirteenth and Fourteenth Amendments guaranteed only a handful of basic civil rights or whether they also covered rights of access to establishments offering goods and services to the public—rights generally labeled "public rights" by their supporters, and "social rights" by their opponents. Many contemporary observers viewed the *Civil Rights Cases* as a key component of the nation's late nineteenth century retreat from Reconstruction ideals, a view subsequently supported by many historians. The reality is more complex. Critics argued that the Act was constitutionally flawed almost from the time it was first introduced in Congress, and in recent years some historians have placed the Court's decision within a framework of antifederalist jurisprudence extending from the founding of the United States to the present.[2]

Despite the extensive scholarly attention that the 1875 Act and the *Civil Rights Cases* have received, at least two perspectives remain largely unexplored: states' roles in the evolution of public rights law, and the case's place in the long history of efforts to work around controversial Court decisions. State law, particularly Northern state law, played a crucial role in preparing the legal soil out of which the Court's decision grew and the response that it elicited. Many whites in Northern states

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who worked against slavery before the Civil War and supported a broad vision of racial equality after the war were uncomfortable engaging with Black Americans on a personal level. They supported extension of basic civil and political rights to Blacks without qualm, but their personal discomfort—a discomfort circumspectly expressed by Joseph P. Bradley, the author of the *Civil Rights Cases* majority opinion—contributed to a reluctance to extend public rights. Others declined to let such discomfort stand in the way of full equality, often because their wartime experiences, particularly their respect for Black soldiers' service, had transformed their views.

Concomitantly, white reformers were divided as to whether the Thirteenth and Fourteenth Amendments created a proactive or reactive role for Congress. Did the Amendments envision comprehensive federal action against racial discrimination, or would that role be left to the states, with federal intervention being authorized only when a state's officials refused to extend to all of its citizens rights that had been granted to some? The Amendments' authors could not overcome that division and left the issue open in order to ensure the Amendments' passage. The Supreme Court opted for a limited view of federal power, a view which the *Civil Rights Cases* underscored; but prior to that decision other courts, most notably Iowa's supreme court, took a more expansive view, consistent with Justice John Marshall Harlan's dissenting opinion.

The Supreme Court's history comprises not only its decisions but also the resistance that controversial decisions have elicited and efforts by state and federal lawmakers to work around those decisions. The *Civil Rights Cases* erected a firm barrier to direct federal enforcement of public rights, but Justice Bradley left an opening in the barrier: states, if they wished, could protect public rights even if Congress could not. Public-rights supporters quickly turned from criticism of Bradley's decision to exploitation of his opening: in 1884 and 1885, ten Northern states enacted public rights laws closely modeled on the 1875 Act. Political pragmatism played a large part in that movement. Black voters held the balance of political power in several closely divided Northern states, and Democrats and Republicans alike supported the new laws in order to win their votes. But the wartime shifts in white opinion and postwar egalitarian sentiment that had driven support for the Act and opposition to the Court's decision also played a role in the new laws' enactment. The laws indicated that Northern fears of social equality, while far from dead, were at least beginning to recede.

Origins of the Public Rights Controversy

Despite the prominent role that debate over public rights played in American discourse after the Civil War, there was virtually no effort to place such rights within an intellectual framework prior to the 1840s. In the antebellum North, race relations were governed largely by custom, that is, prevailing white views of natural "boundaries" and "repugnancies" between the races. As one Ohio judge stated, "No one scarcely would wish to confer upon [free Blacks] equal political rights, and none certainly would wish for social equality and the amalgamation of the races."[3] With few exceptions, even the most fervent white opponents of slavery felt awkward interacting socially with their Black allies—"I have observed," the abolitionist Lewis Tappan commented in 1836, "that when the subject of acting out our profound principles in treating men irrespective of color is discussed heat is always produced"—and Black leaders took care to emphasize in their public appeals that they were seeking only basic freedoms and civil rights, not social equality.[4]

Charles Sumner, a prominent Boston lawyer and reformer then on the eve of a long career in the U.S. Senate, was the first to frame public rights as a matter encompassed by state and federal guarantees of equal protection of the laws and as one implicating both racial and caste prejudice. In 1849, as part of an unsuccessful effort to integrate Boston's public schools, he argued that denying Black children access to neighborhood public schools not only imposed a "stigma of inferiority and degradation" upon them, but also harmed children of both races by denying them the opportunity to meet and learn how to work together in a multi-racial society.[5] During the 1850s and 1860s, other public rights advocates invoked common-law rules holding that innkeepers and common carriers must make their services available to all paying customers without class distinction. Most Northern courts agreed but indicated, explicitly or implicitly, that the duty to serve all did not preclude business proprietors from separating Black and white customers within their premises.[6]

The Civil War triggered a profound shift in the racial attitudes of Northern whites. In 1862, as hopes that the war would result in a quick Southern defeat vanished, many began to accept the idea that emancipation and recruitment of Blacks for service in the United States armed forces were essential for victory. The war brought many white soldiers into indirect or direct contact with Blacks for the first time; those contacts did not destroy prejudice, but they eroded it. Stories of Black troops' courage in combat generated admiration and respect among white

Stories of Black troops' courage in combat during the Civil War generated admiration and respect among white soldiers and civilians alike, together with a belief that Black Americans were now owed not only freedom but a meaningful measure of equality. This is the only known photograph of an African-American Union soldier with his family. We do not know his name, but it is likely he was from Cecil County, Maryland, where the photo was found.

soldiers and civilians alike, together with a belief that Black Americans were now owed not only freedom but a meaningful measure of equality. During debate over the 1875 Act, Massachusetts congressman Benjamin Butler provided a striking example, describing his viewing of the bodies of Black soldiers under his command at the 1864 battle of New Market Heights, Virginia, after they had taken a Confederate redoubt at terrible cost:

> As I looked on their bronzed faces upturned in the shining sun to heaven as if in mute appeal against the wrongs of the country for which they had given their lives . . . feeling I had wronged them in the past and believing what was the future of my country to them, . . . I swore to myself a solemn oath . . . to defend the rights of these men who have given their blood for me and my country . . . From that hour all prejudice was gone . . . and as long as their rights are not equal to the rights of other men under this Government, I am with them against all comers.[7]

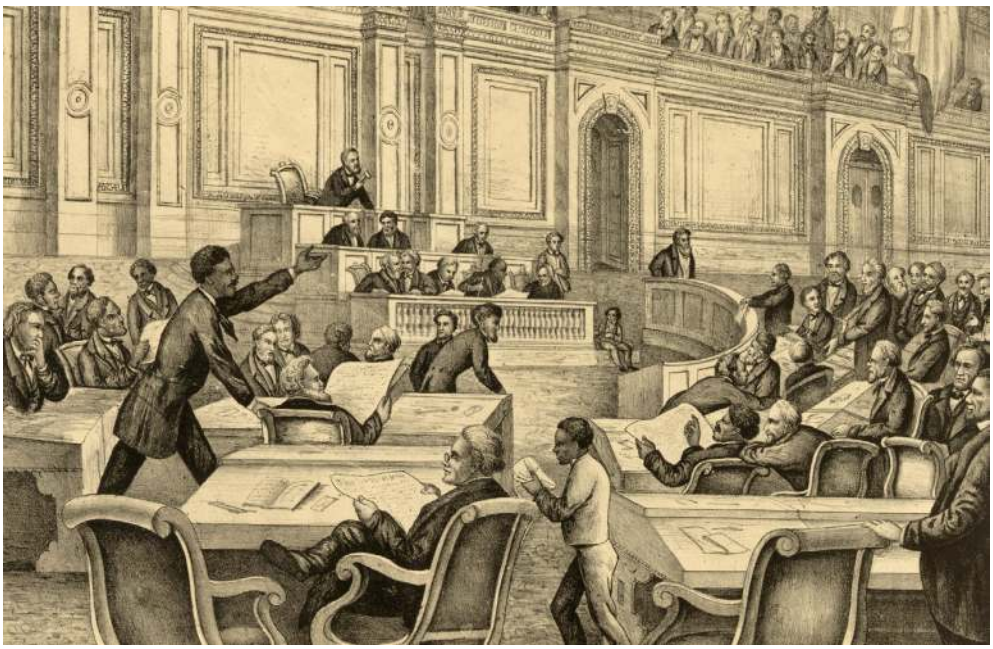
Other Northern whites experienced similar emotions, ranging from veterans who mixed with their Black colleagues in social organizations to lawmakers who invoked a sense of obligation in urging expansion of the law to protect Black civil, political, and public rights.[8] But many, including most of the justices who made up the *Civil Rights Cases* majority, had neither served in the war nor undergone such a conversion. Bradley and his colleagues Samuel Blatchford and Horace Gray had busied themselves with corporate law practice and judicial work during and immediately after the war, and do not appear to have taken any particular interest in the implications of emancipation prior to joining the Court.[9] Bradley initially had some sympathy for strong national authority over civil rights, but as his tenure advanced his sympathy faded, likely in part because he harbored doubts "whether . . . the negro is entitled as a matter of right to ride in the same cars, sit at the same table, and occupy the same rooms at the hotels as the whites and whether Congress can make this law if it is not so."[10] Chief Justice Morrison R. Waite was a centrist Republican who had consistently viewed the war's main purpose as preservation of the Union rather than emancipation and was temperamentally sympathetic to state rights.[11] Stephen J. Field served as a judge throughout the Civil War period; he regularly dabbled in Democratic politics and occasionally tailored his public views to appeal to the party's Negrophobic base.[12] William Woods and Stanley Matthews both saw active duty during the war. Woods' wartime views, like Waite's, were grounded on preservation of the Union rather than emancipation; during Reconstruction he reliably defended Black rights as a federal judge in the postwar South but indicated that he was comfortable with rules requiring separation of the races in public establishments. Matthews participated in the antebellum antislavery movement, but after the war he largely put civil rights aside and devoted himself to corporate practice.[13]

Samuel F. Miller and John Marshall Harlan wrestled most deeply with the war's implications for Black rights. Both were born into small-scale slave owning families in Kentucky, and although both personally disliked slavery—Miller freed his slaves and moved to Iowa in 1850 after efforts to set his state on a course to gradual emancipation failed—and both served briefly in the war, they followed different courses during Reconstruction. Miller's early life gave him an appreciation of the injustices done to Blacks—he publicly denounced the draconian Black Codes adopted by Southern states immediately after emancipation, stating that they "do but change the form of

slavery"—but as a judge his antifederalist sentiments proved stronger.[14]

Miller was perhaps best known for his opinion in the *Slaughterhouse Cases* (1873), a set of cases in which New Orleans butchers argued that a state law requiring them to use a central processing facility for health reasons violated the Fourteenth Amendment's strictures that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." Miller interpreted the Amendment's reference to federal privileges and immunities narrowly, indicating that they were limited to a small set of basic rights including the right to travel, to hold property, to enjoy personal safety, to exercise one's freedom for one's own benefit, and to have equal access with other citizens to the legal system. It was the states' prerogative to grant or deny other rights as they saw fit. But Miller also stated broadly that the "pervading purpose" of the Civil War Amendments was to guarantee "the security and firm establishment of [Blacks'] freedom" and "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." Bradley, who dissented, argued that Miller's construction of the Privileges or Immunities Clause was too narrow: it included, for example, many of the protections granted in the federal Bill of Rights that Miller had not mentioned.[15]

Harlan's views underwent substantial change in the crucible of Reconstruction politics. He was repelled by white Kentuckians' continuing postwar commitment to white supremacy and their willingness to use violence to achieve that goal. As he tried to build a Republican Party in his state,



United States Congressman Robert Brown Elliott of South Carolina spoke on the floor of the House of Representatives on January 6, 1874 during congressional debates over the Civil Rights Act, which was signed into law in 1875.

he became increasingly sympathetic to the party's Reconstruction goals. During his 1871 campaign for governor, he proclaimed that "[h]ad the Federal Government . . . left [newly freed slaves] to the tender mercies of those who were unwilling to protect them in life, liberty and property, it would have deserved the contempt of freedmen the world over." In late 1875, during his second campaign, he dismissed fears that riding or dining next to Blacks would lead to a breakdown of social order and he defended the 1875 Act, although he doubted that the Act applied to "internal [segregation] regulations" observed by private business owners.[16]

Postwar Debate: Public Rights, the Civil War Amendments, and State Courts

The framers of the Reconstruction Amendments did not focus on public rights. They intentionally worded the Thirteenth Amendment's Enforcement Clause, authorizing Congress to enforce the prohibition of slavery "by appropriate legislation"—a clause subsequently much relied on by public-rights advocates—in general terms. Their main goal was to extirpate slavery, and they feared that any elaboration of Congress's powers to that end would create controversy and jeopardize the Amendment's passage.[17] Similar concerns arose during debate over the Fourteenth Amendment: lawmakers had to balance the desire for equality—a concept that had become enshrined in the American canon of values in part because of its lack of definition—against an equally strong fear of centralized political power. In order to obtain the votes necessary for ratification, supporters assured Republican centrists that the Amendment would not create new rights but would merely require states to make existing rights available to all citizens regardless of race. They intentionally did not define what those rights were.[18]

State courts addressed the Amendments' applicability to public rights in a series of school segregation cases during the late 1860s and early 1870s. The supreme courts of California and Indiana summarily rejected an argument that denial of access to establishments serving the public was a badge of slavery prohibited by the Thirteenth Amendment. The Amendment's purpose, said Indiana chief justice Samuel Buskirk, was to end slavery and nothing more. "As to the matter of social and political rights, the African was left . . . subject to all the inconveniences and burdens incident to his color and race, except his former one of servitude."[19] Buskirk's court and the Ohio and Nevada supreme courts likewise rejected arguments that the Fourteenth Amendment extended to public rights. Ohio justice Luther Day anticipated Miller's decision in the *Slaughterhouse Cases*, concluding that the federal privileges or immunities guaranteed by the Amendment included a limited set of basic civil rights but not political or public rights. "A broader interpretation," said Day, ". . . might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment."[20]

Other state courts took a broader view of the Fourteenth Amendment, holding that it not only guaranteed access to establishments serving the public but prohibited intramural segregation, that is, separation of the races within those establishments. In *Coger v. Northwestern Union Packet Co.* (1873), Emma Coger sued the packet company after she was ejected from a steamboat dining room, having been informed that Black passengers could not eat there and must instead eat on deck. In holding that the company's segregation policy violated the Amendment, Iowa justice Joseph Beck laid out a framework that would provide guidance for public-rights supporters during the enactment of the 1875 Act and its aftermath. He began by echoing Sumner's arguments against caste from a quarter-century before: in his view,

the Amendment's Equal Protection Clause followed "[t]he doctrines of natural law and of Christianity [which] forbid that rights be denied on the ground of race or color." The Amendment's language, said Beck, "is comprehensive and . . . includes within its broad terms every right arising in the affairs of life."[21]

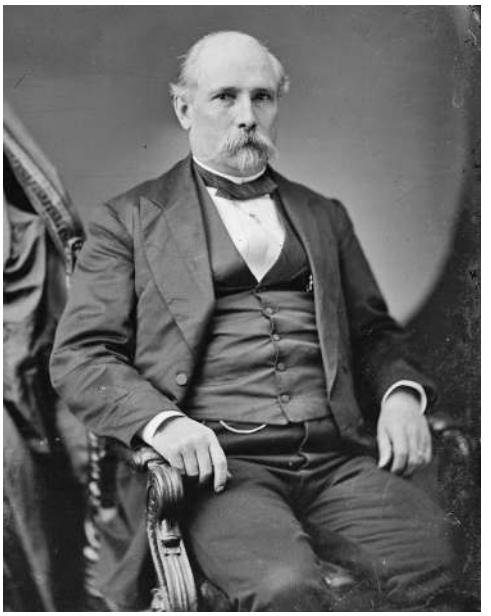
Beck conceded that the Amendment did not extend to "social rights," but he viewed public rights as contractual, not social in nature. Black patrons' right of access to goods and services they were willing to pay for was surely a basic civil right. Beck brushed aside concerns about social equality and racial mixing. Emma Coger, he said, "could not have attained any social standing by being permitted to share the treatment awarded to other passengers; she claimed no social privilege, but substantial privileges pertaining to her property and the protection of her person." Beck acknowledged Miller's narrow definition of federal privileges and immunities in the *Slaughterhouse Cases*, but he focused mainly on Miller's broad statement of the Fourteenth Amendment's general purpose, namely, in Beck's words, "[t]o relieve citizens of the Black race from the effects of this prejudice, to protect them in person and property from its spirit. We are disposed to construe these laws," he said, "according to their very spirit and intent." In 1882, Pennsylvania's supreme court seconded Beck's views, holding that a recently-enacted state statute prohibiting school segregation "is in harmony with the spirit and object of the 14th Amendment."[22]

The 1875 Act Arrives

The 1875 Act's path to enactment began in May 1870 when Sumner, now a U.S. senator, introduced a sweeping public rights bill prohibiting denial of equal access to railroads and other public transportation, hotels, theaters, "houses of public entertainment," cemeteries, jury panels, and schools.[23] Congressional Republicans had majorities sufficient to overcome the solid wall of Democratic opposition to public rights, but centrist Republicans had serious reservations about Sumner's bill based on the Fourteenth Amendment. Maine senator Lot Morrill, an early skeptic, spoke for centrists when he argued that the Amendment merely confirmed Blacks' citizenship, that the federal privileges the Amendment protected were limited to a few basic civil rights and that Congress had no power to create new rights.[24]

Ironically, one of the strongest rejoinders came from a Southern Republican, Mississippi senator James Alcorn. "By the adoption of the [Civil War] amendments," said Alcorn, "the powers of the Government were enlarged. . . . I am here to declare the unmistakable strength of the Government, and its undoubted and unlimited power over the questions now under debate." The bill did not promote social equality—social interaction "exists and is governed by its own laws"—but only equality before the law. The *Slaughterhouse Cases*, he said, did not involve racial issues and therefore did not enter into the debate; and in any case, the basic privileges and immunities which Miller had conceded were directly protected by the Fourteenth Amendment could not be enjoyed without protection of related rights. For example, Black Americans could not fully enjoy their right to travel freely without full and equal access to railroads and other forms of public transportation.[25]

Black representatives in Congress provided strong moral and constitutional support for public rights during debate. Robert Elliott of South Carolina made the most comprehensive case for the Act in a celebrated speech in early 1874. He seconded Alcorn's argument that the *Slaughterhouse Cases* were not on point: the issue there was



James Alcorn, a moderate Republican senator during the Reconstruction era in Mississippi, favored adoption of the Civil Rights Act of 1875. He argued that it did not enforce social equality but only equality before the law.

the extent to which a state's police power to promote public safety allowed it to regulate businesses posing a health hazard, not racial discrimination. Elliott pointed, as other public-rights supporters had done, to Miller's broad statement about the pervading purpose of the Civil Rights Amendments,[26] and he made a particularly powerful argument for an expansive reading of the Fourteenth Amendment's Equal Protection Clause. Notwithstanding Miller's narrow construction of rights directly protected by the Amendment, Elliott contended that "[i]f a State denies to me rights which are common to all her other citizens, she violates this amendment, unless she can show . . . that she does it in the legitimate exercise of the police power" . . . and it was not "pretended anywhere that . . . [o]ur exclusion from the public inn, from the saloon and table of the steamboat, from the sleeping-coach on the railway . . . are an exercise of [that] power."[27]

Other Black representatives supplemented Elliott's arguments. South Carolinians Richard Cain, Alonzo Ransier, and Joseph Rainey addressed the distinction between social equality and public rights, emphasizing that the Act sought only to protect the latter. Ransier went further, arguing that the federally protected rights referenced by Miller in the *Slaughterhouse Cases* were not exclusive, and charging that the Act's opponents were seeking to "construe [the Constitution] for purposes of evasion." James Rapier of Alabama sounded the same theme more bluntly. The Civil War, he said, "decided that national rights are paramount to state rights, and that liberty and equality before the law should be coextensive with the jurisdiction of the Stars and Stripes." The Act would "simply . . . give practical effect to that decision."[28]

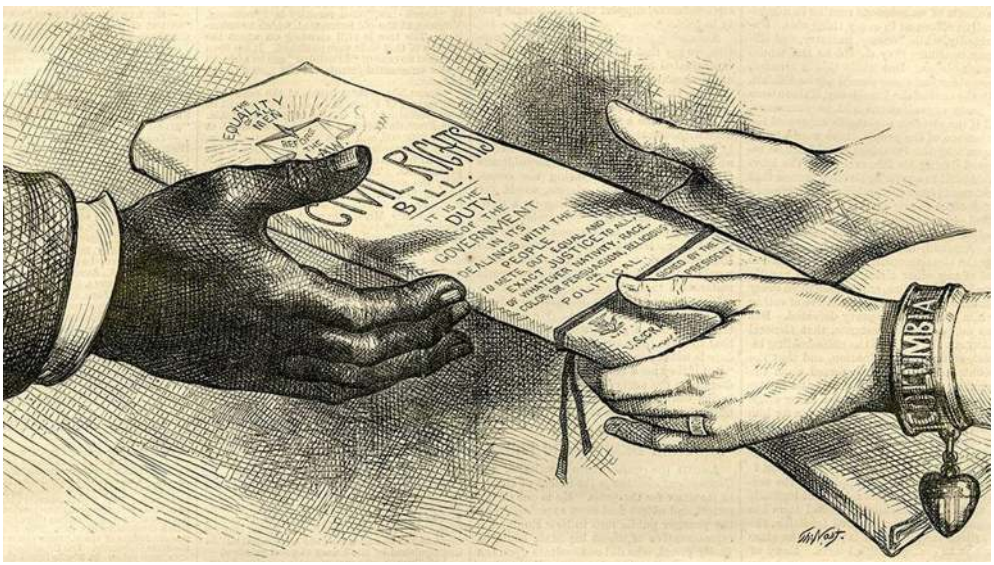
At first, the eloquence of the supporters was not enough to overcome centrists' continuing doubts. Referrals to House and Senate committees, who could not agree on the Act's wording, and opponents' delaying tactics consumed several years. Throughout debate, the Act's supporters avoided the question of whether it prohibited intramural segregation and focused instead on issues of access. However, fears that the Act would be interpreted to require integration of schools drove much of the opposition from Democrats and centrist Republicans alike.[29] By 1874, centrists were particularly concerned about inclusion of schools and cemeteries in the Act, provisions which crossed many Northern whites' personal lines of racial tolerance. Republicans' loss of the House in the fall 1874 elections galvanized centrists into action. Cain and other Black congressmen, recognizing that any chance to obtain a public rights law would soon disappear, agreed to removal of the school and cemetery provisions from the bill, and after some additional procedural

maneuvering the Act was passed two days before the 1873–75 Congress adjourned.[30]

The Supreme Court's Decision: A Conservative Culmination

The 1875 Act generated test cases and constitutional challenges almost from the moment it became law. In March 1875, weeks after the Act's passage, Tennessee circuit judge Halmer Emmons opined that the Act was unconstitutional: he instructed a grand jury that the Thirteenth Amendment abolished the institution of slavery and nothing more. Relying heavily on the *Slaughterhouse Cases*, Emmons added that the Fourteenth Amendment did not permit Congress to regulate public rights: only the states could do so.[31] By contrast, Minnesota district judge Rensselaer Nelson instructed another grand jury three months later that while he "ha[d] no sympathy with this kind of Congressional legislation," Congress had the power to act in all cases "where race . . . furnishes the only reason for the commission of [a] wrong or outrage." Nelson agreed with the Act's supporters that the *Slaughterhouse Cases* did not govern the Act's constitutionality because they did not involve race, and he pointed to an earlier Supreme Court decision, *McCulloch v. Maryland* (1819), in support of his belief that Congress had broader power over public rights than Miller had suggested. Furthermore, he believed that any distinction between state and individual action was illogical when it came to race.[32] Several two-judge panels assigned to hear cases under the Act deadlocked as to its constitutionality, including one on which Blatchford, then a circuit judge, was serving. These cases, along with several others, made their way to the Supreme Court between 1875 and 1880. For reasons not altogether clear, the Court repeatedly deferred oral argument and its decision as the cases accumulated.[33]

The Supreme Court finally issued its decision on October 15, 1883.[34] Bradley, writing for the majority, began by making the Court's



This sentimental engraving depicts Columbia (the United States) passing the Civil Rights Act of 1875 to the hands of Black Americans. The act protected Blacks from discrimination by state and city governments and prohibited private businesses, such as inns and theaters, from denying them access.

concern for state rights clear; there was no mention of *McCulloch* or Rapier's argument for a national concept of equality. Bradley held that the Fourteenth Amendment applied only to state action, not individual action—an argument that opponents of the Act had made during its debate, but on which the Act's supporters had not focused, and one which the Court had endorsed in 1880.[35] The Amendment limited Congress' powers to enactment of "corrective legislation" when states enacted laws or took action that discriminated against Black citizens in violation of the Amendment.[36] Any other rule, said Bradley, would allow Congress to "establish a code of municipal law regulative of all private rights between man and man in society." However, he said, persons injured by private acts of discrimination "may presumably be vindicated by resort to the laws of the State for redress," and states were free to regulate private discrimination if they chose to do so.[37]

Bradley then turned to whether private acts of discrimination constituted "badges or incidents of slavery" prohibited by the Thirteenth Amendment. Relying heavily on the Civil Rights Act of 1866 as a guide to the Amendment's intent, Bradley concluded, in line with Miller's opinion in the *Slaughterhouse Cases*, that the Amendment only covered "fundamental rights which are the essence of civil freedom," namely the right to travel freely, own property and make contracts, and to have the same access to and rights within the justice system as whites. He concluded by pronouncing that "[w]hen a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." The nation had not extended public rights to free Black persons before the war, thus, he reasoned, public rights could not be considered fundamental privileges of citizenship.[38]

Harlan, despite experiencing some trepidation about his role as the lone defender of the Act in such a momentous case, issued a lengthy dissent that endorsed most of the arguments advanced in favor of the Act and added some points of his own. He opened by echoing Congressmen Ransier and Rapier, arguing that "[t]he substance and spirit" of the Civil War Amendments had been "sacrificed by a subtle and ingenious criticism."[39] Like Judge Nelson in Minnesota, Harlan pointed to the Court's prewar policy of interpreting Congress's power expansively, citing *McCulloch* and also noting that the antebellum Court had used expansive interpretation to facilitate extradition of fugitive slaves from the North.[40] "I insist," he proclaimed, that Congress "may . . . do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves."[41]

Harlan then discussed the Thirteenth Amendment, arguing that its Enforcement Clause extended to direct federal prohibition of all race-based discrimination by states and individuals. He noted the common law's longstanding prohibition of discrimination by hotels and common carriers, and he advanced a novel argument as to other businesses based on *Munn v. Illinois* (1876), in which the Court had held that legislatures have near-plenary power to regulate the operation of businesses that are "of public consequence, and affect the community at large." All businesses which served the public, he argued, met this standard and thus were subject to federal and state regulation under *Munn*. Furthermore, racial discrimination by such businesses clearly imposed a badge of servitude on Black patrons.[42]

Harlan turned next to the Fourteenth Amendment. He argued that his *Munn*-based analysis also applied to that Amendment's Enforcement Clause, which was similar to the Thirteenth Amendment's clause. He extended his *Munn* analysis by arguing that even if one accepted Bradley's position that

the Amendment limited Congress to regulation of state action, operators of public businesses should be regarded as agents of the state.[43] Furthermore, in his view, the Enforcement Clause refuted Bradley's holding that the Amendment allowed Congress only reactive, not proactive powers: it authorized Congress to secure for Blacks the full scope of their rights as citizens and their right to be free of racial discrimination by individuals as well as states. Like earlier supporters of the Act, Harlan pointed to Miller's broad statement of the Amendments' purpose in the *Slaughterhouse Cases*.[44] Harlan agreed that "no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him," but he also agreed with the Act's congressional supporters that the Act applied to legal, not social rights. Whites could choose not to mix with Blacks in public places, but they could not deny Blacks access to those places. He concluded by taking issue with Bradley's pronouncement that Blacks must cease to be "the special favorite of the laws"; it was "scarcely just" to say that they had ever been so.[45]

Reaction: A Divided Initial Response

Public reaction to the Court's decision came quickly and divided largely along racial lines. Much of the Northern press defended the decision, arguing that it was unsurprising in light of the constitutional criticisms voiced during Congressional debate over the 1875 Act and that the Act was nothing more than a misguided effort to enforce social equality. Blacks can "only hope to improve their social condition," the *Chicago Tribune* argued, "by availing themselves of the equal political, civil, business and educational facilities which the Constitution guarantees to them." Contrary to opponents' charges that the *Civil Rights Cases* struck a blow against racial equality, in the *Tribune*'s view the Court had held only that "Congress can give [Blacks] no superior rights and no special protection not enjoyed by the white man."[46] The *Nation*, at that time perhaps the most influential American magazine catering to an elite readership, took a more detached but no less dismissive attitude. In its view, the decision "shows how completely the extravagant expectations as well as the fierce passions of the war have died out," and the Act's failure lay in the fact that in 1875, Blacks had not "come . . . distinctively into view as citizens and property-holders, theater-goers and travelers."[47] A few newspapers expressed tepid regret, often based on the grossly unrealistic assumption that the Act had settled the public rights issue and had contributed to a permanent stabilization of race relations.[48] Only a handful ventured anything like direct criticism of the decision.[49]

Black leaders and their white allies were incensed. One week after the Court handed down its decision, a mass protest meeting took place at Lincoln Hall in Washington featuring Frederick Douglass and Robert Ingersoll, a nationally known white freethinker, as the principal speakers. Douglass avoided direct criticism of the Court as an institution, but he did not spare the decision itself. He echoed Harlan's view that the majority had improperly applied a cramped construction to the Thirteenth and Fourteenth Amendments and had ignored the true spirit and intent of the Amendments: to extirpate all racial discrimination and all other stains left by slavery. In his view, the distinction between state and private action was sophistical: states could only act through their citizens. Douglass criticized the Northern press for promoting confusion between social and public rights, and, echoing Sumner, he denounced the decision as "a concession to race pride, selfishness and meanness [which] will be received with joy by every upholder of caste in the land." The Act, he said, "though dead, did speak," and was "a banner on the outer wall of American liberty." Ingersoll praised

Members of the Supreme Court who decided the Civil Rights Cases in 1883. Joseph P. Bradley, the author of the decision, sits at left; John Marshall Harlan, the lone dissenter, stands second from right. While the decision struck down the 1875 Act's protections for Black citizens, it also inaugurated a wave of state-level action, both legislative and judicial, as to public rights that came to play a crucial if little-remembered role in American civil rights history.

Harlan and agreed with him that the Court had rendered the Fourteenth Amendment toothless by confining it to state action.[50]

Black leaders in cities throughout the North called similar meetings which voiced similar sentiments, and some white Republican leaders also spoke up. In December, Iowa senator James Wilson responded to the *Civil Rights Cases* by introducing a proposed constitutional amendment giving Congress broad power to guarantee equal protection of the law to all American citizens. He criticized Bradley's decision in detail, labeling it "a denial of the old and familiar saying that 'revolutions never go backward'"; but his measure soon died in committee.[51]

A New Wave of State Public Rights Laws

What was to be done? Open defiance of the Court's decision was out of the question. Instead, civil rights leaders seized upon Bradley's statement that the Constitution did not preclude states from enacting public-rights laws. They urged their followers to organize and press for such laws in their home states.[52] They recognized that Blacks' newly-won suffrage rights provided their strongest lever. "Somebody," one speaker at a Chicago mass meeting proclaimed, "must be made to feel that the ballot in the hands of the colored was a power. They should stick to a party as long as it did right, but when it failed to do that, they must look for someone else to tie to." Howard University president William Patton underscored the point for white Republicans. "A million colored votes, distributed throughout the States, in many of which parties are nearly balanced, . . . will not long be unheeded."[53] Northern politicians of both parties heeded the message. It had played a central role in northern Democrats' decision

in the early 1870s to adopt a "New Departure" doctrine, which called for acceptance of the Civil War Amendments as a permanent feature of the postwar legal landscape and abandonment of open professions of white supremacy; and it had not lost its force among Democrats. Likewise, Republicans took pains after 1883 to assure Black voters that the party would not take them for granted.[54]

The 1875 Act provided an obvious template for new state public rights laws. Newspapers in Kansas, which had enacted a public rights law in 1874, trumpeted the state-law strategy immediately after the *Civil Rights Cases* decision was handed down,[55] and during the 1884–1885 legislative cycle ten Northern states, four of which were closely divided politically and had substantial Black populations,[56] took the cue and enacted such laws.[57] Ohio was the first, and its enactment process vividly demonstrated the new world of bipartisan competition for Black support.

In November 1883, Ohio voters elected Democrat George Hoadly as governor. Hoadly was not a typical postwar Democrat: he had been a Free Soiler before the war and had represented Cincinnati's Black school district in its successful effort to secure its fair share of city school taxes. Hoadly believed that Black votes had given him his victory, and he and many fellow Democrats hoped to consolidate Black support by supporting a public rights law. When the legislature, divided nearly evenly between the two parties, met in early 1884, both Hoadly and his Republican predecessor publicly urged enactment of such a law.[58] William Crowell, a Democratic state senator, promptly introduced a bill in which Peter Clark, a long-time Black leader in Ohio, played an important part.

Clark had been educated at Oberlin College and had helped found the National Equal Rights League in 1864. He was a firm believer in strategic use of Black voting power, and during the 1870s he had identified at different times as a Republican, a Democrat, and an independent.[59] In 1883, he sensed that opportunity lay for the moment with the Ohio Democracy, and he acted accordingly. Even though Crowell's bill was only a watered-down version of the 1875 Act—it covered only inns, public transport, and theaters, and "other places of public amusement"—some Democrats objected to any bill, and passage was uncertain until Clark addressed the Democratic legislative caucus. In early February 1884, the bill passed by a nearly unanimous vote. The *Cleveland Gazette*, Ohio's leading Black newspaper, was philosophical about the partial nature of the victory. "Whether the bill passed is intended as a bait to catch the colored voters or not," it reasoned, it was "nevertheless a step in the right direction, and we should be thankful for favors that are good, if 'the devil did fetch 'em.'" [60]

Black activists in other states helped maintain a steady stream of pressure to enact public rights laws. They organized national conventions in Louisville and Pittsburgh and local meetings from Rhode Island to Nebraska, publicized the conventions' calls for new laws, and organized signings of mass petitions that were forwarded to state legislatures.[61] In January 1885, George Downing, a long-time Black leader in Rhode Island who had also played a role in enactment of the 1875 Act, published a nationally circulated letter in which he congratulated the Democratic Party on Grover Cleveland's recent election to the presidency, appealed to the party's "more mellow mood touching the interest of the colored man," and urged that "the colored vote may be won, which is better than to intimidate it." Downing also reminded white lawmakers that he and his colleagues were seeking not social equality but public rights, which "involved no disregard of vested interests, proprietary claim, [or] invasion of any private or domiciliary right." Regard for "merit, . . . respect, irrespective

of color, . . . including natural and just aspirations" was paramount; the campaign's goal was simply "fair play."[62]

As in Ohio, surprisingly little opposition to public rights laws surfaced in other state legislatures that passed such laws. No lawmakers urged colleagues to be guided by Bradley's rule of narrow construction of guaranteed rights. Very few objected that public rights laws would foster social equality or racial amalgamation. In several states, Republicans and Democrats sparred openly as to who should get credit with their black constituents for passing the bill; in New Jersey, two assemblymen nearly came to blows over the issue. Some Democratic legislators complained that the laws would give blacks preferential treatment over whites, but others such as Indiana state senator W.C. Thompson, the chief sponsor of his state's bill, responded that the laws would do no harm and might do some good:

> Senators have declared upon this floor that the colored man is entitled to all the rights and privileges of the white man, and I don't see what harm there is in ingrafting that into a law. We know a prejudice against the colored man is seen every day. . . . I am a philanthropist. I believe in God Almighty wherever I see Him in the face of a human being.[63]

Why did the fierce opposition to public rights that had marked debate over the 1875 Act disappear so completely from state debates in the wake of the *Civil Rights Cases*? Contemporary observers did not address the question, but likely there were several factors behind the disappearance. Northern parties' desire to attract Black votes and residual egalitarian sentiments among Northern whites played a role, and in the mid-1880s most whites believed that public rights laws would not require racial mixing within a public establishment even if Blacks were admitted: for example, Black pupils could be educated in separate buildings or classrooms and Black theatergoers and restaurant patrons could be seated in separate sections.[64] But Bradley's opinion likely also played a role. The Court had sanctioned state protection of public rights, and unlike their federal counterparts, state lawmakers who privately disliked public rights had no constitutional grounds for opposing such laws.

Conclusion: The Hidden Modern Importance of the *Civil Rights Cases*

Time has eroded the force and the respectability of the *Civil Rights Cases*. The view that the decision's chief importance lies in its facilitation of the Jim Crow era remains common among historians. Justice Harlan's broad construction of the "badges of slavery" against which Congress may take direct action under the Thirteenth Amendment has prevailed over Justice Bradley's narrower construction, and during the 1960s the Supreme Court endorsed the suggestion raised during the 1875 Act debates that Congress could enact public rights laws under the federal commerce clause if not the Fourteenth Amendment.[65] But the *Civil Rights Cases* can also be viewed from the perspectives discussed in this article; and although these perspectives may not restore its luster, they highlight the decision's continuing importance in the twenty-first century.

First, if the Supreme Court's decision was transformative in that it sharply cabined the scope of federal civil rights reform, it was also transformative in that it inaugurated a wave of state-level action, both legislative and judicial, as to public rights that came to play a crucial if little-remembered role in American civil rights history. The state public rights laws enacted in response to the Court's decision generated a wide variety of legal issues that preoccupied Northern courts for the better part of a century. What should

the scope of the laws be? Nearly all prohibited race-based discrimination in hotels and public transportation; several included omnibus clauses that typically covered "all other places of public accommodation and amusement," and each state added other categories of its own. These choices were the subject of much debate in state legislatures and were frequently modified in later years. Should public rights statutes be construed liberally to include types of discrimination close in nature to listed categories? Courts regularly confronted that question and reached widely varying results.[66]

Other issues also arose. Should employers be held vicariously liable for discriminatory acts by their employees? Again, court decisions varied, but a steady trend in favor of vicarious liability developed during the early twentieth century.[67] Perhaps the most important question of all, one which the 1875 Act and the *Civil Rights Cases* had avoided, was whether public rights laws allowed segregation within an establishment to which Blacks were admitted—for example, as in Emma Coger's case, whether Black steamboat passengers could be shunted into dining areas separate from whites once they were allowed on board. The Iowa supreme court's rejection of intramural segregation was a minority position in 1873, and it remained so well into the twentieth century, but over time an increasing number of courts took the Iowa court's side.[68]

The *Civil Rights Cases* also provide a prime example of the dynamic between Supreme Court decisions addressing sensitive social and political topics and opponents' efforts to work around those decisions. That dynamic has appeared repeatedly throughout the Court's history, and it has particular resonance today, in a time of controversial Court decisions on topics such as abortion, political gerrymandering and discrimination based on religious beliefs. The *Civil Rights Cases* elicited an initial reaction of anger and despair among opponents, a fear that the cause of public rights might be doomed; but that reaction quickly gave way to pragmatic efforts to work around the decision. One of the Court's main goals was to preserve a maximal sphere for state rights and opponents took advantage of that goal, focusing on the opening Bradley had made for state public rights laws. There was no hope of persuading Southern states to enact such laws, but Black civil rights leaders made effective use both of Black voters' leverage as a swing bloc in many Northern states and of the still-substantial reservoir of Northern white support for the 1875 Act's goals. They achieved a surprising amount of success in the years immediately following the Court's decision, followed by decades of slow but steady incremental gains in state legislatures and courts. Like many decisions throughout the Supreme Court's history, the *Civil Rights Cases* made an imprint that was deep but by no means permanent. The reaction the decision produced proved to be at least as important as the decision itself.

ENDNOTES

[1] 109 U.S. 3 (1883); 18 Stat. 335 (1875).

[2] For a detailed overview of traditional and revisionist historiography of the *Civil Rights Cases, see* G. Edward White, "The Origins of Civil Rights in America," *Case Western Law Review* 64 (2014), 755–6, 759–60n9, 801–12; *see also* Michael J. Horan, "Political Economy and Sociological Theory as Influences Upon Judicial Policy-Making: The Civil Rights Cases of 1883," *American Journal of Legal History* 16 (1972), 73–5.

[3] *State v. Hoppess*, 2 *West. L.J.* 279, 1845 WL 2675, at *7 (Ohio 1845); *see also West Chester & Phila. R. Co. v. Miles*, 55 Pa. 209, 212–13 (1867) (referring to "boundaries" and "repugnancies").

[4] Leon F. Litwack, "The Abolitionist Dilemma: The Antislavery Movement and the Northern Negro," *New England Quarterly* 37 (1961), 50–52, 53 (Tappan quotation), 54–61.

[5] *Roberts v. City of Boston*, 59 Mass. 198, 201–04 (1849); George F. Hoar, ed., **Charles Sumner: His Complete Works** (Boston, 1900–09), 3:61, 74, 83, 96.

[6] *See, e.g., Day v. Owen,* 5 Mich. 520 (1858); *McCrea v. Marsh*, 78 Mass. 211 (1858); *Pleasants v. North Beach & Mission R. Co.,* 34 Cal. 586 (1868); *Chi. & N.W. R. Co. v. Williams,* 55 Ill. 175 (1870).

[7] *Congressional Record*, 43rd Cong., 1st Sess., 457–58 (January 7, 1874); see also John A. Logan, "Speech Delivered at Salem, Illinois, July 4, 1866," 12–13, accessible at https://babel.hathitrust.org.

[8] *See, e.g.,* Robert Dykstra, **Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier** (1993), 209–19, 266–7 (describing the evolution of several leading Iowa Republicans, including Iowa supreme court justice Chester Cole who participated in the *Coger* decision referenced at notes 21–22 and accompanying text); Barbara A. Gannon, **The Won Cause: Black and White Comradeship in the Grand Army of the Republic** (2011), 4–9, 85–95, 118–24, 168–70 (describing the racial integration of many Grand Army of the Republic posts).

[9] Charles Fairman, **The History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888** (1971), 1:723–27 (Bradley), 2:531–32 (Blatchford), 2:530–31 (Gray).

[10] Christopher Waldrep, "Joseph P. Bradley's Journey: The Meaning of Privileges and Immunities," *Journal of Supreme Court History* 34 (2009), 150, 152–60; Fairman, **Reconstruction and Reunion**, 2:288–90 (quotation from letter, Bradley to William Woods, October 30, 1876).

[11] C. Peter Magrath, **Morrison Waite: The Triumph of Character** (1963), 18, 67–70, 151–4, 163–4.

[12] Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997), 35; Carl Swisher, **Stephen J. Field: Craftsman of the Law** (1963), 165.

[13] Fairman, **Reconstruction and Reunion**, 2:527 (Woods), 2:528–29 (Matthews); *Bertonneau v. Board of Directors*, 3 F. Cas. 294 (Cir. Ct. D. La. 1878) (Woods on segregation).

[14] Charles Fairman, **Mr. Justice Miller and the Supreme Court, 1862–1890** (1939), 3, 14–16, 129 (quotation).

[15] *Slaughterhouse Cases*, 83 U.S. 36 (1873), 71 (Miller's broad statement of purpose), 75–6 (Miller's narrow reading of federal privileges and immunities), 118–19 (Bradley dissent).

[16] Alan F. Westin, "John Marshall Harlan and the Rights of Negroes: The Transformation of a Southerner," *Yale Law Journal* 66 (1957), 660–61, 666, quoting transcriptions of Harlan speeches in the *Louisville Daily Commercial*, "General Harlan's Republicanism," November 1, 1877; Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (1992), 27–8, 87–8.

[17] Leonard L. Richards, **Who Freed the Slaves? The Fight over the Thirteenth Amendment** (2015), 7, 230–40; Eric Foner, **The Second Founding: How Civil War and Reconstruction Remade the Constitution** (2019), 48–9, 53–4; *see also* Alexander Tsesis, **The Thirteenth Amendment and American Freedom: A Legal History** (2004), 45.

[18] William E. Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (1988), 58–60, 115–8, 122–3.

[19] *Cory v. Carter*, 48 Ind. 327, 347 (1874); *Ward v. Flood*, 48 Cal. 36, 49 (1874).

[20] *Cory*, 48 Ind. 327 (1874); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209–10 (1871); *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 346 (1872) (stating that "while [school segregation] may be, and probably is opposed to the spirit of the [U.S. Constitution], still it is not obnoxious to [the] letter").

[21] *Coger*, 37 Iowa 145, 154, 156 (1873).

[22] 37 Iowa at 158; *Kaine v. Commonwealth ex rel. Manaway*, 101 Pa. 490, 495 (1882).

[23] *Congressional Globe*, 41st Cong., 1st Sess., 3434 (May 13, 1870); Bertram Wyatt-Brown, "The Civil Rights Act of 1875," *Western Political Quarterly* 16 (1965), 763–5; Alan Friedlander and Richard A. Gerber, **Welcoming Ruin: The Civil Rights Act of 1875** (2019), 15–20; Ronald B. Jager, "Charles Sumner and the Civil Rights Act," *New England Quarterly* 42 (1969), 362–7.

[24] *Congressional Globe*, 42d Cong., 2d Sess., Appendix, 2–5 (January 25, 1872); Wyatt-Brown, "Civil Rights Act," 766–67.

[25] *Congressional Record*, 43d Cong., 1st Sess., Appendix, 303–04 (May 22, 1874). *Congressional Record*, 43d Cong., 1st Sess., Appendix, 1792 (February 26, 1875) (similar arguments made by Massachusetts senator George Boutwell).

[26] *Congressional Record*, 43d Cong., 1st Sess., 407–8 (January 6, 1874).

[27] *Congressional Record*, 43d Cong., 1st Sess., 408–9.

[28] *Congressional Record*, 43d Cong., 1st Sess., 343–44 (December 19, 1873) (Rainey); 382–85 (January 5, 1874) (Ransier); 901–3 (January 24, 1874) (Cain); 4782–6 (June 9, 1874) (Rapier).

[29] Friedlander and Gerber, **Welcoming Ruin**, 33–34, 98–100, 513–15; Wyatt-Brown, "Civil Rights Act," 765.

[30] Friedlander and Gerber, **Welcoming Ruin**, 140–45, 187–88, 517–28, 545–53, 557–63; Wyatt-Brown, "Civil Rights Act," 771–74.

[31] *Charge to Grand Jury—Civil Rights Act*, 30 F.Cas. 1005 (Cir. Ct. W.D. Tenn. 1875).

[32] *Anti-Monopolist* (St. Paul, Minnesota), June 17, 1875 (reporting Nelson's unpublished decision). In *McCulloch*, 17 U.S. (4 Wheat.) 316 (1819), a case involving Congress's power to charter the Bank of the United States, the Court, speaking through Chief Justice John Marshall, gave a broad construction to the Constitution's

"necessary and proper" clause which authorizes the federal government to make "all Laws which shall be necessary and proper for carrying into Execution" its constitutional powers. U.S. Const. art. I, §8.

[33] Fairman, **Reconstruction and Reunion**, 2:550–58. Blatchford and federal district judge William Choate divided in an unpublished decision, *U.S. v. Singleton*, involving a claim of discrimination in New York. Contemporary reports do not say which way each judge voted, *see, e.g., New York Times,* January 15, 1880, but given Blatchford's vote in the *Civil Rights Cases*, it is almost certain that Choate believed the Act was constitutional and Blatchford did not.

[34] Five unpublished lower-court decisions were at issue: *Singleton; U.S. v. Stanley*, in which a panel of Kansas federal judges divided over the Act's constitutionality; *U.S. v. Ryan* and *U.S. v. Robinson*, in which California and Tennessee federal judges respectively pronounced the Act unconstitutional; and *U.S. v. Nichols*, in which a Missouri judge certified the issue for the Supreme Court's decision without giving an opinion. See Fairman, **Reconstruction and Reunion***,* 2:550–55. For a comprehensive account of lower-court cases involving the Act, *see* John Hope Franklin, "The Enforcement of the Civil Rights Act of 1875," 6 *Prologue* 225, 226–34 (1974).

[35] *Civil Rights Cases*, 109 U.S. at 11–12; *see Congressional Globe*, 42d Cong., 2d Sess., 279–80 (December 21, 1871) and *Congressional Record*, 43d Cong., 1st Sess., 4084–85 (May 20, 1874), 4146–47 (May 22, 1874) (Ohio Democratic senator Allen Thurman); *Virginia v. Rives*, 100 U.S. 313, 318 (1880).

[36] 109 U.S. at 13–14.

[37] 109 U.S. at 17, 19, 24.

[38] 109 U.S. at 20, 22, 25. Bradley did uphold the portion of the 1875 Act extending to jury selection, reasoning because selection was administered by government officials it was state action within the meaning of the Fourteenth Amendment. 109 U.S. at 15–16.

[39] Beth, **Harlan**, 228–9; 109 U.S. at 26 (dissent).

[40] 109 U.S. at 33–40 (dissent), relying chiefly on *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

[41] 109 U.S. at 31, 33–34, 51 (quotation) (dissent).

[42] 109 U.S. at 36, 37–40 and 41–42 (dissent), quoting *Munn*, 94 U.S. 113, 126 (1876).

[43] 109 U.S. at 58–59 (dissent).

[44] 109 U.S. at 44 (quotation), 45–50 (dissent).

[45] *Id*. at 55–56, 61 (quotation) (dissent).

[46] *Chicago Tribune*, October 17, 1883; *see also, e.g., Tribune*, October 18, 20, and 24, 1883; *New York Times*, October 18, 1883 (arguing that the 1875 Act had been a dead letter but had "kept alive a prejudice against the Negroes and against the Republican Party in the South, without which it would have gradually died out").

[47] "The End of the Civil-Rights Bill," *Nation* 37 (October 18, 1883), 326.

[48] *See, e.g., Hartford Courant*, October 16, 1883; *Detroit Post and Tribune*, October 17, 1883; *Indianapolis Journal*, October 16, 1883. *See also* Fairman, **Reconstruction and Reunion**, 2:573–82, which contains an extensive compilation of contemporary remarks in newspapers North and South.

[49] *See Philadelphia Press*, October 17, 1883 (arguing that the Act "ha[d] been accepted in both sections as embodying the just demands of an enfranchised race"); *Denver Republican*, October 16, 1883 (arguing that if Blacks did not have "equal rights with all men in public places, then the work has been only half done"); *St. Louis Globe-Democrat*, October 17, 1883 (arguing that Blacks were entitled to public rights and that the Act was within the spirit of the Fourteenth Amendment).

[50] *Proceedings of the Civil Rights Mass-Meeting Held at Lincoln Hall* . . . (1883), 9, 12 (Douglass quotations), 13–14 (Douglass); 18, 32–34 (Ingersoll).

[51] *Congressional Record*, 48th Cong., 1st Sess., 133, 136 (December 12, 1883). Several other measures responding to the *Civil Rights Cases* also died in committee. Fairman, **Reconstruction and Reunion**, 2:585.

[52] *Proceedings of Mass-Meeting at Lincoln Hall*, 3; *Buffalo Morning Express & Illustrated Buffalo Express*, October 17, 1883 (quoting Richard T. Greener's statement that "the colored man . . . must continue to fight for his rights with his eloquence and his pen . . . By pluck he will force his way to the front, as the Anglo-Saxon race admires pluck and always acknowledges it finally").

[53] *Chicago Daily Tribune*, October 25, 1883 (quoting Rev. J.W. Polk at Chicago mass meeting); *see Tribune*, October 18 and October 22, 1883 (noting indications by Black leaders in Iowa and Pennsylvania that their followers would consider supporting Democrats); Patton, "The U.S. Supreme Court and the Civil Rights Act," *New Englander* 43 (January 1884), 15–17.

[54] Lawrence Grossman, **The Democratic Party and the Negro: Northern and National Politics, 1868–1892** (1976), 15–7, 25–7; James L. Vallandigham, **Life of Clement L. Vallandigham** (1872), 438–9.

[55] *Topeka Commonwealth,* October 17, 1883; *Atchison (Kan.) Champion,* October 17, 1883, both cited in Fairman, **Reconstruction and Reunion**, 2:579.

[56] A rough calculation of Black voter influence in a state can be made by dividing the average population of potential Black voters during a given period into the average margin of victory in gubernatorial elections (regardless of which party won). A ratio of 1.0 or more indicates that the Black vote is potentially outcome determinative, and a ratio of 0.5–1.0 indicates that it is highly important. Among the ten states that enacted public rights laws in 1884–85, Indiana, Ohio and New Jersey's ratios for the 1870–1890 period exceeded 1.0 and Rhode Island's

and Colorado's ratios were approximately 0.5. The ratios were calculated from U.S. Census population figures and from election results published in the (New York) *Tribune Almanac* during that period.

[57] See: **1884**: 1884 Ohio Laws, p. 15 (February 7), *amended, id*. p. 90 (March 27); 1884 Iowa Laws, p. 107 (March 29); 1884 N.J. Laws, (May 10). **1885**: 1885 Neb. Laws, p. 393 (March 4); 1885 Minn. Laws, p. 296 (March 7); 1885 Ind. Laws, p. 76 (March 9); 1885 Colo. Laws, p. 132 (April 4); 1885 R.I. Laws, p. 171 (April 24); 1885 Mich. Laws, p. 131 (May 6); 1885 Ill. Laws, p. 64 (June 10).

[58] David A. Gerber, **Black Ohio and the Color Line 1860–1915** (1976), 229–37; Davison M. Douglas, **Jim Crow Moves North: The Battle Over Northern School Segregation, 1865–1954** (2005), 93; *Valley Sentinel* (Sidney, Ohio), January 17, 1884 (outgoing governor Charles Foster); *Democratic Press* (Ravenna, Ohio), January 17, 1884 (Hoadly).

[59] Gerber, **Black Ohio,** 23, 35, 229, 234–36; *Jackson (Ohio) Standard*, February 14, 1884; Grossman, *Democratic Party and the Negro*, 38–42, 80.

[60] *Cleveland Gazette*, March 8, 1884; 1884 Ohio Laws, p. 15; 1884 Ohio Sen., *Journal* (1884), 100 (30–1 vote); Ohio H. Reps., *Journal* (1884), 158 (95–0 vote).

[61] *See, e.g., Indianapolis Sentinel*, March 2, 1885.

[62] *New York Freeman*, January 16, 1885; *Memphis Daily Appeal*, January 16, 1885.

[63] *Indianapolis Sentinel*, February 11, 1885.

[64] Many Northern courts confirmed this understanding. *See, e.g., Brown v. J.H. Bell Co*., 123 N.W. 231 (Iowa 1909) (food court); *Commonwealth v. George*, 61 Pa. Super. 412 (1915) (theater).

[65] *See* White, "Origins of Civil Rights," 755–56, 759–60 n. 9, 801–12; *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968) (Thirteenth Amendment); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Fourteenth Amendment).

[66] *Compare, e.g., Jones v. Broadway Roller Rink Co*., 118 N.W. 170 (Wis. 1908) (liberal construction) with *Brown v. J.H. Bell Co*., 123 N.W. 231 (Iowa 1909) (narrow construction).

[67] *See, e.g., Davis v. Euclid Avenue Garden Theatre Co*., 17 Ohio C.C. (N.S.) 495 (Cir. Ct. 1911); *Hubert v. Jose*, 132 N.Y.S. 811 (App. Div. 1912) (both imposing vicarious liability).

[68] *Compare, e.g., McCrea v. Marsh*, 78 Mass. 211 (1858) (intramural segregation permitted) with *Baylies v. Curry*, 21 N.E. 595 (Ill. 1889) and *Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890) (prohibited).

How to Avoid Dictatorship: The Public Debate Over Franklin D. Roosevelt's Court-packing Plan and Its International Context

Leon Julius Biela

Introduction

More than eighty-five years after its eventual failure, Franklin Delano Roosevelt's attempt to influence the Supreme Court's jurisprudence by increasing the number of justices remains a frequently used point of reference in American debates about the role of the constitutional judiciary in the U.S. political system. The story of the Plan (or rather the Judicial Procedures Reform Bill as it was officially called) and its eventual failure is quickly told. In 1935 and 1936, the Court, by a slim majority of justices, struck down a number of major pieces of New Deal legislation. The line of jurisprudence that emerged in these decisions was expected to continue for years to come, threatening further New Deal programs. President Roosevelt was unwilling to accept this, and on February 5, 1937, just weeks after his first re-election, he announced a plan to reorganize the federal courts. This Plan would have allowed him, among other things, to appoint up to six new justices to the Supreme Court, thus ensuring a majority of justices sympathetic to the New Deal. The Plan met with considerable opposition, however, and Roosevelt failed to win the support of a majority of members of Congress. Meanwhile, the Supreme Court had begun to significantly shift its line of jurisprudence, ruling in favor of New Deal programs.[1]

As simple as this sequence of events may seem, its interpretation has been hotly debated ever since, and many questions connected to the Plan still cause controversy

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among scholars from various fields. Perhaps the most intensely debated of these questions is whether political pressure or an internal interpretative shift preceding the Plan was responsible for the fundamental change in Supreme Court jurisprudence beginning in 1937.[2] Another point of controversy is the rationale behind Roosevelt's decision to propose the Court-packing Plan rather than pursue a potentially less controversial reform, such as a constitutional amendment.[3] Some contemporary commentators, as well as revisionist interpreters of the New Deal era, attribute this to Roosevelt's alleged hubris brought on by his overwhelming election victory.[4] Many historians refute this idea of such short-term, almost affective decision-making, pointing to the long genesis of the Plan and arguing that it was the most rational option from Roosevelt's perspective.[5] Finally, there are differing views as to why the Court-packing plan ultimately failed. Revisionist interpretations of the Roosevelt presidency see the plan as out of touch with reality and thus doomed from the outset.[6] Most scholars, however, see the outcome of the congressional negotiations as open and point to strategic errors on Roosevelt's part or emphasize the significance of the sudden death of Senate Majority Leader Robinson, who had been particularly committed to the Plan's success in Congress.[7]

These scholarly debates, fueled by the continuing relevance of Roosevelt's Court-packing Plan as a precedent for the present debates on the Court, have generated a vast body of scholarship spanning the fields of history, political science, and law. Most of these publications focus on the questions outlined above as well as other issues connected to the historical development of U.S. constitutional law, or the political history of the Plan as it unfolded within the institutions of the federal government. Largely missing from this existing scholarship is the extensive debate over the Plan among the American public. In particular, analysis of the arguments that comprised that public debate and their deeper meanings within the context of American political discourse remains scarce.

A thorough analysis of the public debate surrounding the Plan is essential not only to explaining how and why the Plan failed, but also to understanding its broader significance for the history of the U.S. political landscape. To understand this public debate, in turn, it is crucial to consider not only how it related to developments in U.S. political discourse but also how the international situation of the 1930s, especially the erosion of democracy in many European countries, influenced Americans' perspectives on the Plan. Deeply informed by a sense of a crisis of democracy, both opponents and proponents of the Plan claimed that either the Plan or its prevention would save the U.S. from the global spread of authoritarianism. In this atmosphere, the Plan was discussed almost exclusively in terms of its implications for preserving democracy, rather than as a possibility for judicial reform. Thus, if the Plan is to be considered of lasting importance not only as a turning point in the history of the Supreme Court, but also because of its impact on the history of the New Deal era, the U.S. party system, and American politics in general, it is crucial to recognize how the international circumstances and their perception in the U.S. were a key factor in these histories.

Although most studies concerned with the Court-packing Plan make some brief reference to the heated public debate that accompanied it, to date there has been little systematic examination of this debate, its arguments, or the public reception of the Plan. Only a few scattered studies have looked more closely at the public debate over the Plan. Some of them have re-evaluated contemporaneous public opinion polls to provide a quantitative perspective on Americans'

perceptions of the Plan.[8] Other studies have analyzed the perception of the Court-packing Plan in specific social groups and institutions, such as the regional press, lawyers' associations, the African-American community, or religious groups.[9] Only a few works have shed light on the myths, narratives, arguments, symbolisms, and rhetorical strategies employed in the debate.[10] Analyzing the impact of the international context of the 1930s and the resulting discourse on the preservation of democracy on the debate over the Plan adds a new perspective to the existing research. This perspective thus contributes to a deeper understanding of the Court-packing Plan and its meaning for the American political discourse of the 1930s and beyond. Therefore, after briefly reviewing the political situation when Roosevelt first announced the Plan, this essay will analyze in detail the arguments of both opponents and proponents of the Plan, and then briefly discuss the medium- and long-term consequences of this debate.

A Window Broken: The Court-packing Plan and its Background

President Roosevelt and the New Deal polarized American society long before the Court-packing Plan was launched. Although directly after his inauguration even some Republican-leaning Americans were sympathetic to the new president and the optimism he spread, he soon became a hated figure for many, especially in the business community. Opposition groups emerged, often organized and financed by powerful corporations, and, together with some large press companies, devoted themselves to the cause of opposing the president.[11] Opposition to the New Deal was largely motivated by the notion that its economic regulations represented an inappropriate and inefficient expansion of the state's power to the detriment of individualism and free enterprise. Instead, a broad understanding of property and individual rights was seen as necessary for American democracy as defined by the Constitution.[12] Thus, Roosevelt was soon accused of seeking to establish quasi-dictatorial rule by disregarding these rights and expanding executive power. This accusation was used even more intensively as the New Deal shifted from immediate relief programs to social legislation beginning in 1935.[13] The accusation that Roosevelt's government was flirting with dictatorship thus allowed opponents of the New Deal to present themselves as defenders of democracy and the Constitution, a pattern that would reappear in the debate over the Court-packing Plan.[14]

The success of the campaign was mixed. Many Americans still had to worry about making ends meet and were convinced of Roosevelt's sincerity. To them, such concerns seemed remote.[15] It was therefore easy for Roosevelt and his supporters to discredit the charges against them as being driven by elitist economic interests. The references to the Constitution and American individualism, they argued, were mere pretexts or, at best, expressions of an outmoded understanding of the Constitution used to counteract necessary reforms.[16] For all the superficial polemics, these accusations hinted at two different understandings of democracy.

The debate over the role of the Supreme Court in the political system, and many of its arguments, even predated the New Deal era. In particular, during the Progressive Era of the late nineteenth century, the Court, with its focus on protecting property rights and a strict interpretation of the Constitution, was perceived by some reformers as an obstacle to necessary social reform.[17] This anti-Court sentiment continued well beyond the end of the Progressive Era. In 1924, Robert La Follette Sr., Progressive Party presidential

From 1935 to 1937, Congress received more petitions to reform the Court and curtail its powers than at any other time in its history. Above FDR announced his Judicial Procedures Reform Bill in February 1937 in a fireside chat.

candidate, made Supreme Court reform a central plank of his campaign.[18]

In the early years of the New Deal, criticism of the Court still had traction, but the willingness to actually embrace a reform that would curtail the Court's power was weak. In a Gallup poll taken in the fall of 1935, only thirty-one percent of respondents favored such a reform.[19] Beginning in 1935, this sentiment started to change, as the Court began to rule against New Deal programs and legislations. The ruling against the National Industrial Recovery Administration was still largely accepted, while the ruling against mandatory old-age pensions for railroad workers and regulations of the coal industry turned workers in those sectors into opponents of the Court. The ruling against the Agricultural Adjustment Administration angered many farmers.[20] Finally, the 5 to 4 ruling against a New York State minimum wage law for women seemed incomprehensible even to many opponents of the New Deal.[21] Among Roosevelt's supporters, each ruling against the New Deal reinforced the perception of a Court working for special interests, which was strengthened by the perceived bloc of four conservative justices (called the "Four Horsemen"), who consistently voted against New Deal programs.[22]

From 1935 to 1937, Congress received more petitions to reform the Court and curtail

its powers than at any other time in its history.[23] A flood of letters urged Roosevelt and members of Congress to finally act to end the blockade caused by the Court.[24] This criticism was quickly laced with sharp polemic. The book **Nine Old Men**, by journalists Drew Pearson and Robert Allen, who described the justices as men behind the times, became a best-seller.[25] When it became clear in 1936 that the National Labor Relations Act ('Wagner Act'), which protected workers' right to organize, would also be reviewed by the Supreme Court, it was widely expected, that it, too, would be struck down. Reforming the Court thus became a pressing issue for organized labor.[26] Despite the growing support for some kind of reform, Roosevelt was made aware as early as 1935 that a possible reform of the Supreme Court would be a sensitive issue. After publicly labeling the justices as adherents to a "horse-and-buggy" interpretation of the Constitution, he faced a strong backlash of public criticism. Until the 1936 election, therefore, Roosevelt, while internally evaluating various ways to end the Court's blockade of New Deal legislation, held back on public statements. Thus, Republican attempts to use the issue of a possible Court reform in the campaign against Roosevelt failed.[27]

In the 1936 presidential election, Roosevelt won the most sweeping electoral victory in American history up to that time. He and his supporters interpreted this victory as a mandate to continue the New Deal policies against all resistance.[28] Thus, shortly after his second inauguration, Roosevelt decided to finally implement a plan for judicial reform by introducing a bill in Congress. This draft of the Judicial Procedures Reform Bill would have added one additional justice for every justice on the bench over the age of seventy, allowing Roosevelt to appoint up to six new justices (either by adding new justices or by replacing those who instead chose to retire). The proposed bill was thus a powerful tool for turning the conservative-leaning majority on the bench into a minority, possibly even before the upcoming decisions on the Wagner Act and other New Deal legislation.[29] What happened next caught Roosevelt off guard. Congress, despite its overwhelming Democratic majority after the election, fell into a polarized debate over the proposed bill. Moreover, the public did not show the overwhelming support that the president had expected.

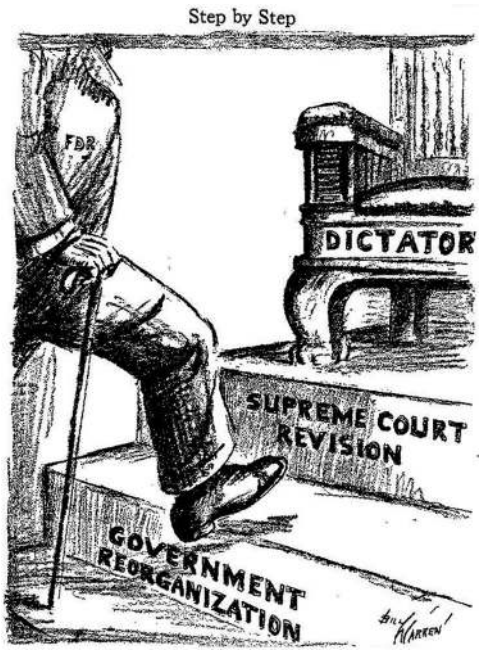
However, the wave of public protest was by no means as crushing as it is often portrayed, for example by Marian McKenna, a historian critical of the New Deal, who writes of an "almost total public backlash."[30] The evidence for such claims is sketchy. The frequently cited letters to the editors of leading newspapers and magazines, as well as to members of Congress, can hardly be considered representative of the sentiment of the American public.[31] Moreover, many owners of newspapers and press companies had been critics of Roosevelt and the New Deal long before the Court-packing Plan, which explains the strong negative press on the Plan.[32]

Public opinion polls gave a different picture than the reaction of the press. In Gallup polls taken in the first few weeks after Roosevelt announced the Court-packing Plan, support for the Plan among respondents consistently hovered between forty-seven and forty-nine percent.[33] Compared with the thirty-five percent support for court reform that Gallup had measured as late as 1935, support had grown significantly, even if a wide margin of error is taken into account. At the very least, the polls show that public opinion was thus by no means overwhelmingly against the Court-packing Plan. If the polls are assumed to be accurate, for a brief period in March the public was even leaning slightly in favor of the plan.[34] Nevertheless, Roosevelt was never able to win a firm majority for his plan either.[35]

Tyranny, Past and Present: The Arguments of the Opponents of the Court-packing Plan

The accusation that Roosevelt was seeking to establish a dictatorship had largely fallen silent by the time of the 1936 election since it had failed to mobilize the general public for the Republican cause.[36] After the announcement of the Court-packing Plan, however, the dictatorship-accusation made a sensational comeback. The Plan was presented by proponents of the dictatorship theory as irrefutable evidence of Roosevelt's dictatorial tendencies, this time with considerable effect even among moderate Roosevelt voters.[37]

The powerful impact of these accusations can only be understood by considering the international political situation and its role in American political discourse. In the spring of 1937, to most Americans democracy seemed to be in retreat throughout the world, threatened by dictatorships' aggressive claims to power. Hardly a day passed without the Court-packing Plan sharing the newspaper pages with stories of democracies in crisis and dictatorial regimes on the rise.[38] Germany, in particular, was perceived as increasingly threatening after the remilitarization of the Rhineland and the intensifying persecution of Jews, other minorities, and dissidents. In addition, Mussolini's close ties with Berlin after the conclusion of the Anti-Comintern Pact, and the establishment of the Berlin-Rome Axis, as well as the Italian invasion of Ethiopia that had begun in 1935, made the Italian fascismo appear increasingly dangerous. Japan's entry into the pact also seemed threatening, especially as more and more signs pointed to a new war of aggression in China, following Tokyo's annexation of the Chinese province of Manchuria in 1931. A particularly dramatic event was the outbreak of the Spanish Civil War in 1937, when right-wing military leaders, backed by Italy and Germany, waged war against the Republic and its government.[39] Meanwhile, in the Soviet Union, the Great Terror had just reached its bloody climax.



The global threat to democracy and the radicalization of autocracy made Americans worry that the erosion and decay of democracy were possible in the United States as well. FDR quickly ran into strong opposition with the Court-packing Plan because the international backdrop made a dictatorship seem both more likely and more threatening to Americans.

The global threat to democracy and the radicalization of autocracy had become central points of reference in American political discourse. Above all, Americans now asked themselves whether "it could happen here"; that is, whether erosion and decay of democracy were possible in the United States as well, and if so, how they could be prevented.[40] This atmosphere was very different from the situation in 1933, when European dictatorships were still considered interesting experiments by many Americans, and some intellectuals wrote about the possibilities of a temporary dictatorship. This helps to explain why Roosevelt was able to obtain emergency powers largely without resistance in 1933,

but quickly ran into strong opposition with the Court-packing Plan.[41] By the spring of 1937, a dictatorship seemed both more likely and more threatening to Americans.

Given this public mood, it is not surprising that even voices sympathetic to Roosevelt felt that the Court-packing Plan was going too far and represented a dangerous accumulation of power in the executive branch. This fear was heightened by Roosevelt's landslide election victory and a Congress with an overwhelming, seemingly compliant Democratic majority.[42] Although moderate critics stopped short of accusing Roosevelt of seeking dictatorial powers, they argued that enlarging the Court would set a dangerous precedent that would allow future presidents to stack the Supreme Court in preparation for dictatorship.[43] Journalist Merlo Pusey, citing the decline of democracy in European states, wrote that in case of a successful implementation of the Court-packing Plan "we would have no assurance that 'it can't happen here.' What a travesty it would be if so-called liberals, seeking temporary advantages, should thus lay the groundwork for a dictatorial regime!"[44] Arthur Vandenberg, Republican senator from Michigan, warned that a successful Court-packing Plan would leave American democracy vulnerable and exposed to the encroachment of the "European curse."[45]

In this way, the question of the Court-packing Plan's impact on American democracy soon became the focus of debate. While moderate critics referred more generally to the world situation and the potential dangers posed by future politicians with dictatorial ambitions, more radical critics referred directly to Roosevelt, accusing him of using the Court-packing Plan to establish a "tyranny," "personal government," or "dictatorship" and compared him to Stalin, Mussolini, or Hitler.[46] There was, however, rarely any deeper analysis, at least in the broader public debate, of what exactly the Court-packing Plan had in common with the establishment of dictatorships in Europe. One of the most systematic comparisons was offered by Walter Lippman in the conservative *New York Herald Tribune.* He postulated that Hitler and Mussolini had both come to power in times of economic hardship on the promise of economic improvement. Then, both had transformed parliament into a mere rubber-stamp for executive policy and proceeded to do the same with the courts. Roosevelt, he wrote, had already taken the first two of these three steps toward dictatorship. The Court-packing Plan was now an attempt to take the third step as well.[47] Senator Burton K. Wheeler, the most vocal Democratic opponent of the Plan, made a similar point in a Senate debate, pointing out that "There are courts in Germany, there are courts in Italy, there are courts in Russia, and men are placed on them to meet the needs of the times as the dictators see the needs, and those justices do what the dictators want them to do."[48]

The warnings and comparisons did not become more precise than that. Most of the articles and speeches comparing the European dictatorships to the Court-packing Plan remained superficial and vague.[49] They often viewed the Court-packing Plan as a personal pursuit of power and equated this desire for power with the European dictators, whose atrocities were then presented as a cautionary example of the consequences of the Court-packing Plan. Nationally syndicated columnist Dorothy Thompson, for example, used rhetorical questions to link fears of the demise of democracy to the Court-packing Plan: "This is the beginning of pure personal government. Do you want it? Do you like it? Look around the world—there are plenty of examples—and make up your mind."[50] In general, little distinction was made between the various authoritarian systems. Roosevelt and the supporters of the Court-packing Plan were almost arbitrarily accused of fascism, communism, or even both at the same time.[51]

Senator Burton Wheeler, the most vocal Democratic opponent of the Plan, warned about the loss of democracy in Europe during a Senate debate. "There are courts in Germany, there are courts in Italy, there are courts in Russia," he said, "and men are placed on them to meet the needs of the times as the dictators see the needs, and those justices do what the dictators want them to do."

Radical critics of Roosevelt were not interested in showing as precisely as possible what precedents his actions had in the European dictatorships. Instead, they sought to evoke a rather abstract image of unfreedom, tyranny, and personal rule, for which the dictatorships of Europe were present symbols or manifestations. Emblematic of this tendency was the fact that the rather abstract word "tyranny" appeared at least as often as "dictatorship" in speeches and newspaper articles critical of the Plan. The dependence of the courts on the executive branch was a defining element of this "tyranny," according to them. Moreover, not only contemporary dictatorships were cited as cautionary examples of "tyranny," but also former European monarchies. Thus, in texts written by his critics, Roosevelt found himself compared not only to Hitler and Stalin, but also to British monarchs and French absolutists.[52]

This rhetorical strategy also allowed for references to America's own history. Senator Wheeler, for example, referred several times to his family's flight from the oppression of European monarchies, warning that this oppression in its current form must be prevented from spreading to the United States. In a Senate speech, he argued that the ideas and ideals enshrined in the Constitution and fought for in the Revolutionary War had saved America from "tyranny" and prevented its spreading.[53] In such an understanding of history, then, it was the Constitution and its

ideals that had previously made it impossible for "tyranny" to gain power in the United States. From this perspective, the Supreme Court was seen as a key part of that Constitution, removed from the disputes of day-to-day politics and impartially monitoring the inviolability of the Constitution.[54] This understanding of the Court as an apolitical and independent guardian of constitutional principles was presented by the opponents of the Court-packing Plan as the intent of the founders of the Republic.[55] This reasoning was problematic since the powers of the Supreme Court were only vaguely spelled out in the Constitution and there were quite different ideas among the founders, for example between Thomas Jefferson and Alexander Hamilton, about what the Court's powers should be in practice. Moreover, the number of justices had been changed several times for political reasons, first under Presidents Adams and Jefferson, then by the Republican Congress of the Reconstruction Era.[56]

This description of the Supreme Court by the Plan's opponents was linked to the Court's self-portrayal, which, like the judiciary as a whole, depended for its own legitimacy on an understanding of the law as an independent, apolitical entity, and cultivated this understanding accordingly. Like all courts, the Supreme Court was not only a symbol of the law, the rule of law, and the Constitution, but it also surrounded itself with symbols of gravitas and solemnity such as the ceremonial protocol of a hearing, the robes of the justices, or the newly built marble courthouse on Capitol Hill.[57] This image of an almost sacred court allowed opponents of the Court-packing Plan to cast the Supreme Court as a quasi-sacred symbol of the Constitution whose fate would be the fate of the Constitution as a whole.[58] In a retrospective, later Associate Justice Robert Jackson aptly compared the Court-packing Plan to the breaking of a church window: "It isn't the damage that's done, it's the spirit of the thing that stirs up all the passion."[59]

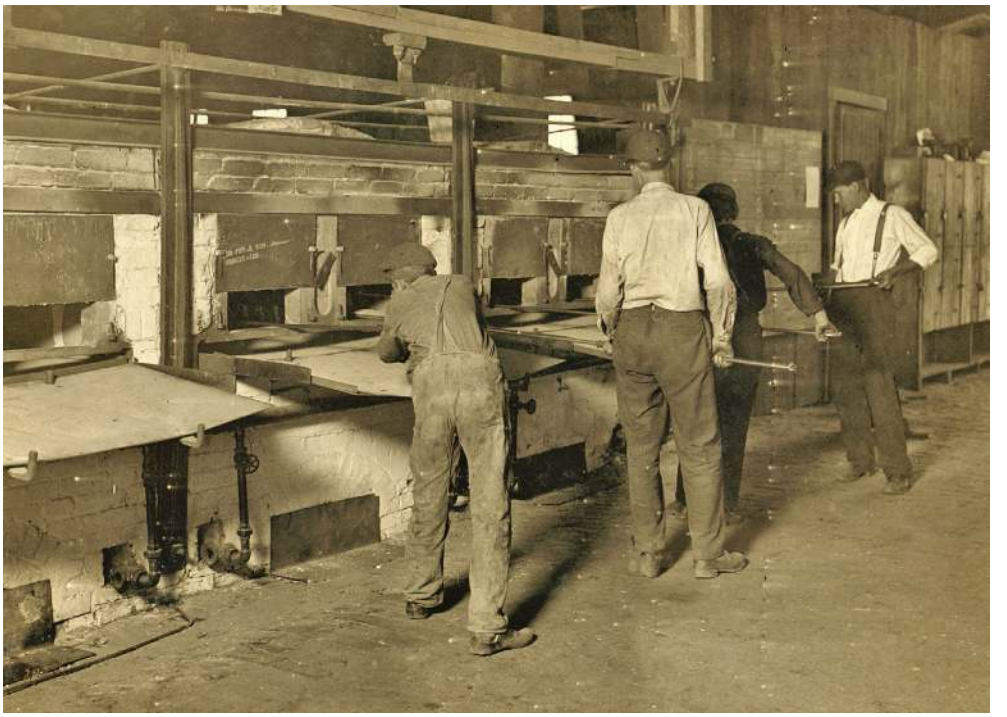
With the notion of the Court's independence at the forefront, opponents of the Court-packing Plan could now argue that the Plan would destroy the Court's independence and politicize what they saw as the bulwark of democracy and personal freedoms. For them, the Plan thus represented a blatant attack on the constitutional values that had so far protected the United States from dictatorship.[60] Former President Herbert Hoover declared the Supreme Court to be the "last safeguard of free men."[61] For Republican Representative Parnell Thomas of New Jersey, the nine justices were "the last barrier between dictatorship and democracy."[62]

This general line of argument was more effective and important to opponents of the Court-packing Plan than analytical comparisons with Europe's dictatorships. The latter, however, were important to emphasize that "tyranny" was not yet a thing of the past, but was still present and threatening, and its suppression an urgent problem. Preventing the Court-packing Plan could thus appear as a defense of democracy. In addition, locating the historical and contemporary examples of "tyranny" in Europe made it possible to define "tyranny" and its characteristics as essentially un-American and to present the Constitution as the epitome of a superior "American civilization."[63] By postulating this European-American dualism, the debate about the Court-packing Plan could be additionally charged with a nationalist exceptionalism, opening this line of argument to racist notions of a culturally superior Anglo-Saxon heritage.[64]

Racist ideas were also crucial to the opposition of many Southern Democrats to the Court-packing Plan. Many white Southerners saw Roosevelt's policies as threatening the South's "labor and race relations,"[65] that is, its social structure based on white supremacy

and the dominance of traditional elites, especially since the Congress of Industrial Organizations (CIO), which was allied with the president, had begun to break up traditional dependency relations in favor of unionization. In addition, the Democratic Party in the northern states, much to the consternation of Southerners, had actively courted the votes of African Americans in the election campaign. Many Southern Democratic officials now began to distrust the informal agreement between them and the New Dealers that made Southern support for reform contingent on the preservation of the Jim Crow system.[66] When the Court-packing Plan was announced, many Southern Democrats interpreted the move as part of a national plan to advance civil rights for African Americans by removing the Court as a potential defender of the South's social system.[67]

More concerned with labor relations in general, by the mid-1930s industrialists, as well as many middle-class businesspeople, were increasingly worried that the working class, which formed the core of Roosevelt's electoral base, would eventually dominate politics and threaten property relations.[68] They feared that Roosevelt and the Democratic majority in Congress would simply impose the will of the working class "masses" without regard for the rights and interests of minorities.[69] Alexis de Tocqueville famously termed this notion the "tyranny of the majority," which he identified to be one of the greatest dangers of the democratic form of government. Consequently, he argued for a system of separation of powers, including a strong and independent Supreme Court.[70] In the 1930s, this idea was echoed by large segments of the middle and upper classes, who



Unsurprisingly, the unemployed and workers supported the Plan as they had benefited most from the New Deal and thus from Roosevelt's idea of democracy. The AFL Executive Committee, among others, instructed its affiliates to actively support the Plan, but union activism nonetheless fell short of Roosevelt's expectations.

valued the Supreme Court as an obstacle to Roosevelt's "tyranny of the majority."[71]

These fears were fueled by events in Europe, especially in the Soviet Union, which were widely interpreted as revolts of the lower classes that had turned into a "tyranny of the majority."[72] But more importantly, domestic political developments fanned these anxieties, namely the overwhelming Democratic victories in the elections and the labor struggle, which was particularly intense in the spring of 1937. When the CIO began to employ new and more militant methods, like sit-down strikes, to fight for workers' interests throughout the country, a majority of Americans rejected these aggressive methods of labor struggle.[73] Because Roosevelt was allied with organized labor, which did not seem to respect liberal values of private enterprise and the sanctity of property, it was easy to cast the Supreme Court as defender of these values.[74]

Religious communities and churches were divided over the Court-packing Plan. Catholics and Jews, in particular, found themselves in an ambivalent situation. Both religious groups were part of the New Deal Coalition and tended to be sympathetic to Roosevelt. At the same time, however, they were minorities who had much to lose from a "tyranny of the majority" and were therefore more inclined to see the Supreme Court as a defender of individual rights.[75] For them in particular, the world situation played an important role in assessing the danger posed by the Court-packing Plan. Most obviously, Jewish Americans were particularly concerned about the possible consequences of the plan because of the intensifying anti-Semitic persecutions in Germany.[76] Catholics in the U.S., too, anxiously observed the increasingly anticlerical policies of the Nazi party. This sense of concern was expressed in Pope Pius XI's encyclical "With Burning Anxiety," issued shortly after the Court-packing Plan debate began, in which he condemned the German government's policies. In addition, the anti-Catholic stance of the Republican Loyalists in the Spanish Civil War fueled anxieties among Catholics, especially since Roosevelt sympathized with the Republic.[77] As William Ross has pointed out, the religious communities seldom sided unequivocally with the critics, but in general they were more hostile to, than supportive of the Court-packing Plan.[78]

Whether all those who accused Roosevelt of trying to establish a dictatorship in the U.S. were actually convinced of this accusation is doubtful. Nevertheless, the fact that they succeeded in inserting the criticism of the Court-packing Plan into the ongoing discourse on the crisis and the preservation of democracy showed that the Plan represented a threatening scenario for many Americans. But the criticism of the Court-packing Plan was always more than a warning against dictatorship or pointing out parallels to European dictatorships. It was a powerful tool for conservatives and free-market Republicans to reassert their own design of American democracy in the wake of the widespread discrediting of laissez-faire capitalism caused by the Great Depression and Hoover's much-maligned response to it. It allowed them to position their ideas as a better alternative to Roosevelt's allegedly 'un-American' and dictatorial policies.[79] Thus, the criticism was never simply a rejection of the Plan, but also an argument for an alternative conception of democracy that emphasized, among other things, property rights, a strict interpretation of the Constitution, and limits on power of the executive branch. This understanding of democracy did not emerge in response to the Court-packing Plan but had rather formed in longer developments with intellectual roots that predated the founding of the Republic. The Plan, however, allowed it to regain traction and thus consolidate itself by making itself part of the discourse on the crisis of democracy.[80]

Well-matched Horses: The Arguments of the Proponents of the Court-packing Plan

Not only the critics of the Court-packing Plan, but also its supporters argued with and for a specific understanding of democracy and connected their arguments to the current world situation and the perception of a crisis of democracy. It was no coincidence that Roosevelt ended his probably most effective speech promoting the Court-packing Plan, the 'Fireside Chat' of March 9, 1937, with the words: "You who know me will accept my solemn assurance that in a world in which democracy is under attack I seek to make American democracy succeed."[81] Like the opponents of the Court-packing Plan, its proponents, and Roosevelt in particular, used the reference to the international crisis of democracy to present themselves as defenders of democracy. This attempt to make the arguments for the Plan part of the discourse on the crisis of democracy should not be understood as a mere reaction to the critics' accusations, but as a genuine result of the rationale behind the Court-packing Plan or rather of the specific concept of democracy that underpinned it.[82]

Roosevelt did not interpret the emergence of dictatorships as the result of the violation of abstract ideals or the curtailing of civil liberties but saw them as the consequence of an economic emergency meeting a government incapable of acting and of taking care of the needs and wishes of the majority of the population. Only in a democracy with a strong and swiftly acting government could the defense against authoritarian tendencies succeed.[83] This, in turn, required a flexible approach to the Constitution that would keep pace with the times and allow for appropriate responses to new circumstances.[84] From this perspective, Roosevelt saw the New Deal measures' potential to alleviate the people's hardships as proof of the elected government's ability to act, and thus as an important step toward safeguarding democracy.[85] Thus, for him, the Supreme Court's striking down of these vitally important measures was a threat to democracy.[86] In a nationally broadcast speech to the Democratic Party in March 1937, he made this idea abundantly clear:

> Democracy in many lands has failed for the time being to meet human needs. People have become so fed up with futile debate and party bickering over methods that they have been willing to surrender democratic processes and principles in order to get things done. . . . In the United States democracy has not yet failed and does not need to fail. And we propose not to let it fail! Nevertheless, I cannot . . . tell you, under present circumstances, just where American democracy is headed nor just what it is permitted to do in order to ensure its continued success and survival. I can only hope. For as yet there is no definite assurance that the three-horse team of the American system of government will pull together. If three well-matched horses are put to the task of ploughing up a field where the going is heavy, and the team of three pull as one, the field will be ploughed. If one horse lies down in the traces or plunges off in another direction, the field will not be ploughed.[87]

It is difficult to reconcile Roosevelt's assertion that the three branches should "pull as one" with a perspective emphasizing that democracy should be based on checks and balances. At the time, however, Roosevelt's ideas were convincing to many Americans who favored swift government action to counter the effects of the economic crisis. Left-liberal intellectuals, urban progressives, and the organized labor movement echoed Roosevelt's

argument and saw the Supreme Court as *the* obstacle to implementing important reforms. The left-liberal periodical *The Nation*, in an article supporting the plan, even postulated that Americans should be afraid of the rise of dictatorship, since the Supreme Court stood in the way of implementing the "popular will" in a democratic manner: "The issue is one of democracy versus a possible fascism. But the side of Congress and the President is the side of democracy."[88]

So far, research on the Court-packing Plan has paid little attention to the plan's supporters, who at one point were estimated by Gallup to comprise forty-nine percent of the total population. An important reason for this is that many supporters of the plan had little public visibility. The Gallup polls show that workers and welfare recipients were the most supportive of the plan, groups that, especially in the latter case, did not wield much power to shape public discourse.[89] Thus, quantitatively speaking, the public debate was dominated by critics of the Court-packing Plan.[90]

The support of the workers and welfare recipients for the Plan was hardly surprising, since these groups generally felt that they had benefited most from the New Deal and thus from Roosevelt's idea of democracy. Moreover, historically labor had benefited little from Supreme Court decisions and thus had no reason to feel sympathy for the Court.[91] This labor sentiment was reflected, for example, in the fact that the executive boards of both the CIO and the more moderate American Federation of Labor (AFL) and Non-Partisan Labor League issued statements unequivocally in favor of the Court-packing Plan, which received widespread approval among their members.[92] Many unionists saw the justices as reactionary representatives of business interests and feared losing the gains labor had made during the New Deal.[93] As a result, the AFL Executive Committee, among others, instructed its affiliates to actively support the Plan.[94] A regional union in Maine, for example, responded by urging local members of Congress to vote for the Plan.[95] The Latherers' Union recommended that the "frenetic appeals" of the "reactionary press" against the Plan should be ignored and was pleased that the "man in the street" was apparently doing so.[96]

This activism was not without effect, given the importance of organized labor in the Democratic electorate, but it still fell short of Roosevelt's expectations. There were several reasons for this. On the one hand, the competition between the AFL and the newly formed CIO weakened the labor movement and tied up resources that could otherwise have been invested in supporting the Plan.[97] On the other hand, organized labor began to lose interest in the issue as it became clear that the jurisprudence of Chief Justice Charles Evans Hughes, and with him the Court, was shifting significantly, beginning with the Court's decision in the case *West Coast Hotel vs. Parrish* in late March, upholding a Washington State minimum wage law for women and overturning earlier rulings. With this shift toward more labor-friendly jurisprudence the immediate reason for unions to support the Plan was gone.[98]

Liberal and progressive intellectuals also backed the Court-packing Plan, largely out of support for the model of democracy it represented and out of frustration with what they saw as a conservative majority on the Supreme Court that was hostile to progress and protective of elite interests.[99] The editors of left-liberal journals such as *The Nation* and *The New Republic*, for example, reliably sided with Roosevelt and the Court-packing Plan in reports, essays, and editorials.[100] The supporters of the Plan used the charge of "tyranny," too, but turned it against the Supreme Court itself. Echoing earlier critics of the Court like Drew Pearson and Robert Allen, many supporters of the Plan resented the idea that a single man, the median justice, could ultimately decide the fate of all

reforms and thus the fate of lives of millions of Americans. This "tyranny," they argued, had to be ended.[101] Frequently, the justices were accused of being guided by economic interests and, as part of the wealthy elite, of putting "property rights" before "human rights," as *The New Republic* put it.[102] Moreover, the supporters argued that Republican nominations to the bench had always been guided by political interest, so the Court-packing Plan was not so much "packing" the Court as "unpacking" it.[103] The notion of an apolitical and nonpartisan judiciary did not have much currency in the left-liberal camp. Here, the justices appeared less as a symbol of apolitical constitutional law than of an outdated and elitist social order.[104]

The possibility that a single justice could decide to overturn measures democratically enacted by representatives of the people in Congress and made absolutely necessary by the circumstances, loomed large in the rhetoric of the supporters of the Plan. The AFL's association journal even published a poem expressing this criticism in particularly dramatic terms. Since the Court had prevented redress for widespread suffering with a simple "no," it was now time to say "no" to the Court.[105]

While the mythicized origins of the Constitution were central to the rhetoric of the

Political scientist O.R. Altman observed that the debate over the Court-packing Plan was essentially a dispute between two "antithetical programs of avoiding dictatorship."

supporters of the Court-packing Plan, Roosevelt and the Plan's supporters did not shy away from referring to the Founding Fathers. Roosevelt, however, saw them less as champions of universal abstract ideals than as revolutionaries with the courage to reform.[106] For Roosevelt, that courage meant moving with the times, accepting the necessities of new circumstances and acting accordingly. Thus, he was by no means advocating the abolition of the Constitution, but rather that it should be seen as a product of its time and reinterpreted under new circumstances. The Court-packing Plan was thus based not only on a specific understanding of democracy, but also on the idea of a Constitution that moved with the times, a "living Constitution," as Roosevelt put it, which was necessary for the resilience of democracy.[107] In this understanding, the Supreme Court, with its conservative constitutional interpretations, resisted the necessary change and thus endangered democracy. This view led to the conviction that the court must therefore be endowed with a majority of justices willing to accept what was necessary, or as Roosevelt metaphorically put it: "Modern complexities also call for a constant infusion of new blood in the courts."[108] The AFL Executive Council echoed this reasoning:

> That form of government which is not flexible enough to expand with the needs of the people, carries within itself the seeds of dissolution. A judiciary sensitive to social and economic situations that condition justice, is an essential factor in a democratic government. Such an enlightened judiciary at this time can be obtained only by the infusion of new blood as the President recommended to the Congress of the United States.[109]

Roosevelt's initial justification of his plan on the grounds of reduced efficiency due to advanced age was an obvious pretext that cost him some sympathy.[110] It is hard to deny, however, that Roosevelt was concerned with revitalizing the Court in the figurative sense as a way to preserve democracy. Only by taking into account the understanding of democracy undergirding the Court-packing Plan can the Plan itself be understood.[111] At its core, then, the debate over the Court-packing Plan was about more than the Supreme Court. It was a clash of different philosophies about democracy and its survival, against a backdrop of a global crisis of democracy.

Turning Point: Impact of the Debate on the U.S. Political Landscape

The debate over the Court-packing Plan left the political discourse changed. In the debate, conflicting positions and tensions that had previously remained below the surface came to the fore and heavily impacted politics and political discourse. The erosion of the New Deal coalition in 1937 heralded the end of the era of New Deal reforms, a reorganization of the party system, and the continued competition between the two designs for democracy highlighted above. The debate over the Court-packing Plan was not the cause of all this, but it was nevertheless the point at which what had previously remained subcutaneous burst into the open, marking the beginning of processes that continue to shape the United States today.

As indicated above, the majority of conservative Democrats, especially from the Southern states, were critical of the Court-packing Plan. After Roosevelt announced his plan, it was from their ranks that the strongest negative reactions came, in part because the Republicans exercised tactical restraint. Moreover, in the more rural areas of the United States, progressive Democrats also tended to be skeptical of the Court-packing Plan. While they shared the concern for court reform, many would have preferred to see

a constitutional amendment and felt that the Plan was the wrong method because of their distrust of any accumulation of power by the executive branch and, increasingly, of Roosevelt himself.[112] The most extreme case was Senator Wheeler, who had been the running mate of Court-critic Robert La Follette in the 1924 presidential election, but whose personal distrust of Roosevelt eventually made him the chief opponent of the Court-packing Plan in the Senate.[113]

This critical attitude toward the Court-packing Plan had been preceded in the years before by an increasingly hostile position toward New Deal measures. Given Roosevelt's immense popularity among their constituents, however, conservative and other dissenting Democrats decided not to oppose the president before the election.[114] The ultimate reason for this alienation was the overextension of the New Deal coalition, which ranged from the conservative planter elite in the Southern states to the labor movements of the industrial centers in the North. For the Democratic elites of the Southern states, the New Deal was worth supporting as long as it did not change existing paternalistic social structures but provided money that could be distributed through those structures. However, when the New Deal shifted from emergency relief to social legislation in its second phase, many Southern Democrats saw this as a left-liberal shift that they were unwilling to support.[115]

Once the 1936 congressional elections were over and the president had launched the Court-packing Plan, there was an opportunity to use the outcry over alleged dictatorial tendencies, made plausible by the international context, in order to oppose the President and slow down the pace of reform. Given the sense of an existential threat to the South's social system, the turnaround of conservative Democrats would probably have come even without the Court-packing Plan, at the latest with the minor recession in the fall of 1937. The Court-packing Plan was not the trigger for the rebellion within in the Democratic Party, but a convenient opportunity and excuse for dissenters to come out of hiding.[116] Moreover, the sudden death of Senate Majority Leader Joseph Robinson of Arkansas, the Plan's most important supporter on Capitol Hill, halted the Plan's momentum and contributed to the fractioning of the Democrats in Congress. Nevertheless, Southern Democrats also had genuine interests in preventing the Court-packing Plan since they feared that Roosevelt would staff the court with liberal justices who would strengthen the CIO and, even more importantly, would advance civil rights for African Americans, thus weakening the Jim Crow system.[117]

Southern Democrats therefore joined with Republicans and dissenting progressives to form a coalition against the Court-packing Plan. The first two groups rallied around the understanding of democracy outlined above and often used the same arguments. Nevertheless, this coalition was hardly homogeneous, given the differing motivations and political ideas. For example, while many Southerners opposed the Court-packing Plan because they feared an expansion of civil rights for African Americans, in Northern states Republicans tried to persuade African Americans to oppose the Court-packing Plan by arguing that only the Supreme Court could protect their rights.[118] Nevertheless, the anti-Court-packing Plan coalition demonstrated that alliances outside the New Deal coalition were possible. The eventual defeat of the Court-packing Plan not only destroyed Roosevelt's aura of invincibility, but also proved that these alternative alliances could command a majority and succeed.[119] The Court-packing Plan, which had exposed the fractures of the New Deal Coalition and stimulated the first collaborations between conservative Democrats and Republicans, thus became the starting point of the coalition's disintegration.[120] While it was not the

The worsening political situation in Europe in 1937 allowed debate over the Court-packing Plan to become a debate about two divergent understandings of democracy itself.

cause, it provided the opportunity for new coalitions to negotiate ideas about the political system and democracy.[121]

Opposition to Roosevelt intensified as the country slipped back into recession again in late summer.[122] From then on, the alliance of conservative Democrats and Republicans managed to prevent a continuation of the far-reaching social legislation and to steer the New Deal into a final phase less inclined toward major reforms.[123] Roosevelt attempted to respond to this by campaigning against Democratic candidates critical of him in the 1938 congressional elections, with the only result that the ranks of his opponents closed even more.[124] Ultimately, this not only halted the reformism of the New Deal, but also set in motion a much deeper process in the U.S. party system. Namely, a process of realignment in which the ideologically broad and overlapping parties of the 1930s became two increasingly self-contained parties dominated by an increasingly homogeneous worldview. The Plan's political fronts were early harbingers of later political battle lines.[125] The Court-packing Plan was a turning point in this long and winding political process.

Conclusion

In an all but forgotten article published in the fall of 1937, political scientist O.R.

Altman observed that the debate over the Plan was essentially a dispute between two "antithetical programs of avoiding dictatorship."[126] This was indeed an accurate assessment. The debate over the Court-packing Plan took place in the context of a political discourse that, against the backdrop of the rise of dictatorships worldwide, was strongly influenced by the perception of a crisis of democracy and thus by the questions of whether democracy was also threatened in the United States and how American democracy could be protected. In this context, the Court-packing Plan was largely discussed in terms of its implications for the preservation of democracy, rather than as a possibility for judicial reform.

While its proponents saw the Plan as a measure to save democracy by guaranteeing the implementation of necessary measures and thus the democratic system's ability to respond to the economic suffering, its opponents saw it as threatening democracy by weakening the Supreme Court and thus the preservation of the constitutional order. The perception of a crisis of democracy in Europe allowed the debate on the Court-packing Plan to take on meaning beyond the issue of Court reform. It became a debate about democracy itself, in which the core ideas of two different understandings of the Constitution and democracy were articulated and negotiated. For conservatives and free-market Republicans in particular, opposition to the Court-packing Plan offered an opportunity to regain a clearer profile for themselves after the discrediting of laissez-faire capitalism and the emergency years of the economic crisis. The debate was extremely polarized, opinions were expressed in parallel without relating them to other arguments, and the points of view of political opponents were frequently defamed without any real engagement with them. As a result, pragmatic dialogue and constructiveness took a back seat to emotion, polemics, and name-calling. All of these findings add to our understanding of the Court-packing Plan, including the motivations behind it. Also, pointing to the rhetorical strategy of the Plan's opponents opens up new perspectives on the causes of the Plan's ultimate failure.

There is now a broad consensus among historians that the New Deal period was a formative period for modern America.[127] The debate over the Plan marked a turning point in that period, as underlying conflicts erupted, and new coalitions were formed along the lines of different conceptions of democracy and the state. It heralded a realignment within the U.S. party system. More broadly, it was also a key moment in the long intellectual history of the U.S. politics going back to the conflict between Federalists and Anti-Federalists over the powers of the central government (a conflict barely mentioned in the debate on the Plan but intellectually connected to it). Many of the political issues and normative tensions that the Court-packing Plan exposed are as relevant and controversial today as they were in 1937.[128] While the Plan and the debate surrounding it did not cause this turning point in political discourse, they did provide the occasion for the emergence of new coalitions and the renewed negotiation of ideas about the political system and democracy. In this way, the Plan and the debate over it informed how this political shift unfolded. Thus, the international circumstances of 1937, which strongly influenced the debate over the Plan, left their mark not only on that debate but also on the longer trajectories of American political history.

ENDNOTES

[1] For concise overviews of the historical events see, among others, Jason Scott Smith, **A Concise History of the New Deal** (2014), 124–37; William E. Leuchtenburg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (1995), 132–61; Mark Tushnet, **The Hughes Court: From Progressivism to Pluralism, 1930 to 1941 (Oliver Wendell Holmes Devise, Volume 11)** (2021), ch. 11.

[2] William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's Court-Packing Plan," *Supreme Court Review*

(1966) 347–400; Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. the Supreme Court** (2010), 243–50; Tushnet, **The Hughes Court**, ch. 13. For an historiographical overview see Laura Kalman, "The Constitution, the Supreme Court, and the New Deal," *American Historical Review* 110:4 (2005) 1052–80, esp. 1056. For overviews of the debate between "internalists" and "externalists," see Kalman, "The Constitution, the Supreme Court, and the New Deal"; Sheldon Gelman, "The Court-Packing Controversy," *Constitutional Commentary* 28 (2013) 451–518, esp. 452–3, 493–8; Stephen Shaw, "The Supreme Court," in William Pederson, ed., **A Companion to Franklin D. Roosevelt** (2011), 433.

[3] On contemporary opinions on a constitutional amendment, see William Blake, "'Justice Under the Constitution, Not Over It': Public Perceptions of FDR's Court-Packing Plan," *Presidential Studies Quarterly* 49:1 (2019) 204. On alternative measures discussed at the time, see Barry Cushman, "Court-Packing in Context," *Journal of Supreme Court History* 48:2 (2023) 174–214.

[4] On contemporary assessments, see Joseph Alsop and Turner Catledge, **The 168 Days** (Garden City, 1938). See also Jamie Carson and Benjamin Kleinerman, "A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan," *Public Choice* 113 (2002) 312; Robert Underhill, **The Rise and Fall of Franklin Delano Roosevelt** (2012), 51. For a revisionist perspective, see Marian McKenna, **Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937** (2002), 263.

[5] Leuchtenburg, "The Origins"; Barry Cushman, "Court-Packing and Compromise," *Constitutional Commentary* 29:1 (2013) 1–30; Shesol, **Supreme Power**, 508–10; Underhill, **Rise and Fall**, 48.

[6] McKenna, **Great Constitutional War**, 562.

[7] On strategic errors, see James Patterson, **Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933–1939** (1967), 125; Michael Nelson: "The President and the Court: Reinterpreting the Court-packing Episode of 1937," *Political Science Quarterly* 103:2 (1988) 267–293, 278. On Robinson's death, see William E. Leuchtenburg, "FDR's Court-Packing Plan: A Second Life, a Second Death," *Duke Law Journal* 34:3–4 (1985) 673–90; Gelman, "The Court-Packing Controversy," 454.

[8] Gregory A. Caldiera, "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan," *American Political Science Review* 81:4 (1987) 1139–53; Barry Cushman, "Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s," *Buffalo Law Review* 50 (2002) 7–101; Alex Badas, "Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan," *Journal of Legal Studies* 48:2 (2019) 377–408; Blake, "'Justice Under the Constitution, Not Over It.'"

[9] James C. Duram, "The Battle to Save the Court: The Kansas Press and the Court Packing Fight of 1937," *Heritage of the Great Plains* 33:2 (2000) 1–18; Kyle Graham, "A Moment in The Times: Law Professors and the Court-Packing Plan," *Journal of Legal Education* 52:1–2 (2002) 151–66; William G. Ross, "The Role of Religion in the Defeat of the 1937 Court-Packing Plan," *Journal of Law and Religion* 23:2 (2007) 629–72; Zach Jonas, "FDR's Court-Packing and the Struggle for Civil Rights," *Journal of Supreme Court History* 48:2 (2023) 215–38.

[10] Justin R. Braga, "The Other Switch in Time: How the Opposition Changed the Debate over the Court-Packing Plan and Won," *Georgetown Journal of Law & Public Policy* 17:2 (2019) 653–82; Trevor Parry-Giles and Marouf A. Hasian, "Necessity or Nine Old Men: The Congressional Debate over Franklin D. Roosevelt's 1937 Court-Packing Plan," in Thomas Benson, ed., **American Rhetoric in the New Deal Era, 1932–1945** (2006), 245–78; Tony McCulloch, "The Roosevelt Image on Trial: FDR, the Radio and the Supreme Court Battle of 1937," in Iwan Morgan and Mark White, eds., **Presidential Image: A History From Theodore Roosevelt to Donald Trump** (2020), 55–74.

[11] Hans Jaeger, **Big Business und New Deal: Die Kritische Reaktion der Amerikanischen Geschäftswelt auf die Rooseveltschen Reformen in den Jahren 1933–1939** (1974), 37–44; Elliot A. Rosen, **The Republican Party in the Age of Roosevelt: Sources of Anti-Government Conservatism in the United States** (2014), 52–3; Betty Houchin Winfield, **FDR and the News Media** (1994), 127–9.

[12] Colin Gordon, "Business vs. the New Deal," in Colin Gordon, **Major Problems in American History 1920–1945** (2010), 411–9; Jaeger, **Big Business und New Deal**, 143.

[13] McCulloch, "The Roosevelt Image on Trial," 62; Rosen, **The Republican Party in the Age of Roosevelt**, 52–3.

[14] Rosen, **The Republican Party in the Age of Roosevelt**, 12, 78; Ira Katznelson, **Fear Itself: The New Deal and the Origins of Our Time** (2013), 118–9; Parry-Giles and Hasian, "Necessity or Nine Old Men," 251.

[15] Jaeger, **Big Business und New Deal**, 145.

[16] Shesol, **Supreme Power**, 235; Blake, "' Justice Under the Constitution, Not Over It,"' 207; McCulloch, "The Roosevelt Image on Trial," 63.

[17] Nelson, "The President and the Court," 273; Leuchtenburg, "The Origins," 348.

[18] Leuchtenburg, "The Origins," 348; Marian McKenna, "Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight," *Pacific Historical Review* 62:4 (1993) 406.

[19] Cushman, "Mr. Dooley and Mr. Gallup," 67.

[20] Leuchtenburg, "The Origins," 355–9, 365–8; Caldiera, "Public Opinion and the U.S. Supreme Court," 1140.

[21] Burt Solomon, **FDR v. Constitution: The Court-Packing Fight and the Triumph of Democracy** (2009), 83; Shesol, **Supreme Power**, 465.

[22] Nelson, "The President and the Court," 291; Solomon, **FDR v. Constitution**, 49.

[23] Nelson, "The President and the Court," 273.

[24] Parry-Giles and Hasian, "Necessity or Nine Old Men," 252; Leuchtenburg, "The Origins," 367–8.

[25] Drew Pearson and Robert Allen, **Nine Old Men** (New York, 1936). See also Parry-Giles and Hasian, "Necessity or Nine Old Men," 249; Leuchtenburg, "The Origins," 390.

[26] "Address of General President William J. McSorley. Fraternal Delegate of the American Federation of Labor to the British Trades Union Congress, Plymouth, 1936," *The Lather*, Vol. XXXVII No. 2 (Oct., 1936) 2. See also James C. Duram, "The Labor Union Journals and the Constitutional Issues of the New Deal: The Case for Court Restriction," *Labor History* 15:2 (1974) 218–29; Solomon, **FDR v. Constitution**, 83.

[27] Nelson, "The President and the Court," 267; Underhill, **Rise and Fall**, 45–6; Leuchtenburg, "The Origins," 358–60.

[28] Alan Brinkley, **The End of Reform: New Deal Liberalism in Recession and War** (1995), 16; Smith, **A Concise History**, 129; Parry-Giles and Hasian, "Necessity or Nine Old Men," 256. For contemporary observations on this see O.R. Altman: "First Session of the Seventy-fifth Congress, January 5, 1937, to August 21, 1937," *The American Political Science Review* 31:6 (1937) 1071–93, here: 1071; "The President's Plan," *New York Times,* Feb. 14, 1937, sec. 4, 8.

[29] For overviews of the stipulation of the proposed bill see Daniels, **Franklin D. Roosevelt**, 320–4; Cushman, "Court-Packing and Compromise," 1–3.

[30] McKenna, **Great Constitutional War**, 558.

[31] There are multiple reasons for this. For example, the social groups tending to oppose the Plan were more likely to write letters to leading newspapers than were social groups tending to support the plan; the press in general tended to be against the Plan (and thus more inclined to print negative letters); and it is easier for pressure groups (especially for ones as well organized as the anti-New-Deal groups) to mobilize writers against something than in support of something. Letters to President Roosevelt were more mixed in their stances on the issue and covered all positions analyzed in this essay. For a selection of letters to Roosevelt, see Lawrence Levine and Cornelia Levine, **The Fireside Conversations: America Responds to FDR During the Great Depression** (2010), 163–200.

[32] Houchin Winfield, **FDR and the News Media**, 127–34; Jaeger, **Big Business und New Deal**, 144. For a regional case study of Kansas newspapers, see Duram, "The Battle to Save the Court," 6–8. The extent to which this press coverage actually influenced public opinion is, of course, difficult to measure. Caldiera argues for a significant influence. See Caldiera, "Public Opinion and the U.S. Supreme Court," 1149.

[33] On the polls, see Caldiera, "Public Opinion and the U.S. Supreme Court"; Blake, "'Justice Under the Constitution, Not Over It'"; Badas, "Policy Disagreement." The results of Gallup polls on the Court-packing Plan were as follows. Survey period February 17–22, 1937: 47 % approval for the Plan among respondents; March 3–8, 1937: 47%; March 17–22, 1937: 48%; April 1–6, 1937: 49%; April 21–26, 1937: 47%; May 5–10, 1937: 46%. These data were compiled using George Gallup, **The Gallup Poll: Public Opinion 1935–1971** (1972), 50–8. Respondents to each of the surveys were approximately 2000 persons selected to get a possibly representative mapping of various social milieus. In each case, the subjects were asked whether they agreed or disagreed with Roosevelt's Court-packing Plan. Abstentions or dissenting positions were not an option. For more information on the technical details of Gallup surveys on the Court-packing Plan, see Badas, "Policy Disagreement," 389–91.

[34] See the analyses of the surveys in McCulloch, "The Roosevelt Image on Trial," 66; Badas, "Policy Disagreement," 402.

[35] Barry Cushman, "The Court-Packing Plan as Symptom, Causality, and Cause of Gridlock," *Notre Dame Law Review* 88:5 (2013) 2094; Adrian Vermeule, "Political Constraints on Supreme Court Reform," *Minnesota Law Review* 90:5 (2006) 1161.

[36] Jaeger, **Big Business und New Deal**, 145.

[37] Solomon, **FDR v. Constitution**, 6; Brinkley, **The End of Reform**, 20–2.

[38] See, for example, the *New York Times* of February 7, the second day after the Court-packing Plan was announced. The Plan shared the first two pages of the newspaper with reports on the front in Spain, the incipient Soviet show trials, and German rearmament. In the *New York Times Magazine* on February 14, a lengthy commentary on the Court-packing Plan was followed by a detailed report on the situation in German concentration camps.

[39] For the American perception of these events see Michaela Hoenicke Moore, **Know Your Enemy: The American Debate on Nazism, 1933–1945** (2010), 61–7; Christopher Vials, **Haunted by Hitler: Liberals, the Left, and the Fight against Fascism in the United States** (2014), 42–54.

[40] Gelman, "The Court-Packing Controversy," 472; Vermeule, "Political Constraints," 1162; Hoenicke Moore, **Know Your Enemy**, 67.

[41] Parry-Giles and Hasian, "Necessity or Nine Old Men," 63; Duram, "The Battle to Save the Court," 10; Vials, **Haunted by Hitler**, 51.

[42] Vermeule, "Political Constraints," 1162; Brinkley, **The End of Reform**, 16.

[43] Parry-Giles and Hasian, "Necessity or Nine Old Men," 260; Shesol, **Supreme Power**, 303; McCulloch, "The Roosevelt Image on Trial," 70.

[44] Merlo J. Pusey, **The Supreme Court Crisis** (New York, 1937), 48.

[45] Arthur Vandenberg cited in Parry-Giles and Hasian, "Necessity or Nine Old Men," 260–1.

[46] Examples for these accusations are cited in Jaeger, **Big Business und New Deal**, 144; McCulloch, "The Roosevelt Image on Trial," 70; Vermeule, "Political Constraints," 1170. Gary Dean Best, himself convinced of Roosevelt's dictatorship aspirations, quotes a selection of newspaper articles with these accusations. Gary Dean Best, **The Critical Press and the New Deal: The Press Versus Presidential Power** (1993), 113–18.

[47] Walter Lippman, "The Seizure of the Court," *New York Herald Tribune*, Feb. 9, 1937, 1.

[48] Burton Wheeler, July 9, 1937, in **Congressional Record, 75th Congress, 1st Session, Volume 81, Part 6** (Washington D.C., 1937), 9974.

[49] For examples, see the excerpts collected in the *New York Times* press review: "Opinions of the Nation's Press on Court Plan," *New York Times,* Feb. 6, 1937, 10.

[50] Dorothy Thompson, "Personal Government," *Evening Star* (Washington D.C.), Feb. 10, 1937, A11. See also Duram, "The Battle to Save the Court," 10; Patterson, **Congressional Conservatism**, 87.

[51] Hoenicke Moore, **Know Your Enemy**, 67 esp. n89.

[52] Leuchtenburg, **The Supreme Court Reborn**, 137. In addition to the examples cited by Leuchtenburg, see also "Editorial," *New York Herald Tribune*, Feb. 6, 1937, reprinted in Alfred Haines Cope and Fred Krinsky, eds., **Franklin D. Roosevelt and the Supreme Court** (Boston, 1952), 27.

[53] Wheeler, July 9, 1937, 9974.

[54] Parry-Giles and Hasian, "Necessity or Nine Old Men," 270; Leuchtenburg, **The Supreme Court Reborn**, 146.

[55] See Leuchtenburg, **The Supreme Court Reborn**, 139. For an example, see the speech of David Walsh, Democratic Senator from Massachusetts, "Text of Senator Walsh's Address Denouncing Court Plan," *New York Times*, Mar. 13, 1937, 10.

[56] Solomon, **FDR v. Constitution**, 41.

[57] Badas, "Policy Disagreement," 381; Parry-Giles and Hasian, "Necessity or Nine Old Men," 249. More generally, see Kalman, "The Constitution, the Supreme Court, and the New Deal," 1068–70.

[58] Nelson, "The President and the Court," 276; Shesol, **Supreme Power**, 28–9, 38.

[59] Robert Jackson, quoted in Shesol, **Supreme Power**, 503.

[60] Blake, "'Justice Under the Constitution, Not Over It,'" 207; Patterson, **Congressional Conservatism**, 87.

[61] Herbert Hoover, quoted in R.L. Duffus, "Issue of the Court: Progress of the Debate*," New York Times*, Feb. 28, 1937, 70.

[62] Parnell Thomas, quoted in "Court Proposal Sharply Criticized," *New York Times*, Feb. 7, 1937, 32.

[63] Rosen, **The Republican Party in the Age of Roosevelt**, 12.

[64] Jaeger, **Big Business und New Deal**, 145.

[65] Gordon, "Business vs. the New Deal," 417.

[66] G. William Domhoff and Michael J. Webber, **Class and Power in the New Deal: Corporate Moderates, Southern Democrats, and the Liberal-Labor Coalition** (2011), 215; Patricia Sullivan, **Days of Hope: Race and Democracy in the New Deal Era** (1996), 4; Patterson, **Congressional Conservatism**, 97–8.

[67] Leuchtenburg, **The Supreme Court Reborn**, 139.

[68] Albert Fried, **FDR and His Enemies: A History** (1999), 130–5; Smith, **A Concise History**, 136; Braga, "The Other Switch in Time," 667.

[69] Fried, **FDR and His Enemies**, 130–5; Smith, **A Concise History**, 136; Braga, "The Other Switch in Time," 667.

[70] Alexis de Tocqueville, **Democracy in America** (ed. Eduardo Nolla) (2010), 244–6.

[71] See as an example, George Wharton Pepper, "Plain Speaking: The President's Case Against the Supreme Court," *American Bar Association Journal* 23:4 (1937) 247–51. See further Ross, "The Role of Religion," 630, 632.

[72] Solomon, **FDR v. Constitution**, 123, 234.

[73] Cushman, "The Court-Packing Plan as Symptom," 2093; Jaeger, **Big Business und New Deal**, 54. In a Gallup poll conducted February 17–22, 1937, 67% of respondents opined *sit-down strikes* should be banned. Gallup, **Public Opinion 1935–1971**, 52.

[74] Braga, "The Other Switch in Time," 667; Smith, **A Concise History**, 126.

[75] Ross, "The Role of Religion," 629.

[76] Ross, "The Role of Religion," 658.

[77] Ross, "The Role of Religion," 643–5, 647; Fried, **FDR and His Enemies**, 148; Vials, **Haunted by Hitler**, 42. On Roosevelt and the Spanish Civil War, see also Dominic Thiery, **FDR and the Spanish Civil War: Neutrality and Commitment in the Struggle that Divided America** (2007).

[78] Ross "The Role of Religion," 666–9.

[79] For similar arguments see Braga, "The Other Switch in Time," 668; Brinkley, **The End of Reform**, 20.

[80] Related but divergent thoughts are articulated by Braga, "The Other Switch in Time," 665; Duram, "The Battle to Save the Court," 14.

[81] Senate Committee on the Judiciary, "Report on the Reorganization of the Federal Judiciary" (75th Congress 1st Session, Senate Report No. 711), June 7, 1937, Appendix D: "Address by the President of the United States

on March 9, 1937," 45. On the impact of the speech, see Caldiera, "Public Opinion and the U.S. Supreme Court," 1145–47.

[82] Shaw, "The Supreme Court," 429; McCulloch, "The Roosevelt Image on Trial," 65; Roger Daniels: **Franklin D. Roosevelt, Volume I: Road to the New Deal 1882–1939** (2015), 318.

[83] Katznelson, **Fear Itself**, 43; Solomon, **FDR v. Constitution**, 130.

[84] Daniels, **Franklin D. Roosevelt**, 318; Cushman, "The Court-Packing Plan as Symptom," 2091.

[85] McCulloch, "The Roosevelt Image on Trial," 63; Jefferson Cowie, **The Great Exception: The New Deal and the Limits of American Politics** (2017), 114.

[86] Shaw, "The Supreme Court," 429–30; Blake, " 'Justice Under the Constitution, Not Over It,' " 207–8; Daniels, **Franklin D. Roosevelt**, 318.

[87] Franklin Roosevelt, "Address at the Democratic Victory Dinner," Washington D.C., Mar. 4, 1937, The American Presidency Project (www.presidency.ucsb.edu/documents/address-the-democratic-victory-dinner-washington-dc).

[88] "The Court and Fascism," *The Nation*, Feb. 20, 1937, 201.

[89] A Gallup survey of April 1–6, 1937, broken down by social group, saw the highest approval rates for the Court Packing Plan among welfare recipients ("relievers," 74% approval) and union members (66%). Gallup, **Public Opinion 1935–1971**, 55.

[90] Shesol, **Supreme Power**, 303.

[91] Parry-Giles and Hasian, "Necessity or Nine Old Men," 256; Duram, "The Labor Union Journals," 216–8.

[92] Braga, "The Other Switch in Time," 659; Fried, **FDR and His Enemies**,130.

[93] Lee Pressman, "Labor and the Law," *The CIO News,* Vol. I No. 25 (May 1938) 25. For a detailed discussion of the union press's attitude toward the Court Packing Plan, see Duram, "The Labor Union Journals," 230–6.

[94] "A.F. of L. Backs Roosevelt's Plan for Reorganizing Federal Judiciary," *The Lather*, Vol. XXXVII No. 9 (May 1937) 18.

[95] "Portland Central Labor Union Firmly Endorses Roosevelt's Court Move," *The Labor News. Official Newspaper of the Maine State Federation of Labor*, Mar. 16, 1937, 1.

[96] "President's Court Plan," *The Lather*, Vol. XXXVII No. 9 (May 1937) 2.

[97] Braga, "The Other Switch in Time," 670; Fried, **FDR and His Enemies**, 128–30.

[98] Braga, "The Other Switch in Time," 656, 671; Solomon, **FDR v. Constitution**, 187.

[99] Leuchtenburg, "The Origins," 348.

[100] See, for example, "The President Faces the Court," *The New Republic*, Mar. 17, 1937, 153–4; "Purging the Supreme Court," *The Nation*, Feb. 13, 1937, 173–4. See also Parry-Giles and Hasian, "Necessity or Nine Old Men," 257.

[101] "Of Two Good Things, Choose Both," *The Lather*, Vol XXXVII No. 12 (Aug. 1937) 18. See also Parry-Giles and Hasian, "Necessity or Nine Old Men," 267; Shesol, **Supreme Power**, 3.

[102] "The President Faces the Court," *The New Republic*, Mar. 17, 1937, 153–4.

[103] Parry-Giles and Hasian, "Necessity or Nine Old Men," 256; Leuchtenburg, **The Supreme Court Reborn**, 136.

[104] Leuchtenburg, **The Supreme Court Reborn**, 136; Underhill, **Rise and Fall**, 47.

[105] Hugh Molleson Foster, "No!," *American Federationist. Official Magazine of the American Federation of Labor*, Vol. 44 No. 4 (Apr. 1937) 391.

[106] Shesol, **Supreme Power**, 159; Leuchtenburg, **The Supreme Court Reborn**, 139.

[107] Cushman, "The Court-Packing Plan as Symptom," 2091; Shesol, **Supreme Power**, 517–8.

[108] Franklin Roosevelt, "Message to the Congress," Feb. 5, 1937, in Cope and Krinsky, **Franklin D. Roosevelt and the Supreme Court**, 19.

[109] William Green, "Editorial," *American Federationist. Official Magazine of the American Federation of Labor*, Vol. 44 No. 4 (Apr. 1937) 354.

[110] Nelson, "The President and the Court," 281; Patterson, **Congressional Conservatism**, 88.

[111] For a similar argument see Gelman, "The Court-Packing Controversy," 488.

[112] Sean Savage, **Roosevelt: Party Leader 1932–1945** (1991), 34.

[113] Shesol, **Supreme Power**, 317–21; Daniels, **Franklin D. Roosevelt**, 326; Savage, **Roosevelt**, 34.

[114] Roger Biles, **The South and the New Deal** (1994), 141; Patterson, **Congressional Conservatism**, 77.

[115] Biles, **The South and the New Deal**; Savage, **Roosevelt**, 30–1.

[116] Domhoff and Webber, **Class and Power in the New Deal**, 201; Smith, **A Concise History**, 126; Sullivan, **Days of Hope**, 5, 61. Sullivan also highlights the difference between legislators, who originated mostly from the Southern elite, and the general electorate of the Southern states, which supported the Court-packing Plan with a stable majority.

[117] Domhoff and Webber, **Class and Power in the New Deal**, 201–3, 214–6.

[118] Leuchtenburg, **The Supreme Court Reborn**, 139. On the discussion of the Plan in the African-American community, see Jonas, "FDR's Court-Packing and the Struggle for Civil Rights."

[119] Biles, **The South and the New Deal**, 143; Patterson, **Congressional Conservatism**, 95, 127; Kalman, "The Constitution, the Supreme Court, and the New Deal," 1057.

[120] Robert Shogan, **Backlash: The Killing of the New Deal** (2006); Shesol, **Supreme Power**, 525; Daniels, **Franklin D. Roosevelt**, 332.

[121] Patterson, **Congressional Conservatism**, 87–8, 331–2; Leuchtenburg, **The Supreme Court Reborn**, 156.

[122] McCulloch, "The Roosevelt Image on Trial," 68; Cowie, **The Great Exception**, 119.

[123] Biles, **The South and the New Deal**, 143–5; Leuchtenburg, **The Supreme Court Reborn**, 157.

[124] Savage, **Roosevelt**, 137.

[125] Savage, **Roosevelt**, 183–7; Rosen, **The Republican Party in the Age of Roosevelt**, 1. Lyndon Johnson, for example, was the best-known defender of the Court-packing Plan in Texas, Sullivan, **Days of Hope**, 61.

[126] Altman, "First Session of the Seventy-fifth Congress," 1072.

[127] See, among others, Rosen, **The Republican Party in the Age of Roosevelt**, 1–2; Katznelson, **Fear Itself**; Smith, **A Concise History**, 149–82.

[128] For a similar argument, see Shaw, "The Supreme Court," 434–6. On the topicality of the issue see also Joshua Braver, "Court-Packing: An American Tradition?" *Boston College Law Review* 61:8 (2020) 2749–808.

Caustic, Comical, Candid, and Insightful Commentary from Chief Justice William Howard Taft, 1921–1929: Excerpts

Jonathan Lurie

The reader of this article may be entitled to a few words of explanation concerning how it came to be written. From about 2009 to 2019, this author researched and completed two studies of William Howard Taft, the only American in our history to hold the two offices of President AND Chief Justice of the United States (although not at the same time).[1] After reading numerous letters and speeches he had written, candor compels me to admit that a number of the former were verbose, and many—although not all—of the latter seemed dull, if not down-right boring. Subsequent conversations with some staff members in the Library of Congress Manuscripts Reading Room convinced me that I needed to reconsider this conclusion. In particular, they called my attention to a series of letters Taft had regularly dictated to his three children. After reading them, it became clear that I had been sadly mistaken, as these paragraphs will—I hope—reveal.

The communications include various observations and comments Taft provided as he composed his weekly letters. I have placed them in a rough kind of chronological order combined with some respect for uniformity of topic. In the endnotes I have also provided minimal background information, although some familiarity with the Taft era is assumed. It appears that Taft had little fear that his children would reveal any of the comments contained herein. Moreover, he was fully aware that he had amassed a huge collection of papers including letters, copies, speeches, and articles—all of which he had confidently assumed would be used by Gus Karger in the authorized biography

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that Taft anticipated Karger would produce. But Karger died in 1924, with the biography only a hoped-for project—yet to come. Upon Taft's death in March, 1930, it fell to Taft's children to resolve this matter. How they did so has been summarized in an earlier article for this journal.[2]

Throughout the final years of his life, and usually on the weekend, William Howard Taft dictated separate letters to his three adult children, Robert, Helen, and Charles; by 1921 all were married with children of their own. A graduate of Yale, Robert, the oldest, had been first in his class at Harvard Law School and president of the *Harvard Law Review*. Already a successful attorney, he served in the Ohio Legislature from 1921 to 1933. Always as a Republican, he would ultimately be elected to three terms in the U.S. Senate, a tenure cut short by his death in 1953. Helen Taft Manning graduated from Bryn Mawr, and later received a Ph.D. in history from Yale. She returned to her alma mater and served both as its dean and as a member of the history department, in which she taught until 1957. She was closely associated with M. Carey Thomas, the second president of Bryn Mawr from 1894 to 1922. Charles P.

President William Howard Taft with his wife, Helen, and children Robert, Charles, and Helen in 1909. When Taft became chief justice in 1921, he dictated letters to each of his children, by then all high achievers. Robert, the oldest, had been first in his class at Harvard Law School and was serving in the Ohio Legislature. Helen was completing her Ph.D. in history at Yale and would soon become dean and head of the history department at her alma mater, Bryn Mawr. Charles (left) received his degree from Yale Law School in 1921 and became active in Cincinnati politics.

Taft received degrees from both Yale College and Yale Law School. For a time, he joined his brother in a Cincinnati law firm, and later served as mayor of Cincinnati from 1955–1957.

As was his want, the elder Taft ranged far and wide in comments to his trusted recipients. In the case of his children or Gus Karger—the long-time Washington correspondent for the *Cincinnati Star-Times*—they might include a description of individuals whom the Taft parents had recently entertained, or visited, observations concerning current congressional or presidential actions, as well as candid comments about contemporary political figures, and/or his colleagues on the bench. A decade ago, I wrote that in his private correspondence, "Taft was often candid, sometimes too candid—and this coming from a very prolific correspondent."[3] Perhaps an excerpt from a private letter by Taft will suffice as an example. In November 1919, as President Woodrow Wilson's fight on behalf of the League of Nations spiraled down into tragic stalemate, Taft wrote to Karger that "the whole world has suffered through the bitter personal antagonism, vanity and smallness of two men, [Massachusetts Republican Senator] Henry Cabot Lodge and Woodrow Wilson," between whom "there is very little difference." Wilson "has just as much of vanity and egotism and a disrespect for the country's welfare and that of the world as Lodge or . . . Knox, Borah, Brandegee and that gang."[4]

Observing Politics from the Outside

Although Taft happily emphasized that after his appointment as chief justice in 1921, he was out of politics, in fact he retained his life-long interest in national affairs as an observer, if not a participant. Now unable to comment publicly, he freely and frequently

A. A. Hoehling, Associate Justice of the Supreme Court of the District of Columbia, swore in Taft as chief justice on July 11, 1921. Taft ceremonially took the Judicial Oath again on October 3, this time in open court before senior Associate Justice Joseph McKenna.

aired his views in his weekly letters to his children. While he also insisted that by the mid-1920s he had virtually "forgotten" his tenure as president, his recollections as chief executive, many of them bitter, ran deep. Thus, his resentment, if not contempt, for Republican insurgents persisted from 1910 throughout the remainder of his life. He died in March 1930.

In 1917, Taft wrote that Senator Robert La Follette "possess[es] a nuisance value which he makes clear every time he rises to his feet. . . . La Follette, Borah, [Hiram] Johnson . . . all show the yellow which is in them and don't hesitate to act as demagogues and cultivate the favor of the voters at the expense of the welfare of the country. . . ."[5] Three years later, his views had not changed. "The Republican party will never attain the usefulness that it should have until it throws overboard Johnson and Borah . . . and La Follette and that group." Its weakness politically, "its lack of leadership are all attributed to the fear of this so-called Republican element, which was never Republican at all. Even at the risk of defeat, it is better for us to get a compact party with party allegiance well defined. . . ."[6] After Calvin Coolidge's triumphant reelection, in 1924, Taft "sincerely hope[d] that the regular Republicans will now not let a man like Borah, who isn't a real Republican, gnaw away at the desire and determination of regular Republicans not to admit as part of their force, La Follette and [George] Norris. . . . I would throw them out now, even at the expense of the organization of the Senate. . . ."[7]

In a similar vein, Taft opposed the idea of a constitutional ban against child labor. Such an amendment would not be wise.

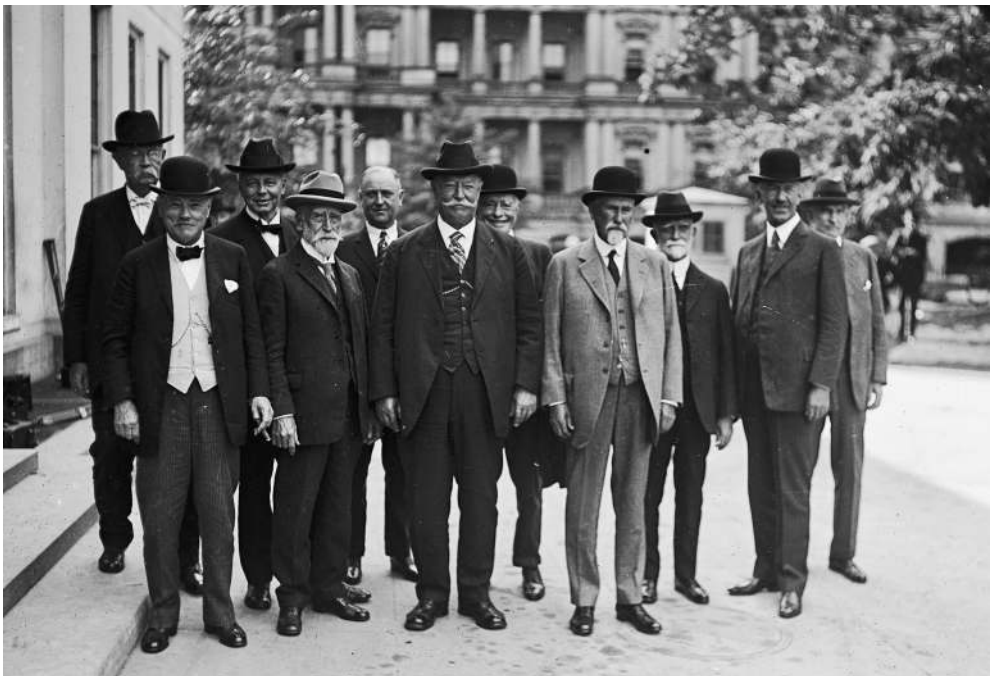
> I think the southern states are getting into better shape with reference to child labor laws, and that the two centers . . . in favor . . . are the labor unions and those good people who have no hesitation in changing the Constitution and shifting all the burdens of executing laws to the National Government whenever there is any doubt as to their enforcement. . . . I think the centralization that has been going on has been greatly detrimental to our constitutional structure[,] and that there is no evidence whatever of such a failure to enforce child labor regulation by the States as to require the Nation to take it up.[8]

As for Democratic Senator Thomas Walsh, "he is the narrowest man in the Senate. Called a Progressive, he is opposed to all progress, and has never had a really useful purpose."[9]

In 1924, Taft described Wilson's imminent death as "quite pathetic."

> It is chiefly pathetic in that it has been too long delayed for his own reputation and the benefit of the world. If he had died when he was first attacked . . . the Versailles Treaty would have gone through with the reservations, and it would have remained a monument to him proportioned to the greatness of the position which he held for a time at the head of the World, but through his own personal peculiarities, vanity and obstinacy he sacrificed. . . .[10]

Also in early 1924, the Senate Judiciary Committee took up the so-called "Judge's Bill," a measure that expanded the certiorari jurisdiction of the Supreme Court. Taft did everything he could to gain its passage but was advised to absent himself from committee hearings because "some of my old enemies on the committee rather resent my being prominent in pressing legislation. This meets with my complete concurrence. I am delighted to escape the friction of that kind of contact," as "one cannot afford to ignore the irrelevant reasons and prejudices of the small minded" who "if not in the majority are



Taft pushed to gain passage of the so-called "Judge's Bill" in 1924, which would expand the certiorari jurisdiction of the Supreme Court. But he told his son, Charles, that he strategically absented himself from Senate Judiciary Committee hearings because "some of my old enemies on the committee rather resent my being prominent in pressing legislation. This meets with my complete concurrence. I am delighted to escape the friction of that kind of contact." Above Chief Justice Taft posed with the Chief Judges of the Federal Appellate Courts for the various circuits in 1923.

at least a sufficient minority to create serious obstruction to real advance, where the matter excites their littlenesses [*sic*]."[11]

Taft's letters demonstrate an occasional sense of sardonic humor that is especially marked in comments about Cary Thomas, the former president of Bryn Mawr, and a committed feminist. Presumably informed about Thomas by his daughter Helen who worked with her at the college, Taft reported that Helen had visited with Thomas, "and the verdict after their consultation was that if the world could be run by women, things would be a great deal better."[12] There is also Taft's letter to Robert about Thomas' travels in Greece late in 1924.

> She was in the mountains somewhere near Athens and stepped aside on a mountain road to allow an old woman and mule to pass, and the mule was apparently prejudiced against Miss Thomas and kicked her and knocked her over a precipice[,] and she rolled down for forty feet. She had with her, however, a vigorous niece who had first aid ready, and while her arm was severely injured and her head was cut, she insisted on getting to Athens[,] and thence took a steamer and landed in New York about the time she expected to land, and she seems to be thriving. Certainly she has wonderful energy and powers of resistance. I think there are a good many people with whom she has been in contact at Bryn Mawr who blame the mule for the failure to do a thorough job.[13]

By 1924 Taft had become very critical of Nicholas Murray Butler, who had been president of Columbia University since 1902. (He would continue in that office for a record term of forty-three years.) In 1912, upon the sudden death of Taft's running mate a few days before the presidential election, Butler had been designated to receive Republican electoral votes cast on his behalf. They amounted to only eight. During the Prohibition Era, Butler consistently opposed the *Volstead Act*, while Taft—once the constitutionality of the statute had been affirmed—supported it. As for Butler, "what he says and does is really an incitement to a breach of the law, and he ought to be ashamed of himself." In 1928, Taft fulminated that "no one is so crassly absurd as Nicholas Murray Butler. . . . [T]he facets of his asininity [sic] are so varied that he has become the most brilliant and varied gem in our entire collection of asses."[14]

Taft and his Colleagues

During the final years of his life, Taft demonstrated a marked sense of introspection. Especially when compared to Oliver Wendell Holmes Jr. and Louis D. Brandeis, two outstanding jurists who had awaited Taft in 1921, and were still on the Supreme Court when he resigned in 1930, shortly before his death. He harbored no illusions concerning his intellect or legal scholarship. Further, "I have a tendency to length that I try to restrain," he admitted in 1925. Justices "Holmes' and [James C.] McReynolds' [decisions] are very[,] very short, and while . . . Holmes has a genius for giving a certain degree of piquancy and character to his opinion[s] by sententious phrases, I think [they] lose strength and value by his disposition to cut down. And this is also true of McReynolds." For Taft, "the chief duty in a court of last resort is not to dispose of the case[,] but it is sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law."[15]

Taft reflected some ambivalence in his views about Holmes, who sat next to the chief justice on the bench for the last half of Taft's tenure. "He is in marvelously good form and greatly enjoys his old age [eighty-five]. He is, in my judgment, a very poor constitutional lawyer, but he is a most learned lawyer, especially in the common law, and he is brilliant, but he lacks the experience of affairs in government that would keep him straight on constitutional questions."[16] Taft's belief that Holmes lacked experience in the affairs of government represented a serious matter for him. It led the chief justice to dissuade his eldest son Robert A. Taft from accepting an offer to serve as secretary to Holmes.

Taft expanded his comments in a later letter to Robert. Holmes "is a remarkable man. He is a very learned lawyer and has an acuteness of intellect preserved that is most exceptional. I think he has grown a little more flippant in his opinions, but he does great work and is the promptest man in his opinions that we have on the bench." Nevertheless, "he is not a great constitutional lawyer. I think he is quite defective in this particular branch of the law, but that is not due to his age—it is due to his training and point of view and to the influence Brandeis has had on him, but on the whole he is a very excellent member of the Court. . . ." With unusual prescience, Taft added that "it is quite possible that he may live to bury several of us."[17] Indeed he did, including Taft himself and Justice Edward T. Sanford, both of whom died on the same day, March 8, 1930—which also happened to be Holmes' birthday. "Of course," Taft conceded, "I don't give him the cases that have the very heavy records and that require a great deal of work in reading

Taft and Holmes (third from left) exiting the White House in January 1923 after calling on President Warren G. Harding. Taft would tell his son Charles that Holmes was "a very poor constitutional lawyer, but he is a most learned lawyer, especially in the common law, and he is brilliant, but he lacks the experience of affairs in government that would keep him straight on constitutional questions." By 1929 Taft was accurately predicting that Holmes would not retire from the bench despite his advanced age, but would "remain in the harness as long as the harness will hold him."

them, but I give him important cases and try to give him cases that he likes."[18]

Taft's comments on Holmes may be contrasted with his observations about James C. McReynolds, widely considered to have been the most obnoxious and disagreeable jurist ever to serve on the High Court. "He is," recalled his law clerk in 1936–1937, "all in all the most contemptible and mediocre old man I ever came in contact with. His selfishness and vindictiveness are unbelievable."[19] Taft complained that "McReynolds tries my patience. . . . He is . . . selfish beyond everything, though full of the so called Southern courtesy, but most inconsiderate of his colleagues and contemptuous of everybody. A fine looking fellow . . . he has been spoiled for usefulness."[20]

Taft served as chief justice during the terms of three presidents: Warren Harding, Calvin Coolidge, and Herbert Hoover.[21] Most effective with Harding, less influential with both Coolidge and Hoover, Taft died at the end of Hoover's first year in the White House. By 1925, however, the chief justice fully realized that his once special access to its occupant was no more. "I have tried in the past," he recalled to Robert,

> to influence the President with reference to judicial appointments when I thought an opportunity existed to secure good men, but now Coolidge thinks I am too insistent on having good men, and am not sufficiently sympathetic with his

> trials with Senators, and I'm going to keep out of judicial selections hereafter. . . . [Indeed,] I don't think I could make my voice prevail against a Senator, however much he might show the lack of judicial qualities in his proposed candidate. People can't understand the outrage of the Senatorial interference in judicial appointments, and they don't understand [further] how strong the leverage that a Republican Senator has in these days when so much depends, for the comfort of the President, and his achieving of his broad purposes, upon the vote of a two penny small minded United States Senator. I don't think there are many senators who don't come within that description.[22]

In point of fact, after Coolidge elevated Harlan F. Stone to the Supreme Court late in 1924, neither he nor Hoover were able to make another such appointment until Taft resigned in February 1930, with barely a month to live.

In Defense of Daugherty

Early in 1924, Taft made an interesting observation about the late President Harding's beleaguered attorney general, Harry Daugherty.

> In spite of all the attacks against Harry . . . he has stood up in the matter of judges and their appointment . . . and he secured on the whole, against the vicious system of Senatorial selection of candidates for political purposes, a good list of judges. But for him, Harding would have made a wreck of it, I fear, because he is not a lawyer and did not appreciate the importance of his selections.

Indeed, "we ought ever to be grateful to [Daugherty] for that, and a good deal of this Senate feeling against him is due to his courage in refusing to yield to poor candidates." Taft added that Coolidge "would doubtless be relieved if he would insist upon resigning, but I don't look for any such thing."[23]

The 1924 and 1928 Elections

With the 1924 election a few months away, Taft commented on the split within the Democratic Party. Al Smith, the popular governor of New York, was supported by "the wets" and the Catholics, and opposed by Wilson's son-in-law. Former Secretary of the Treasury, William McAdoo, was supported by "the drys," the KKK, and the anti Catholics. "The bitterness of feeling between the two sides is deeper a good deal than mere party difference, and I think their troubles have just begun—at least I hope so."[24] The forthcoming Democratic convention turned out to be the longest continuous such meeting (June 24–July 9) in our history. Unable to choose between Smith and McAdoo after more than 100 ballots, ultimately the convention settled on John W. Davis, a former ambassador to Great Britain, and a distinguished attorney. "I know John Davis well," observed Taft, "and I know he would make a good President," but "I don't think he is going to be elected." He predicted—correctly—that Robert La Follette "who primarily enters the field to defeat the Republican ticket, is going to find, as I think the Democrats are going to find, that he will draw more from the Democratic party on . . . labor than he will from the Republican party on the farmer. . . ."[25] As will be seen, Taft offered more extended comment on Al Smith as the 1928 election drew nigh.

By March 8, 1925, both Coolidge and his Vice President Charles Dawes had taken their oaths of office. Dawes chose to denounce the enduring and anti-democratic rules of the Senate to its assembled members. Along with

his brethren, Chief Justice Taft listened, and later recalled that "Dawes made his speech and stirred up the monkeys. His manner was bad and did not leave a good impression, but what he said was God's truth." Indeed, his comments "however ill advised his manner, met a hearty response everywhere except in the Senate, and I think there the majority of the Senators realized the truth of what he said."[26]

With Coolidge's impressive reelection victory a thing of the past, the president nominated his current attorney general and college classmate Harlan F. Stone to be associate justice, his sole appointment to the Supreme Court during Taft's tenure. "We are completely rejoiced in this," Taft responded, and indeed Stone's selection was "one eminently fit to be made." In 1925, his initial enthusiasm for Stone had not yet dissipated.

> Stone is a strong addition to our bench, and it is a great pleasure for me to know that I rather forced the President into his appointment. The President was loath to let him go, because he knew his worth as Attorney General, but I told him that I did not think it was fair to him not to give him the opportunity to accept the Bench if he desired it, and that he was the strongest man that he could secure in New York that was entitled to the place, and so he submitted the matter to Stone, and in that way we got him.

Of course, Taft added, had Coolidge realized the difficulties he would have over his appointment of Michigan Republican Charles Warren as Stone's replacement [the Senate

Harlan Fiske Stone is "a strong addition to our bench," wrote Taft about President Calvin Coolidge's appointee in 1925, although he later expressed disappointment in him. Above, Stone testifies before the Senate Judiciary Committee on January 28.

rejected him twice], "he never would have put him on the Bench, but that difficulty was the President's own making and he could not blame Stone for it."[27]

Upon receiving word from Helen that Judge Learned Hand had spoken recently to students at Bryn Mawr, Taft—who had appointed him to the Federal District Court in 1909—recalled his nature. Hand "is a good fellow, a good judge[,] a bit erratic but a high minded public servant with a touch of cynicism at times. He and I have I think smoothed over some roughnesses [*sic*] of the past." [Hand had supported Theodore Roosevelt in 1912]. Coolidge promoted Hand to the Court of Appeals for the Second Circuit, in 1924. Three years later, Learned Hand welcomed his cousin Augustus Hand to the same court—on which they sat together for more than twenty years. "He is very happy now that he has succeeded in securing the appointment of his cousin Gus Hand to the same Court—Gus is not as bright and scintillating as Learned but he has better judgment and on the whole is the safer better judge[,] but both are good."[28]

A year earlier, Taft had paid tribute to his old friend Elihu Root, former secretary of war, former secretary of state, and former U.S. senator from New York. As chairman of the 1912 Republican Convention, he had been instrumental in securing Taft's renomination. In 1926, Taft stated simply that Root "fits the measure of statesmanship rather more fully than anyone with whom I have come in contact. He is an intellectual leader," yet

> he has not the qualities of leadership that [Theodore] Roosevelt had—that is he has not the courage and instantaneous grasp of situation for leadership that Roosevelt had, but his judgment of political and state issues was much more trustworthy and wise and prudent. He was a most admirable complement to Roosevelt in the conduct of government, and it was only after Roosevelt cut himself loose from Root's influence that he made the really great mistakes of his life.[29]

Darkening Shadows

Perhaps more so than with his sons, Taft shared increasing awareness of his failing health with his only daughter, Helen.

> I want you to know that we are thinking of you whether you are thinking of us or not . . . I have been a son myself and know the obligations in such a relation are always felt more strongly by the older generation. This is natural, because the older generation has not so long to live and wants to keep up as closely as possible . . . with those whom they must look forward to in the near future to leaving. . . .[30]

I'm not so sure, he later added, that "I don't see that my mental faculities [*sic*] are dulling a bit and that it takes more work for me to get hold of questions and to dispose of them. However, I have to stay on the bench until 1931 in order to earn my pension, and that I must struggle to do, unless I am so weakened that I cannot do the work."[31] Indeed, such turned out to be the case. Taft resigned from the Court in February 1930, and died on March 8.

Chief Justice Taft was not the only major national figure to consider his future in 1927. In August, along with much of the national press, Taft was surprised to learn from President Coolidge that "he does not choose to run for reelection." Possibly recalling the 1912 election, Taft offered an interesting explanation for the president's choice of words:

> I think he really wishes to avoid running . . . , that he has had enough, but the peculiar form which his

> declaration takes seem to me to be an indication that while he wishes really to avoid a renomination, he does not care to put himself in a place where by the unanimous demand of the party he may feel under obligation to run and will be confronted with a previous statement by him that he would not run.[32]

Meanwhile, Justice Holmes had celebrated his eighty-seventh birthday. Taft reported to Robert that his senior colleague "is studying [Chief Justice Roger] Taney's life. Taney lived to be 87 years and 8 months." Hence Holmes will "only need 8 months more to equal Taney. He will die in harness," concluded Taft, "if he ever dies."[33] Taft returned to this subject in May 1929, following the death of the justice's wife, Fanny Holmes. "It is a great mistake to suppose that he proposes to surrender because of her death." He "did not propose to give up—that the matter would go right on. . . . He proposes to remain in the harness as long as the harness will hold him. He seems to have a great deal of reserve force. He wrote an opinion and sent it to me the day she died, and I don't know but I shall give him another one before the month ends."[34]

Two Final Battles

Two topics continually interested Taft during the final phase of his life; the 1928 presidential election, and construction of the new building for his Court. Late in 1927, he observed that "everybody here seems to think that Al Smith will be the Democratic nominee, but that does not make the Democrats from the South or West feel very happy, and they are very much troubled over the question of the election in case Smith is nominated."[35] Taft's prescience once again might be noted.

The May 1927 issue of the *Atlantic* had featured a lengthy public letter from Smith that concerned both his Catholicism and the forthcoming presidential election in 1928. The chief justice found Smith's statement to be "an admirably written document." While Taft doubted that the letter "is read in Rome with the same enthusiasm with which it is read in this country . . . I am delighted to have it stated as it is and as strongly as it is." Indeed, "the usefulness of the Roman Catholic Church in our community is so great that I am most grateful for its presence."[36] It was one thing to applaud Smith's accomplishments as a Catholic Urban progressive and four term governor of New York. It was quite another thing, however, to support his presidential aspirations.

For Taft, a life-long Republican entering the final two years of his life, Smith's quest for the presidency remained problematic. Were he to be elected,

> his defects would not appear in his Catholicism but they would grow out of his origin in Tammany and in the most vulgar and coarse political atmosphere of lower New York, and I have not been able to overcome the feeling that as President he might disclose some of the faults of that origin.

Further, Taft doubted "if the publicity that has been given to [Smith's letter] will eliminate the religious issue from the campaign, the presence of which I think is to be deplored. With the intolerance of those who hate the Catholics and oppose them, the letter will figure and intensify it."[37]

On the eve of the election, Taft had become markedly enthusiastic about Herbert Hoover, with whom he recently visited. He now concluded that the nominee "was really one of our great men," one who "has the highest ideals and . . . the courage to follow them even when they seem to imperil his success." He saw the 1928 presidential campaign as essentially "a fight between the cities and

the country. . . . It was a concentration of all the vicious in the city against the conservative, patriotic, God-fearing people of the country." As for Smith, the Catholic vote, and anti-Catholicism, Taft asked why the Catholics should

> submit themselves to the leadership of such a man as Smith and Tammany, and hope to have in their political activities sympathies of people who know what desperate extremes they will resort to? One finds himself on the fence between the desperate bigotry of both the Methodists of the south and west[,] and the Catholics of the east. . . . I am greatly troubled at the danger of the invasion of the White House by Tammany and Tammany methods.[38]

Although earlier Taft had expressed great confidence in Hoover as the candidate, the lame duck period between his election in November and his inauguration in early March 1929 reflected marked disillusion with both the president-elect, and Hoover's closest friend on the Supreme Court, Harlan F. Stone. The junior justice had been advising Hoover with some frequency on possible cabinet appointments. The chief justice thought that Hoover "might have had a wiser adviser, for I have not been greatly impressed with Stone's judgment of m[e]n or things." By this time, Taft was well aware that Stone had joined Holmes and Brandeis with increasing frequency in dissent from the positions taken by the so called "Taft majority," consisting of Willis Van Devanter, McReynolds, George Sutherland, and Pierce Butler, often joined by both the chief justice and Justice Edward T. Sanford. In this, the final year of his life, far from seeking unanimity, Taft was merely content to keep his majority intact, and by 1929 he could only count on minimal support—if that—from Stone.[39]

Nor was Taft very happy with the president-elect who apparently "is a good deal of a dreamer in respect to matters of which he knows nothing, like the judicial machinery of our government." Indeed, added the chief justice in writing to Robert, "it is a great comfort to me to feel that neither you nor I ask any favors from him. I have tried to give him the benefit of the best information I have, but he is evidently not at all impressed."[40] But there was yet a greater source of tension between the president-elect and Taft. Again, it involved Justice Stone.

Well aware of extensive public criticism about the current state of American criminal law, during his first year in office Hoover determined to create a new commission to recommend appropriate reform. According to Taft, Hoover had found "so few" lawyers who represented "the kind of men whom he intended" to select as members. This situation may have strengthened his determination to name as chair of his new commission his close friend Stone, at this time the newest and youngest member of Taft's Court. He confronted here, however, the implacable opposition of the chief justice, who insisted that with very limited exceptions, work on the High Court was a full-time job. Hoover "wanted to use our Court, but he cannot have our Court used that way unless they retire." The president "thinks that Stone is keen to get on with the work. Stone tells me that he is not and wishes to be let alone on the Court."[41]

Taft reminded Hoover that "the Court is a coordinate branch of the Government and has to function, and there are so many cases in which there is a difference of opinion [that] the necessity exists for the existence of the whole Court." To be sure, there were "very valuable members," including Holmes, Brandeis, and Sutherland "who could retire and accept positions on this Commission, but I don't know whether they would want to. It is very hard to impress the President with the necessity of not bending the Court's requirements to his."[42] Although Chief Justice Taft would have been delighted to see Brandeis

off the bench, "he did not know if Hoover could "induce Brandeis to retire. I think it unlikely. . . ." Moreover, "his anxiety to vindicate certain views as a dissenting member of the Court would probably prevent his acceptance of such a suggestion."

On the other hand, Van Devanter was also eligible to retire, but unlike Brandeis, for Taft "the loss of Van Devanter to the bench I could not overestimate. He is a very remarkable man[,] and admirably equipped to revamp the criminal code and put it in [proper] condition." No one knows, least of all Hoover, "the extent to which the whole Court are indebted to him for keeping them in line in reference to the condition of the law and their own decisions as well as the statutes." The problem with Van Devanter, however, "is that he is opinion shy." Hence, his major contributions to the confidential Conferences of the Court were unknown to most. Thus, Taft feared that the president "will not value Van Devanter as much as he should," even though he had emphasized to Hoover that his appointment "represented a great opportunity . . . to make the best chairman of the commission that could be found in the United States. . . ." This "that I am writing to you is of course completely confidential."[43]

Hoover, however, continued to press for Stone's selection as chair of the commission, even as he carried on as a justice. "I have," Taft informed his son, "been going through a trial with Hoover, in which he has attempted to take from our Court, and still retain him on the Court, his favorite Stone. I opposed

President Hoover wanted newly-appointed Associate Justice Stone to chair a commission charged with surveying the U.S. criminal justice system under Prohibition. Chief Justice Taft refused, saying that Hoover could only appoint a retired justice. But Taft wrote his son Robert that although Willis Van Devanter (above) was eligible for retirement, "the loss of Van Devanter to the bench I could not overestimate. He is a very remarkable man." Hoover ultimately chose George Wickersham instead.

it," and indeed "submitted the question to the whole Court and they stood by me every one, so that he had to come down."[44] By the middle of May, the "trial" had ended, and perhaps the chief justice can be pardoned for the tone of self-congratulation that appears in his report to his son Robert about its outcome. The president had finally decided to name George Wickersham, President Taft's former Attorney General and senior partner in the still thriving New York City law firm of Cadwalader, Wickersham, and Taft [brother of the Chief Justice] as chair. William H. Taft, who had consistently and continually urged Wickersham upon the President after Hoover had floated his idea of the proposed commission, expressed his delight to his son:

> I think it is an admirable appointment and that it is far and away the best he could do. . . . [Wickersham] is so much better adapted to such a position than Stone that I rejoice, although it is greatly to the disappointment of Mr. Hoover. George has more administrative capacity in two minutes than Stone has in a much longer time, and then George's judgment is so much better than Stone's that I think Hoover is really to be congratulated, although he gnashes his teeth over the result.

Taft had already concluded that Hoover "is daft in respect to the qualities of our youngest member, Stone, because he has known him for a long time, and not being a lawyer has not had full opportunity to understand and gauge his qualities in action."[45] Meanwhile, "[t]he Senate has succeeded in making themselves even more ridiculous than they ever were, which is going a long ways."[46]

Since June 1921 when Taft had assumed the center seat, he had dreamed and schemed about a new and suitable home for his Court. By 1928, with Congress apparently in a mood to appropriate many millions of dollars for federal building projects, and with the consistent support of Andrew Mellon, Treasury Secretary to Warren Harding, Calvin Coolidge and Herbert Hoover—Taft brought to fruition his near decade of quiet persuasion of old congressional allies to fund a new court building. As he wrote with some accuracy to his youngest son, "my prayer is that I may stay long enough on the Court to see the building constructed. If I do, then I shall have the right to claim that it was my work, for without me it certainly would not have been taken up at this time. It really is very necessary."[47]

Taft revealed that even before Congress got involved in the project, he had to persuade his colleagues to support it. By a bare majority, they did. But Justices Holmes, McReynolds, Brandeis, and Sutherland all questioned not only the necessity but also the desirability for such a change. All four, it might be noted, had long maintained comfortable residences within Washington, wherein they had space for their law libraries and support staff. "My predecessors," Taft recalled, "had always been against" the change, "but I think the present opponents are beginning to see how short sighted their feeling has been."[48]

In addition to internal opposition within the Court, Taft also confronted attempts to defeat condemnation of the two lots adjacent to the Library of Congress, on which he hoped to see the new building constructed. He faced a challenge from Alva Belmont's National Woman's Party, which owned part of one lot as well as "an old broken down house that they claim to have some historical value," to block the condemnation proceedings. The "old broken down house" had been the Old Capitol Prison until 1867 when it was sold to George Brown, the sergeant at arms to the U.S. Senate. He in turn had converted it into a three-row structure that had later become the headquarters for the National Women's Party. In fact, Taft insisted, the structure "ought to be removed, but they are a lot of women who are most unprincipled and attempting to use every

method possible to squeeze up the amount they are to derive from the Government."[49] The group "has heretofore obstructed us as much as its blackmailing members could." By late 1928, however, Taft doubted "if the Woman's Party will be able to do anything other than make obstruction."[50] Ultimately, the Party agreed to accept about $120,000 as settlement for the lot and structure. When all the other owners had completed negotiations for their compensation, the total costs just for the condemnation proceedings alone would total $1,768,000.[51] Taft reminded his youngest son that "we shall be building a building for a century, certainly."[52]

Well aware of his declining health and without waiting for the promised appropriation, the chief justice invited the prominent American architect Cass Gilbert to provide sketches, plans, and estimates to Congress. With considerable understatement, he informed Helen that Gilbert "has been doing a good deal without [congressional] authority." Taft was able to examine the plans as well as to view a model of Gilbert's structure aptly described by legal scholar William Wiecek as "impressive, neoclassical in style, balanced, dignified, imposing, reverential, symmetrical, majestic, intimidating, dramatic, and above all, awe-inspiring."[53] But Taft died two years before the ground-breaking ceremonies in 1932.

What can be gleaned from this potpourri of spontaneous reactions by Chief Justice Taft during the final years of his life? Two examples of insights can be noted. (1) In 1916 he had labelled himself as a "believer" in "progressive conservatism."[54] When one considers Taft's career prior to 1921, this description seems valid. Most of the excerpts discussed above, however, are from the last years of Taft's life, and by then his self-description had lost its accuracy. The chief justice had become almost addicted, as it were, to classical legal thought. The term described a still controversial legal tenet with four key components: a) "a complete disregard for the real world in which a minimum wage has been deemed necessary" b) an assumption that courts "were better equipped to judge the wisdom of policy" rather than the legislature that had adopted it c) an emphasis on legal formalism "which elevated rules, especially those relating to freedom of contract to a sacrosanct position," and (d) "an unrelenting opposition to government intervention in the market."[55]

Taft's commitment to this philosophy is reflected in his negative comments about Holmes. Why did he consider Holmes a poor constitutional jurist? To a legal classicist, the Constitution was fundamental law, a protection against statutes "reflective of newer ideas and conditions." The flexibility Holmes demonstrated in supporting a wide variety of newly enacted state regulations offended the chief justice. Constitutional values for him were unchanging and immutable. Contrary to Holmes, Taft saw the Constitution as a barrier against undesirable change, not an instrument to facilitate it. He viewed Holmes' constitutional suppleness as a result of unfortunate factors that had unduly influenced him—such as Holmes' close friendship with Brandeis. Like most classical legalists, Taft probably would have agreed with Sutherland that if the type of changes envisaged by Holmes and Brandeis were somehow deemed desirable, they had to come through outright amendment of the Constitution, not a perverse judicial twisting of its current words into improper usage.[56]

Although by 1929, Taft freely acknowledged his fear that the time might come when the "Bolsheviki" [his term for Holmes, Brandeis, and Stone] could dominate his Court, he took heart in the fact that—in theory at least—a bloc of four, Van Devanter, McReynolds, Sutherland, and Butler—often joined by Taft and/or Sanford, would make such a situation impossible. Such had indeed been the case during Taft's last years on the bench, and he saw no reason why this alignment couldn't continue on into the foreseeable

future; assuming that he remained on the Court. It turned out that such an assumption was untenable. Yet the hard-core bloc of four—sometimes joined by Charles Evans Hughes and/or Owen J. Roberts [Hoover's replacements for Taft and Sanford] usually kept "the Bolsheviki" at bay, at least until 1937 when the bloc began to shatter.

These concerns did not prevent Taft from offering observations on a variety of subjects, as seen above. His comments on the fall 1928 presidential election between Hoover and Smith are of special interest in part because it was the last presidential campaign he ever witnessed. Further, he well understood the deeper significance of Smith running as the first Roman Catholic national nominee, supported by urban anti-prohibition interests. He also saw the force concealed in the link between opposition to Smith on religious grounds and Southern support for "the drys." Correctly, he expected that Hoover would fracture the "Solid South," something that had not occurred since the Reconstruction era.

Finally, in the variety of roles he demonstrated in these excepts, that of husband, father, elder statesman, cynical observer, judicial administrator, chief justice to his colleagues, Taft managed to find humor where it might not be noticeable to others. He wrote of Nellie that "she goes to the Unitarian Church with me today because it is a rainy Sunday, and she prefers wet Unitarianism to wet orthodoxy, because she can go by car. I may in this way finally incorporate her in my church."[57]

ENDNOTES

Author's Note: This article is dedicated to my old friend Melvin Urofsky, recently retired as the long-time Editor of this *Journal*, in beloved memory of his late wife, Susan.

[1] Jonathan Lurie, **Willian Howard Taft: The Travails of a Progressive Conservative** (2012). Lurie, **The Chief Justiceship of William Howard Taft, 1921–1930** (2019).

[2] See Jonathan Lurie, "Chief Justice Taft and Henry Pringle: How Pringle Came to Write the Life and Times of William Howard Taft," *Journal of Supreme Court History* 43, no. 2 (2018.)

[3] Lurie, **Taft**, xiv.

[4] Lurie, **Taft**, 189. "That gang" referred to four Republican Senators, all well known to Taft: Henry Cabot Lodge, Philander Knox, from Pennsylvania, whom Taft had appointed as his Secretary of State, William Borah who would ultimately be elected to six terms in the U.S. Senate from Idaho, and Frank Brandegee elected four times as a Republican from Connecticut. As for some other Republican senators opposed to both the Treaty and the League, they demonstrated "vicious narrowness," "explosive ignorance," "selfishness, laziness and narrow lawyer-like acuteness." As will be seen, Taft reserved a special place in his pantheon of invective for the Senate in general and certain individual members in particular.

[5] Although there is some duplication, copies of the Taft letters are contained in the separate papers of his three children in the Manuscripts Division of the Library of Congress. William Howard Taft (WHT) to Robert Taft (RT), September 6, 1917.

[6] WHT to RT, April 24, 1920.

[7] WHT to RT, November 16, 1924.

[8] WHT to RT, December 22, 1924.

[9] WHT to RT, November 30, 1924.

[10] WHT to Charles Phelps Taft (CPT), February 3, 1924. Taft had long realized that Wilson's dogged refusal to permit any Democratic senators to support ANY alterations to the treaty ultimately would insure its defeat. For this tragedy he blamed Wilson [I think correctly] more than Lodge.

[11] WHT to Charles Phelps Taft (CPT), January 27, 1924.

[12] WHT to Charles Phelps Taft (CPT), January 27, 1924.

[13] WHT to RT, December 22, 1924.

[14] WHT to RT, May 27, 1928.

[15] WHT to CPT, November 1, 1925.

[16] WHT to CPT, March 7, 1926.

[17] WHT to RT, March 7. 1926.

[18] As to Brandeis, "he cannot avoid writing an opinion in a case in which he wishes to spread himself, as if he were writing an article for the *Harvard Law Review*. When that is not in his mind, he writes a very concise and a very satisfactory opinion, but his dissents are of a different character." WHT to RT, October 24, 1926.

[19] John Knox, **The Forgotten Memoir of John Knox**, edited by Dennis Hutchinson and David Garrow (2002), 246.

[20] WHT to RT, February 1, 1925. Taft's negative views concerning McReynolds were not new. In 1922, he described his colleague as "selfish to the last degree . . . fuller of prejudice than any man I have known, and one who seems to delight in making others uncomfortable. He has no high sense of duty. He has a

continual grouch . . . and really seems to have less of a loyal spirit to the Court than anybody." WHT to HTM, June 11, 1922.

[21] See generally, Lurie, **Taft**, and **The Chief Justiceship of William Howard Taft**.

[22] WHT to RT, March 13, 1925.

[23] WHT to RT, January 27, 1924, and March 30, 1924. By this time, contrary to Taft's prediction, Coolidge had forced Daugherty from office, to be replaced by the former dean of Columbia Law School Harlan F. Stone, for whom the future held imminent appointment to the Taft Court.

[24] WHT to RT, April 20, 1924.

[25] WHT to RT, July 14, 1924. "I shall be surprised if we . . . do not find that a good many conservative Democrats who intend to vote for Davis now will be induced to vote for Coolidge in the end." WHT to RT, August 3, 1924.

[26] WHT to RT, March 8, 1925.

[27] WHT to RT, July 2, 1925.

[28] WHT to HTM, June 2, 1927. Taft's prescient observation brings to mind the maxim once heard in many law schools that students "should quote Learned but follow Gus."

[29] WHT to HTM, January 10, 1926. A week later, the chief justice recalled that he had very recently accompanied Nellie to the annual White House dinner for the Judiciary, at which she sat between the President [Coolidge] and [Justice] McReynolds. "I don't think that their company added to the excitement of the occasion." WHT to HTM, January 17, 1926.

[30] WHT to HTM, February 6, 1927.

[31] WHT to HTM, October 25, 1927.

[32] WHT to RT, August 16, 1927. Such a situation failed to materialize, and Coolidge's exit from national political prominence after March 1929 was permanent.

[33] WHT to RT, March 10, 1928. In fact, Holmes' tenure on the Court exceeded that of both Taney and Taft. He remained on the bench until early 1932.

[34] WHT to RT, May 5, 1929.

[35] WHT to RT, December 4, 1927.

[36] WHT to RT, December 4, 1927.

[37] WHT to RT, April 24, 1927.

[38] WHT to RT, November 4, 1928.

[39] WHT to RT, February 3, 1929.

[40] WHT to RT, January 20, 1929.

[41] WHT to RT, March 31, 1929.

[42] WHT to HTM, March 17, 1929. In a hand-written addendum, Taft added that "this is all very confidential."

[43] WHT to RT, March 17, 1929.

[44] WHT to RT, April 7, 1929.

[45] WHT to RT, March 17, 1929.

[46] WHT to RT, May 12, 1929.

[47] WHT to CPT, February 27, 1927.

[48] WHT to HTM, February 19, 1928. Apparently, no member of the Taft Court expressed public opposition to plans for the new building, although towards the end of his tenure as a justice Brandeis declined to utilize the suite that had been set aside for him in it.

[49] WHT to RT, November 17, 1928.

[50] WHT to RT, November 17, 1928.

[51] WHT to HTM, December 2, 9, 16, 1928.

[52] WHT to CPT, December 23, 1928. Congress eventually appropriated more than $9,000,000 for building the new home of the Supreme Court.

[53] William Wiecek, **The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937** (1998), 223.

[54] Lurie, **Taft**, 181. Taft used this description as he expressed his utter outrage over Wilson's appointment of Brandeis to the Supreme Court. He could not foresee that in five years he would become chief justice of the tribunal, and until he resigned in early 1930, he would function with at least outward amity if not close friendship with Brandeis.

[55] Melvin I. Urofsky, **Louis D. Brandeis: A Life** (2009), 594–6.

[56] See Sutherland's anguished dissent in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[57] WHT to RT, October 9, 1927.

Drew Pearson's "Predictions": Assessing the Stone Court's Press Leaks

Abby R. West

In the words of Justice Felix Frankfurter, "[t]he secrecy that envelops the Court's work . . . is essential to the effective functioning of the Court."[1] However, the Supreme Court has not always been as shrouded in secrecy as it aspires to be.[2] In the 1940s, a series of three leaks to journalist Drew Pearson exacerbated tensions on an already divided Court. Pearson's "prediction" about *Federal Power Commission v. Hope Natural Gas* was the first indication that the reporter had knowledge of the Court's inner workings, though he did not speculate on the holding.[3] In the second leak, pertaining to the antitrust case *United States v. South-Eastern Underwriters*, Pearson went so far as to forecast the outcome and caused the Court to delay its release of the opinion.[4] For his third prediction, Pearson went even further, naming the specific justices he believed would dissent in *Bridges v. Wixon*.[5] These leaks and their aftermath provide a cautionary tale of the ramifications of piercing the Court's veil of secrecy.

Drew Pearson was born in Illinois, but at a young age he moved with his family to Pennsylvania when his father became a professor at Swarthmore College.[6] Pearson's penchant for journalism developed early—he started a neighborhood journal as a child, and as a teenager he began freelancing for the *Philadelphia Bulletin*.[7] After graduating from Swarthmore (where he was the editor of the student newspaper), Pearson spent two years working with a Quaker organization to rebuild villages in Serbia.[8] Following a brief stint as a professor,[9] Pearson turned to journalism. He spent the early years of his career abroad, selling articles about his travels to newspapers around the world,[10] and then became a foreign editor for the *United States Daily* in 1926.[11] His freelance work for the

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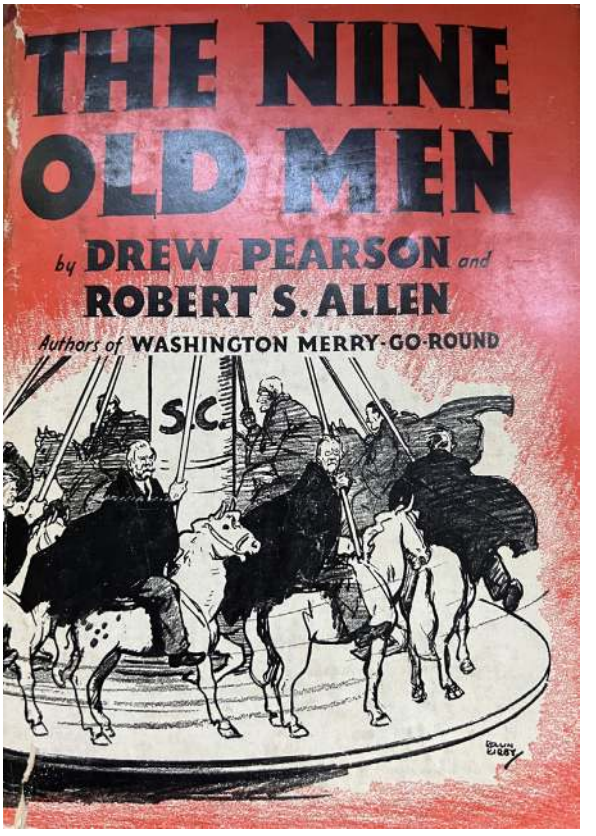
Baltimore Sun eventually earned him the role of Washington correspondent.

In 1931, Pearson and fellow journalist Robert Allen teamed up to make a splash with their first book **Washington Merry-Go Round** (a title he later borrowed for his long-running newspaper column),[12] which heavily criticized President Herbert Hoover.[13] Their sequel, **More Merry-Go-Round**, was far less successful and cost Pearson his job at the *Baltimore Sun* when the newspaper found out that he was one of its co-authors.[14] Pearson and Allen's third book fared better.[15] **The Nine Old Men** ridiculed the Supreme Court for striking down New Deal legislation,[16] and its attacks sometimes got personal. The pair called Chief Justice Charles Evans Hughes "the most pathetic figure" on the Court,[17] deemed Justice Willis Van Devanter a "fanatical reactionary,"[18] and asserted that Justice George Sutherland lacked brains.[19] Despite its discourteous tone,[20] the book earned its authors President Franklin D. Roosevelt's favor, so much so that he chose them to break the story of his Court-packing Plan.[21]

With time, Drew Pearson's reputation preceded him in Washington. As he became "one of the country's most influential political columnists,"[22] less flattering monikers like the "Scorpion-on-the-Potomac"[23] and a "chronic liar" were attached to him.[24] Politicians called him a sponge "because he gather[ed] slime, mud and slander . . . and let[] them ooze out" in his reporting.[25] Even



Because of their scathing critiques in *The Nine Old Men* (1936), the President chose authors Drew Pearson and Robert S. Allen to break the story of his Court-packing plan.

before Pearson made his three Court predictions, his muckraking drew Justice Frankfurter's ire—the justice referred to Pearson as "that scavenger" in a diary entry from 1943.[26] Pearson once admitted that Frankfurter "despises me."[27]

Pearson also became known for getting inside scoops and publishing direct quotes from FDR's internal Cabinet meetings.[28] To gather information for his daily column, Pearson employed "leg men" to bring him leads.[29] He was not afraid to break political secrets and publish classified information, justifying his revelations as work in defense of "the little guy."[30] Even with the FBI tapping his phones and the Office of Naval Intelligence tailing him during the war, Pearson continued to publish secrets and scoops undaunted.[31] He later described his going to "extreme lengths to protect news sources, even to the extent of talking to them in a moving automobile or in some out-of-the-way park where no microphones can be hidden" because he assumed his "phone [was] tapped by so many different intelligence agencies."[32] Nor was he wary of taking political stances: Pearson defended the New Deal, favored military preparedness in advance of World War II, and sought to advance legislation he preferred.[33]

Pearson and Allen expanded their journalistic ventures to the radio in 1935 with a Sunday evening broadcast.[34] During the show's "Predictions of Things to Come" segment, Pearson made predictions on any number of topics, including the outcomes of pending Supreme Court cases.[35] The radio announcer introduced the segment by saying that Pearson's predictions were accurate eighty-six percent of the time; however, other calculations estimate his accuracy to have been far lower.[36] Pearson's "predictions" about how three pivotal Supreme Court cases would come down also ranged in accuracy and detail, sometimes guessing only the outcome and other times going so far as to name which justices would be in dissent.

The premature disclosures, which even the justices suspected were coming from inside their Conference room, contributed to the Court's already-fractious environment. Although President Roosevelt had appointed eight of the nine justices serving in 1944,[37] there was an "internecine war . . . going on in the Court" that Chief Justice Harlan F. Stone described as "not very pleasant" and possibly harmful to the institution.[38]

Some scholars have attributed the tension to the chief justice's lack of leadership.[39] Writing to Justice Hugo L. Black shortly after President Roosevelt elevated Stone to the role of chief justice, Justice William O. Douglas predicted that it would "not be a particularly happy or congenial atmosphere in which to work," and he was right.[40] Enjoying intellectual debate, Stone extended Conferences to hours-long affairs,[41] which his brethren criticized for "dragging out" discussion and leaving them "depressed."[42] Stone also extended the window of time that members of the Court had to comment on draft opinions, likely enabling the justices to splinter.[43] The chief justice himself admitted he "had much difficulty in herding [his] collection of fleas."[44]

Another factor contributing to the Court's tension was the ideological divide between the justices. Even before the leaks, factions within the Stone Court had developed. Frankfurter, Robert H. Jackson, and Owen J. Roberts, who "favored a limited role for the courts"[45] and tended to chart a more conservative course,[46] were often pitted against Black, Douglas, Frank Murphy, and Wiley Rutledge, who "viewed the Court as an essential grantor of constitutional rights."[47] Frankfurter went so far as to begin referring to them as "The Axis"—a pejorative that carried particular weight against the backdrop of the war.[48] The ideological rift became apparent in a series of cases pertaining to compulsory flag salute laws.[49] In the 1940 *Gobitis* case, Frankfurter wrote for the Court

to uphold the expulsion of two Jehovah's Witnesses students who refused to participate in the Pledge of Allegiance on religious grounds.[50] Black, Douglas, and Murphy all joined Frankfurter's *Gobitis* opinion. However, the trio switched sides only three years later in *Barnette* to strike down the compulsory flag salute, angering Frankfurter.[51]

The justices' personalities clashed too, which often led to "interpersonal bickering."[52] Many were "supremely ambitious and confident individuals," vying to control the Court.[53] Frankfurter and Douglas came to "sincerely dislike[] each other," with the former referring to the latter as "one of the two completely evil men I have ever met."[54]

The divisions on the Stone Court ushered in a new era of dissent. Between 1837 and 1940, only 8.5% of cases featured a dissent,[55] a stark contrast to 52% of cases having a dissent in 1943.[56] Even if the justices agreed on the major issue in a case, "sharp conflict on subsidiary questions" still arose.[57] With the Court's internal relations in an already precarious position, the possibility that Pearson would pierce the Court's veil of secrecy stood to worsen divisions.

The Predictions

Pearson made his first "prediction" for *Federal Power Commission v. Hope Natural Gas*.[58] At stake was whether an administrative body had overstepped its bounds in regulating rates for an essential wartime resource. The Natural Gas Act of 1938 required natural gas rates to be "just and reasonable," giving the Federal Power Commission (FPC) the power to fix rates by order but not providing a formula for doing so.[59] Pursuant to its authority under the Act, the FPC reduced the rates the Hope Natural Gas company could

In his Sunday evening broadcast that featured a segment called "Predictions of Things to Come," journalist Drew Pearson made predictions about the outcomes of three pending Supreme Court cases in the 1940s. He is pictured here in 1964 with LBJ: Pearson's daughter-in-law, Bess Abell, served as Lady Bird Johnson's social secretary.

charge after municipal customers in Ohio and Pennsylvania challenged the company's rates as excessive.[60] This had the effect of reducing Hope's operating revenues by $3,609,857.[61] After the Fourth Circuit reversed the FPC's order, finding it confiscatory, the Commission appealed to the Supreme Court.[62]

After oral argument, five justices voted to uphold the FPC's rate, Justice Rutledge among them. Rutledge wavered, however, approaching Douglas on December 31, 1943, to warn him that he "might reconsider his vote."[63] Because Roberts was not participating in the case, Rutledge's vote dictated whether the Court would be split 5–3 or 4–4. Rutledge instructed Douglas to "go ahead and print for release on January 3" because it "was not likely he would change his mind." He nevertheless cautioned that it was a possibility.[64]

On January 2, 1944, Pearson made his first prediction:

> Tomorrow the Supreme Court will split wide open on one of the most important economic questions in the country—the fixing of gas and electric rates. . . . Yesterday the court was split four to four, with the ninth Justice trying to make up his mind by today.[65]

Although Pearson's prediction was slightly incorrect, as not all nine members of the Court were participating, his point that one justice was still deciding how to vote appeared to allude to Rutledge's reconsideration of the case. By broadcasting his knowledge of internal Court deliberations, Pearson drew attention to a case with important doctrinal and practical considerations.

The Court was reportedly "in an uproar the next morning."[66] Jackson recounted that Roberts demanded the justices meet to discuss Pearson's report and brought a "transcript" of

"Tomorrow the Supreme Court will split wide open on one of the most important economic questions in the country—the fixing of gas and electric rates. . . . Yesterday the court was split four to four, with the ninth Justice trying to make up his mind by today" reported Pearson in his first leaked account of the justices' deliberations. But his information was partially inaccurate as Owen J. Roberts (seated second from left) was not participating in the decision.

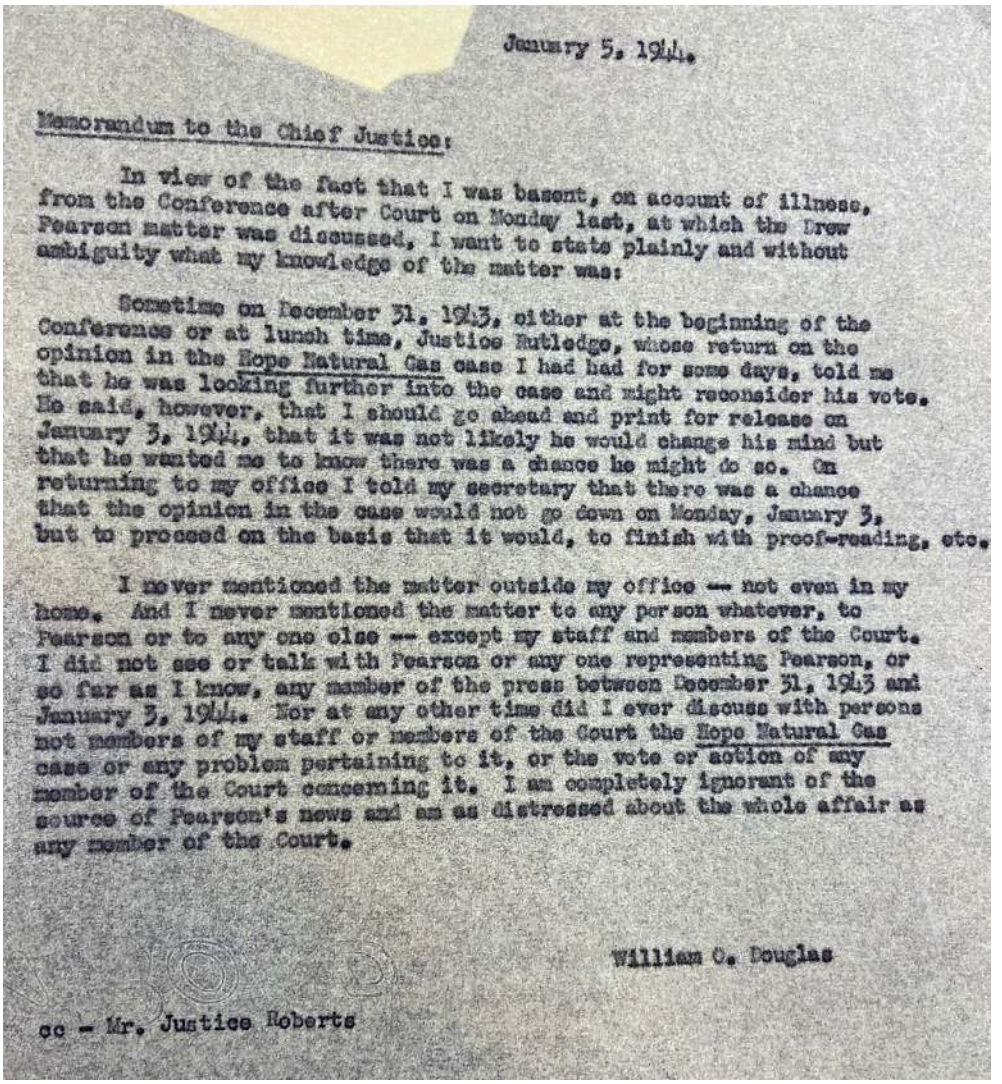
the broadcast with him to that meeting. It is unclear how Roberts would have acquired a transcript of the previous evening's broadcast so quickly, but Jackson recalled his having a "transcript" which "showed that Mr. Justice Rutledge couldn't make up his mind."[67] Jackson might have misspoken, intending to say "script," which Pearson apparently departed from in not mentioning Rutledge by name in his broadcast.[68] Roberts also requested that the Court delay handing down the decision[69]—a tactic the Court would employ to render Pearson's later predictions less accurate. Presenting more inside knowledge about the Court, Pearson reported in his *Merry-Go-Round* column the following week that "Justice Roberts had fumed and sputtered over news leaks."[70]

Several justices developed theories on the leak's source. Notably, Douglas was absent from the January 3 Conference "on account of illness,"[71] causing Frankfurter to identify him and Murphy as "the mostly likely suspects."[72] Roberts too was suspicious of Murphy.[73] Douglas wrote to Stone on January 5 that he was "completely ignorant of the source of Pearson's news and . . . as distressed about the whole affair as any member of the Court." He insisted that he "did not see or talk with Pearson . . . between December 31, 1943 and January 3, 1944."[74] (Douglas had, however, attended a New Year's Eve party at which Pearson was present.)[75] Douglas did admit to telling his secretary Edith Waters that the decision might not be handed down on January 3, but insisted that he "never mentioned the matter outside [his] office."[76]

Within days, rumors began to circulate that Douglas had relayed the story to Washington insider and former Supreme Court clerk Tommy Corcoran, who had then passed it along to Pearson.[77] Douglas did admit to having seen Corcoran at the New Year's Eve party,[78] but the justices were regular fixtures in the capital's social scene and insisted they never discussed particular cases when socializing.[79] Douglas staunchly refuted the Corcoran allegation, calling it "an outright, contemptible lie" without "a grain of truth in it."[80]

Rutledge ultimately did not reconsider his vote, and the Court upheld the Commission's rate in an opinion released as planned on January 3, 1944.[81] Douglas's opinion acknowledged the "public importance of the questions presented" and focused on the "impact" of the rate order, rather than the "theory" the FPC used to issue it.[82] Because the rate "enable[d] the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed,"[83] it was just and reasonable as the Act required.

As was common for the Stone Court, the case drew many separate opinions. Frankfurter dissented to note that Congress acquiesced to judicial review of utilities regulation by delegating only limited power to the Federal Power Commission.[84] Because Congress "specifically provided for court review of such orders," Frankfurter wanted to return the case to the FPC for it to articulate explicitly the criteria it had used in determining that the rates were just and reasonable.[85] Black and Murphy wrote a brief concurring opinion specifically objecting to Frankfurter's assumption that Congress had acquiesced to judicial review.[86] Reed dissented, taking issue with the Commission's process in fixing Hope's rate, writing that "a major error . . . was committed in the disregard by the Commission of the investment in exploratory operations and other recognized capital costs."[87] Jackson also dissented, first providing a historical overview of the natural gas industry and emphasizing the need to conserve the nation's supply, then expressing his desire that the Court articulate a "rational way of reaching . . . conclusions."[88] That the justices were so fractured prompted skepticism as to



January 5, 1944.

Memorandum to the Chief Justice:

In view of the fact that I was basent, on account of illness, from the Conference after Court on Monday last, at which the Drew Pearson matter was discussed, I want to state plainly and without ambiguity what my knowledge of the matter was:

Sometime on December 31, 1943, either at the beginning of the Conference or at lunch time, Justice Rutledge, whose return on the opinion in the Hope Natural Gas case I had had for some days, told me that he was looking further into the case and might reconsider his vote. He said, however, that I should go ahead and print for release on January 3, 1944, that it was not likely he would change his mind but that he wanted me to know there was a chance he might do so. On returning to my office I told my secretary that there was a chance that the opinion in the case would not go down on Monday, January 3, but to proceed on the basis that it would, to finish with proof-reading, etc.

I never mentioned the matter outside my office -- not even in my home. And I never mentioned the matter to any person whatever, to Pearson or to any one else -- except my staff and members of the Court. I did not see or talk with Pearson or any one representing Pearson, or so far as I know, any member of the press between December 31, 1943 and January 3, 1944. Nor at any other time did I ever discuss with persons not members of my staff or members of the Court the Hope Natural Gas case or any problem pertaining to it, or the vote or action of any member of the Court concerning it. I am completely ignorant of the source of Pearson's news and am as distressed about the whole affair as any member of the Court.

William O. Douglas

cc - Mr. Justice Roberts

William O. Douglas, author of the majority opinion in *Hope Natural Gas*, wrote to Chief Justice Stone to deny that he was the source of the leak. He had been ill and missed the Conference where the justices discussed how the leak could have happened.

whether the decision in *Hope* was the Court's final word on rate setting.[89]

Though Douglas's majority opinion did not expressly overrule *Smyth v. Ames*'s "fair value" doctrine, analysts viewed *Hope* as having that effect.[90] In *Smyth*, the Court had determined whether rates were reasonable by comparing them to the fair value of the property the company was using to provide the service.[91] By abandoning *Smyth*'s formulaic approach, the *Hope* case established an "exceedingly deferential standard" of judicial review of the Federal Power Commission's regulation of public utility rates.[92] FPC Chairman Leland Olds described the case as "mark[ing] the beginning of a new era" in utilities regulation and enabling "'very large possible reductions' in electric rates."[93]

In the months following the *Hope* "prediction," the media began to pay particular

attention to disputes on the Court. Three days after the leak, a Pennsylvania newspaper described the "feud" between Black and Frankfurter as a "battle over conflicting views of constitutional law" and "a fight to the finish over the next chief justiceship."[94] Though it did not mention Pearson's prediction, the article demonstrated that journalists were attuned to the Court's discord. Another article in mid-February criticized the Court for failing to set an example as a government institution by "sail[ing] along serenely" "amid the natural confusion and tension incident to war."[95] In March, just before Pearson's next leak, one journalist remarked that he looked forward to Supreme Court decisions "for the criticism of the members that most of the dissent opinions contain."[96] Such opinions included Frankfurter's impassioned *Barnette* dissent, where he called out other justices' "deciding shift of opinion"[97] on compulsory flag salutes, and Stone's dissent in *Schneiderman*—a high-profile case about the government's effort to strip a Soviet-born Communist of his U.S. citizenship[98]—where he not only criticized the majority for not giving deference to the lower court's factual findings but also deemed Douglas's concurring opinion an "emasculation of the statute" at issue.[99] With the public growing increasingly aware of the Court's internal strife, Pearson made another prediction.

In early January 1944, just days after Pearson's *Hope* prediction, the Court heard oral argument in the *South-Eastern Underwriters* case.[100] The South-Eastern Underwriters Association (SEUA), which controlled ninety percent of fire and allied lines insurance in six states, was indicted for price-fixing in violation of the Sherman Anti-Trust Act. The Association allegedly fixed insurance premium rates for members and used "coercion and intimidation" to compel non-member insurance companies to adopt them as well. SEUA conceded its conduct was anticompetitive and monopolizing, but it argued that the Sherman Act did not apply because fire insurance was not interstate commerce.[101]

SEUA had precedent on its side, as the Court had held that insurance was not interstate commerce in *Paul v. Virginia* in 1868.[102] Not only was the government asking the Court to overturn its own precedent, but it was also seeking to "end[] 150 years of state regulatory dominance over insurance."[103] And the stakes were high for SEUA, as the Court's finding that the Sherman Act applied to the insurance industry would allow prosecutors to pursue its members "on criminal price-fixing charges."[104]

Pearson's leak about this case came in his Sunday radio broadcast on March 12, 1944:

> One of the most controversial cases before the U. S. Supreme Court involves government prosecution of 196 fire insurance companies for criminal violation of the Anti-Trust Act. Fire insurance companies contend that they should not be subject to Federal laws, but regulated only by states. So here is my prediction—This week the Supreme Court will hand down a split decision in favor of the government and against the insurance companies, ruling that insurance can be regulated by the Federal Government.[105]

After hearing of the prediction, the justices held another Conference and "deliberately withheld the release of the final opinion to make it appear as though Pearson was wrong."[106]

Speculation about the identity of the leaker resumed. Roberts suspected Douglas of being Pearson's source,[107] but the justices considered other sources too. They questioned their law clerks about the leak; Stone indicated that he wanted to meet with all the clerks but later called the meeting off.[108] Another apparent investigative route proved fruitless for Stone: he reportedly attempted

to contact Pearson to get a copy of his transcript, but the reporter declined to take the call.[109]

The justices used the additional time to keep working on the case. In late April, at the same time as Black was revising his majority opinion reversing the judgment,[110] the Court considered switching to a per curiam opinion affirming the judgment that the Sherman Act did not apply to SEUA. Douglas circulated a draft per curiam opinion in late May[111] because some justices objected to overturning *Paul v. Virginia* to hold that the law was constitutional with only a four-vote majority.[112] Roberts and Reed were not participating, thus the majority consisted of four justices, leaving three justices in the dissent. "[A] majority of us have concluded that we should not overturn the precedents which underly this case and render a decision of such farreaching consequences without the concurrence of a majority of a full Court," wrote Douglas in his draft.[113] After Black insisted that upholding laws as constitutional with a four-vote majority was less tenuous than striking down laws as unconstitutional with only four justices,[114] the Court decided not to issue the per curiam opinion.

The Court did not release the *South-Eastern Underwriters* opinion until June 5, 1944. That the decision was announced the day before D-Day likely reduced public awareness of the case. Black's majority opinion held that fire insurance constituted interstate commerce which the federal government could regulate; thus, the Sherman Act applied to the Association.[115] He highlighted the economic importance of the insurance industry, stating that insurance "has become one of the largest and most important branches of commerce" and noting the industry's employment of 524,000 workers.[116] He then described the interconnected nature of the insurance business between states as "a continuous and indivisible stream."[117] Finally, Black refuted SEUA's argument that Congress did not intend the Sherman Act to apply to interstate insurance, noting the Act's "sweeping" language and the "spirit and impulses" behind it.[118]

The Court again fractured, producing numerous separate opinions. Chief Justice Stone dissented, stating that the Court misconceived the question before it. "It is not a question as to whether or not Congress had power to regulate the insurance companies or some phase of their activities," he wrote, "but rather whether Congress did so by the Sherman Act."[119] Stone noted that precedent established that the formation of insurance contracts was not itself interstate commerce.[120] Frankfurter wrote a brief separate opinion, joining Stone's opinion but writing to emphasize that Congress did not intend the Sherman Act to apply to insurance.[121] Despite his agreement with the majority that insurance was interstate commerce, Jackson dissented in part to propose a less disruptive regulatory approach: states should continue to regulate insurance in tandem with Congress's enacting laws on the subject.[122] Because Congress had not indicated a desire to "federalize responsibility for insurance supervision," Jackson would have left the states' power intact.[123]

That the Court sided with the government to allow federal regulation of the insurance industry is not surprising in context. In stark contrast to their predecessors who struck down many New Deal measures,[124] the justices on the Stone Court favored "deference to economic legislation and regulation."[125] Still, the case "'precipitated widespread controversy and dismay.'"[126] Insurance companies feared antitrust liability, and states were concerned their taxation of insurance companies might be struck down.[127] In response to these concerns, Congress swiftly enacted the McCarran-Ferguson Act in March 1945 to limit *South-Eastern Underwriters*' impact, returning regulation primarily to the states and creating an insurance industry exemption from antitrust laws.[128]

Pearson was not yet done forecasting Supreme Court decisions, though over a year passed before his next "prediction" in *Bridges v. Wixon*. Harry Bridges was a prominent labor leader who had sent the Secretary of Labor a telegram criticizing a judge's order and threatening to strike. In 1941, Bridges prevailed before the Supreme Court in his subsequent First Amendment case.[129] In 1945, Bridges was before the Court again, this time facing deportation.

The first formal deportation proceeding in a decades-long effort to deport Bridges began in 1938.[130] The Secretary of Labor dismissed this proceeding because Bridges was not then a Communist Party member as the statute required.[131] But Congress amended the statute in 1940 to include past affiliation,[132] so Bridges was accused of having been a "member[] of or affiliated with" the Communist Party, which "advised and taught" the forceful overthrowing of the government.[133] He sought a writ of habeas corpus.[134]

During his broadcast on May 20, 1945, Pearson accurately stated not only the outcome of *Bridges v. Wixon*, but also named the specific justices who would dissent: Frankfurter, Stone, and Roberts. On June 18, the Court ruled 5–3 that the government could not prove labor leader Harry Bridges (pictured) was affiliated with the Communist Party and overruled his deportation order.

A month and a half after the Court heard oral argument in the *Bridges* case, Drew Pearson made another prediction. During his broadcast on May 20, 1945, Pearson accurately stated not only the outcome of the case, but also named the specific justices who would dissent:

> One of the most controversial labor questions in many years has been the deportation of Harry Bridges to Australia on the grounds that he was a Communist. Attorney General Biddle ordered his deportation, but the matter has been appealed to the Supreme Court. So here is my prediction. Very soon the Supreme Court will hand out its opinion in which Justices Stone, Roberts and Frankfurter will vote to send Bridges out of the country, but the majority of the court will rule that Bridges did not try to overthrow the United States Government, and that he can remain here.[135]

In response to the leak, Chief Justice Stone penned a confidential memorandum for the Court on May 21, 1945.[136] The memo informed the justices of the prediction, indicating that "it [was] reported to" Stone that Pearson named him, Roberts, and Frankfurter as dissenters,[137] accurately reflecting how the Court was divided. That same day, Douglas wrote another memorandum to the chief justice, apparently anticipating that he would again be a suspect. His wording echoed his missive in response to the *Hope Natural Gas* leak:

> I am greatly distressed to lear [sic] what Drew Pearson last night said about the Bridges case and the vote of the various members of the Court. For myself I want to say that

> (1) I have never mentioned the case to anyone besides members of the Court and members of my staff—not even to Mrs. Douglas. (2) I have had absolutely no relationship or connection (social or otherwise) with Drew Pearson.[138]

Again, the justices suspected one another of having leaked to Pearson. Frankfurter and Roberts accused Douglas, Black, and Murphy, each of whom denied the allegation.[139] Years after the incident, Douglas stated in his autobiography that Pearson had revealed his source to Douglas—though Douglas still did not name the supposed source—and "Felix had been far from the mark."[140] Douglas and Pearson did exchange a series of letters about the *Bridges* leak in 1968, but their recollections were hazy and unilluminating.[141]

Pearson's third leak also affected the timing of the Court's decision. Douglas relayed that the *Bridges* opinion was supposed to be handed down on May 21, 1945, but the chief justice called a special Conference at which the justices "decided to put the case off a week or two" because "Frankfurter rebelled at rendering Drew Pearson's story reliable,"[142] taking a similar tack as they had after the second leak. A United Press story announcing the case's outcome mentioned that the Court had originally scheduled to adjourn on May 28, "but a welter of important cases forced postponement."[143] Again, the Court happened to announce its decision on a day when Washington was otherwise engaged, this time with providing General Eisenhower "the most tumultuous and heart-felt homecoming reception in this capital's history."[144]

In his majority opinion reversing Bridges' deportation, Douglas examined the meaning of "affiliation" as used in the immigration statute, opting for a narrow construction. According to Douglas, acts proving affiliation "must evidence a working alliance to bring the proscribed program to fruition," rather than mere cooperation with its lawful activities.[145] Attorney General Francis Biddle had not used this narrow standard when evaluating the Bridges case. Though Bridges was in charge of publishing the union's journal, the *Waterfront Worker*, the publication did not advocate forcefully overthrowing the government.[146] Thus, Bridges was not sufficiently affiliated. Douglas then turned to membership, the proof of which he found similarly lacking.[147] The majority's opinion repeatedly emphasized that while deportation is not a criminal proceeding, it can be a "most serious" penalty which "visits a great hardship on the individual."[148]

Again, the Court did not achieve unanimity. Jackson did not participate,[149] and Murphy wrote a concurring opinion in which he described the "concentrated and relentless crusade" to deport Bridges.[150] Because Douglas declined to reach the constitutional questions in his majority opinion,[151] Murphy tackled them directly in his concurrence, deeming the immigration statute and subsequent proceeding "obvious[ly]" unconstitutional for deporting an immigrant because he had exercised his First Amendment right to free speech and association.[152] As Pearson predicted, Stone dissented, joined by Roberts and Frankfurter, criticizing the Court for its unprecedented decision to set aside the attorney general's deportation order based on a collateral attack when there was evidentiary support for his factual findings.[153] In Stone's view, because one witness provided sufficient evidence that Bridges was a Communist Party member, and the applicable hearsay rules did not render such evidence inadmissible, Bridges should have been deported.[154]

The war may have influenced the outcome. Two years prior, the Court had sided with an individual with Communist ties in *Schneiderman*, declining to rescind his naturalization.[155] When Stone was drafting his *Schneiderman* dissent, Frankfurter wrote to him expressing frustration that "present war

considerations" and "our relations with Russia" were "the driving force behind the result of this case."[156] Murphy denied Frankfurter's allegation in *Schneiderman*,[157] but in *Bridges* Attorney General Biddle admitted he considered whether deporting Bridges would "affect our international unity—meaning our relation to Russia[.]"[158] Thinking "[t]he war would be over before the final decision was reached,"[159] Biddle went ahead with the deportation. When the case reached the Supreme Court, the war was still ongoing, and the justices may have felt a need to placate the country's ally.[160]

Some columnists praised the Supreme Court for its decision not to deport Bridges.[161] An opinion column declared June 18, 1945 "a great day for American democracy" and commended the Court for offering "a lot of protection" for civil rights.[162] However, Douglas also received letters condemning the decision, indicating that public opinion was divided just like the Court had been. One concerned citizen wrote to Douglas, "It is too bad such an immoral and unscrupulous individual can get court protection as did he."[163]

Not only did the Court's holding upset some Americans, but conservative columnist Westbrook Pegler recognized that the leak itself also had repercussions.[164] A few months after Pearson's *Bridges* broadcast, Pegler condemned Pearson's disclosure of the leak:

> Our people don't try to break into the privacy of the court . . . and decent editors would refuse to jump the gun on court decisions even if

Justice Douglas claimed that Justice Roberts (pictured) became embittered by the Pearson leaks. Roberts stepped down from the Court in July 1945, but the leaks were not the only reason he had become disenchanted with his colleagues.

> they did have pipe-lines into the chambers. We feel that such news can wait until it is announced in open court because this court has been debauched enough already under the New Deal without our exploiting the destruction of public confidence in its integrity.[165]

Looking at the aftermath of the predictions more broadly, all of the justices claimed to be frustrated by Pearson's predictions, but Roberts was especially irritated. In Douglas's words, Roberts, who served on the Court from 1930 to 1945,[166] became "very, very bitter"[167] at some point late in his tenure. Roberts and Black were once good friends, with the former hosting the latter at his Philadelphia farm on weekends.[168] However, Roberts became disenchanted with Black after he sought him out to discuss the leaks. When Black insisted neither Douglas nor Murphy was responsible, and assured Roberts he had "implicit confidence" in them, Roberts "thereafter became very embittered."[169] Rather than taking part in the customary "Judicial Handshake," a tradition adopted by Chief Justice Melville Fuller in the 1880s,[170] Roberts reportedly refused to enter the robing room to shake hands with the other justices but would instead wait in the hall for the messenger to robe him.[171] He also declined to lunch with the other justices, arrived late to Conferences, and spoke only to Frankfurter and Jackson.[172]

When speaking to Princeton professor Walter Murphy[173] to compile an oral history in 1961, Douglas credited the source of Roberts's bitterness to a "very accurate" prediction from Drew Pearson.[174] Douglas could not remember which case the prediction involved but mentioned that Roberts brought a copy of Pearson's prediction to the Conference.[175] Other justices recalled Roberts bringing the prediction to the Conference where they discussed the *Hope Natural Gas* leak.[176] Douglas also recalled being absent due to illness from the Conference to discuss the leak that angered Roberts, lending further support to the likelihood that he was describing the *Hope Natural Gas* prediction.[177]

Though Douglas credited Roberts's frustration to the leaks, there were other possible causes. First, Roberts took issue with "the decisions of his activist colleagues," dissenting fifty-three times in his last full Term.[178] Second, Roberts was "especially embittered" by the 1944 case *Smith v. Allwright*.[179] In 1935, Roberts wrote for the Court in *Grovey v. Townsend* to uphold the exclusion of Black Americans from Democratic Party membership and primary elections.[180] Nine years later in *Smith*, the Court expressly overturned *Grovey* and required states to allow Black voters to vote in primary elections.[181] Whatever the source of Roberts's ire, he resigned from the Court in July 1945.[182] Because the justices could not even reach a consensus on the wording of their formal appreciation letter to him, one was not sent.[183]

The Pearson leaks were one of many sources of dissention on the Stone Court. Absent the leaks, there would still have been strife. The Court was full of strong personalities[184] which Chief Justice Stone was not well-equipped to rein in, its docket was full of tough cases with broad societal significance, and the uncertainty of war loomed large. That said, the leaks added further conflict to the already discordant Court, and their increasing level of detail and accuracy led many to suspect they were coming from inside the justices' Conference room. The breakdown of trust amongst the justices and the delays in handing down important opinions were serious consequences of Pearson's repeated breaches.

Drew Pearson's predictions for the Stone Court were far from the first—or last—Supreme Court leaks in history. Justice Douglas might have been linked to one of the two leaks in the high-profile *Roe v. Wade* case,[185]

as he did not step down from the Court until 1975.[186] In July of 1972, the *Washington Post* published a story describing how Chief Justice Warren Burger convinced the Court to delay deciding *Roe* until the next Term. According to the *Post*, Burger initially voted with the dissenters, but assigned the Court's opinion to Justice Harry A. Blackmun.[187] Douglas protested, as he was the senior associate justice in the majority who usually would have been entitled to make the assignment. Burger then convinced Blackmun to withdraw his opinion and let the case be reargued. The article relayed that Douglas had written a memorandum that "explain[ed] in detail all the events that had led to the failure to decide," which Douglas threatened to file as a dissenting opinion to the Court's order setting the cases for reargument.[188] That the *Post* had such intimate knowledge of the justices' moves and countermoves—which it attributed to "reliable sources"—and especially of the Douglas memorandum suggests it had inside knowledge. Douglas's response to the story was reminiscent of his Pearson protestations: he was "upset and appalled," and insisted he "never breath[ed] a word . . . [to] anyone outside the court."[189] Another leak occurred just before the Court handed down its decision in *Roe*; Justice Lewis F. Powell's law clerk Larry Hammond confessed to speaking with a *TIME* reporter,[190] who published a story predicting that the Court "ha[d] decided to strike down nearly every anti-abortion law in the land."[191]

In the 1940s, the Stone Court was divided well before Drew Pearson made his first prediction. The often-forgotten Pearson leaks may not have been the root of the tension, but they were another catalyst that caused havoc, furthered dissention, and delayed important opinions. Justice Roberts's own colleague credited his frustration with and ultimate departure from the Court in part to his outrage at the press leaks. The Pearson leaks and their aftermath provide a useful indication of the repercussions of compromising Court confidentiality.

ENDNOTES

[1] Felix Frankfurter, "Mr. Justice Roberts," *University of Pennsylvania Law Review* 104 (1955), 311, 313.

[2] In the words of Drew Pearson and Robert Allen, "For years the Supreme Court of the United States . . . has been the height of decorum. Its chamber is cloaked in an atmosphere of silence and restraint." Drew Pearson and Robert S. Allen, **The Nine Old Men** 34 (1937).

[3] 320 U.S. 591 (1944).

[4] 322 U.S. 533 (1944).

[5] 326 U.S. 135 (1945).

[6] Donald A. Ritchie, **The Columnist: Leaks, Lies, and Libel in Drew Pearson's Washington** 22 (2021).

[7] Ritchie, **The Columnist**, 22.

[8] Ritchie, **The Columnist**, 24–25.

[9] Ritchie, **The Columnist**, 25.

[10] Ritchie, **The Columnist**, 26, 28.

[11] Ritchie, **The Columnist**, 28.

[12] Oliver Pilat: **Drew Pearson: An Unauthorized Biography** 119 (1973).

[13] *See* Drew Pearson and Robert Allen, **Washington Merry-Go-Round** 53–55 (1931) ("There were few, not even among the staunchest members of [Hoover's] own party, who would not admit that he had failed to live up to expectations."). Pearson and Allen published the book anonymously, but Hoover's administration uncovered their identities and revoked Allen's White House access, causing him to lose his job at the *Christian Science Monitor*. Ritchie, **The Columnist**, 17, 20.

[14] Ritchie, **The Columnist**, 20–1.

[15] Laura Krugman Ray, "America Meets the Justices: Explaining the Supreme Court to the General Reader," *Tennessee Law Review* 72 (2005), 573, 580. ("**The Nine Old Men** became a national bestseller").

[16] *See* Ritchie, **The Columnist**, 45 (describing how the book "popularized the notion that crusty septuagenarians opposed to innovation dominated the court"). *See generally* Pearson and Allen, **The Nine Old Men**.

[17] Pearson and Allen, **The Nine Old Men**, 76; *accord* Pilat, **Unauthorized Biography**, 116, 126.

[18] Pearson and Allen, **The Nine Old Men**, 186.

[19] Pearson and Allen, **The Nine Old Men**, 198.

[20] The book did draw some criticism. *See* Thomas Reed Powell, "The Nine Old Men. By Drew Pearson and Robert S. Allen. New York: Doubleday, Doran & Company, 1936," *Yale Law Journal* 46 (1937), 561. ("[T]he book is vulgar in language, vulgar in tone and innuendo, and guilty of enough inaccuracies to be unreliable in general").

[21] Ritchie, **The Columnist**, 45.

[22] Alden Whitman, "Watchdog of Virtue," *New York Times*, September 2, 1969, 44.

[23] Pilat, **Unauthorized Biography**, 5.

[24] Pearson made many powerful enemies: it was President Roosevelt who deemed him the "chronic liar"; Winston Churchill called him "'the champion liar of the United States.'" Ritchie, **The Columnist**, 15.

[25] Pilat, **Unauthorized Biography**, 21.

[26] Joseph P. Lash, **From the Diaries of Felix Frankfurter** 250 (1975).

[27] Drew Pearson, "Confessions of 'an S.O.B.,'" *Saturday Evening Post*, November 3, 1956, 23, 87.

[28] Pilat, **Unauthorized Biography**, 140.

[29] Ritchie, **The Columnist**, 8.

[30] Ritchie, **The Columnist**, 3–4.

[31] *See* Ritchie, **The Columnist**, 60, 77.

[32] Pearson, "Confessions of 'an S.O.B.,'" 94.

[33] Ritchie, **The Columnist**, 4–5.

[34] Ritchie, **The Columnist**, 14; Pilat, **Unauthorized Biography**, 162–3. When Allen left to rejoin the army in 1942, Pearson carried on the broadcast. Ritchie, **The Columnist**, 54–5.

[35] Ritchie, **The Columnist**, 174 (recounting predictions that Germany would invade Russia, electricity would be rationed during the war, and the Secretary of State would become the Russian ambassador). Pearson sometimes wrote **Merry-Go-Round** columns about the topics on which broadcasted predictions, but he does not appear to have published stories on the Supreme Court predictions this Article discusses.

[36] *See* 81 Cong. Rec. A5961 (21, 1950) ("The results of these tabulations were: 1. Strict test—47 percent accurate. 2. Lenient test—55 percent accurate. 3. 'Charitable' test—67 percent accurate."). Representative Andrew Jacobs (D-IN) entered these articles into the record. 81 Cong. Rec. A5958. *See also* Jack Alexander, "Pugnacious Pearson," *Saturday Evening Post*, January 6, 1945, 9, 68 ("Roughly . . . the Pearson crystal ball appears to give off the right glint 60 per cent of the time.")

[37] *See* Merlo Pusey, "Supreme Court: Trends Reflected in Recent Decisions," *Washington Post*, June 20, 1944, 7.

[38] Letter from Harlan F. Stone to Marshall Stone (February 10, 1944) (on file with the Library of Congress, Stone's Papers Box 2, Folder 10).

[39] *See* Melvin I. Urofsky, **Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953** 8 (1997).

[40] Letter from William O. Douglas to Hugo Black (June 22, 1941) (on file with the Library of Congress, Douglas's Papers Box 59, Folder 1).

[41] Urofsky, **Division and Discord**, 31–2.

[42] Lash, **From the Diaries of Felix Frankfurter**, 152, 173–4.

[43] Cass R. Sunstein, "Unanimity and Disagreement on the Supreme Court," *Cornell Law Review* 100 (2015), 769, 790–1.

[44] Letter from Harlan F. Stone to Sterling Carr (June 13, 1943) (Stone's Papers Box 9, Folder 6).

[45] Cliff Sloan, **The Court at War: FDR, His Justices, and the World They Made** 347 (2023).

[46] *See* Peter G. Renstrom, **The Stone Court: Justices, Rulings, and Legacy** 26 (2001); Urofsky, **Division and Discord**, 19, 21 ("Frankfurter . . . demanded that judges defer to the legislative will unless they found a clear-cut constitutional prohibition.")

[47] Sloan, **The Court at War**, 347; *accord* Howard Ball and Phillip J. Cooper, **Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution** 91 (1992) ("To Douglas and Black, the responsibility of the Supreme Court was clear. Employ judicial review to invalidate acts of a legislature or other officials that invade the fundamental rights and liberties . . . of the people.")

[48] Howard Ball and Phillip Cooper, "Fighting Justices: Hugo L. Black and William O. Douglas," *American Journal of Legal History* 38 (1994), 1, 25. Pusey, "Trends Reflected."

[49] Melvin I. Urofsky, "Conflict Among the Brethren," *Duke Law Journal* 1988 (1988), 71, 84 (attributing Douglas's break with Frankfurter to *Barnette*).

[50] *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

[51] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); Urofsky, "Conflict Among the Brethren," 84.

[52] Urofsky, **Division and Discord**, 32.

[53] Sloan, **The Court at War**, 347.

[54] Ball and Cooper, "Fighting Justices," 12–13.

[55] Sunstein, "Unanimity and Disagreement," 776.

[56] Sunstein, "Unanimity and Disagreement," 780.

[57] Alpheus Thomas Mason, "Inter Arma Silent Leges: Chief Justice Stone's Views," *Harvard Law Review* 68 (1956) 806, 827 (describing the Justices' disagreement over the meaning of the Articles of War in deliberations concerning *Ex Parte Quirin*, 317 U.S. 1 (1942)).

[58] 320 U.S. 591 (1944).

[59] Natural Gas Act, 15 U.S.C. §717c–1 (1938); 320 U.S. at 600–01.

[60] 320 U.S. at 593–5.

[61] Case Comment, "The Hope Natural Gas Case and Its Impact on State Utility Regulation," *Maryland Law Review* 8 (1944) 122. The FPC argued that its rate only prevented Hope from profiting "at the expense of the public in wartime." Reply Brief of Petitioner, *Hope Nat. Gas*, 320 U.S. 591 (1944) (No. 35), 1943 WL 54340, *2.

[62] *Hope Nat. Gas Co. v. Fed. Power Comm'n*, 134 F.2d 287, 292 (4th Cir. 1943).

[63] Memorandum from William O. Douglas to Harlan F. Stone (January 5, 1944) (Douglas's Papers Box 254, Folder 15).

[64] Memo from Douglas to Stone, January 5, 1944..

[65] Drew Pearson, Radio Script (January 2, 1944) (unpublished script) (on file with the LBJ Library, Drew Pearson Box 175 Radio Scripts January 9–April 16, 1944).

[66] John M. Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge** 274–5 (2004).
[67] Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** 493 n.82 (1958).
[68] *See* Ferren, **Salt of the Earth**, 483 n.9 ("Drew Pearson's script had Rutledge named as the undecided man—but he didn't mention him by name on the radio.")
[69] Ferren, **Salt of the Earth**, 275.
[70] Drew Pearson, "The Washington Merry-Go-Round," *Washington Post*, January 11, 1944, B5.
[71] Memo from Douglas to Stone, January 5, 1944.
[72] Roger K. Newman, **Hugo Black: A Biography** 322, 678 n.3 (2d ed. 1997).
[73] Newman, **Hugo Black**, 322, 678 n. 3.
[74] Memo from Douglas to Stone, January 5, 1944.
[75] Ferren, **Salt of the Earth**, 275. However, the details of the party, such as how many guests were in attendance, are unknown, leaving open the possibility that Douglas and Pearson may not have crossed paths.
[76] Memo from Douglas to Stone, January 5, 1944.
[77] *See* Memorandum from William O. Douglas to Harlan F. Stone (January 6, 1944) (Douglas's Papers Box 254, Folder 15).
[78] Memo from Douglas to Stone, January 6, 1944.
[79] *See* Sloan, **The Court at War**, 263 (describing how Douglas regularly attended FDR's poker nights); Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** 581 (1956) (noting that Stone considered cutting back on evenings out to twice a week); Lash, **From the Diaries of Felix Frankfurter**, 149–60 (recounting Frankfurter's many social engagements, including a dinner with Attorney General Francis Biddle).
[80] Memo from Douglas to Stone, January 6, 1944.
[81] 320 U.S. at 593.
[82] 320 U.S. at 594, 602.
[83] 320 U.S. at 604–05.
[84] 320 U.S. at 625–28 (Frankfurter, J., dissenting).
[85] 320 U.S. at 625–6 (Frankfurter, J., dissenting).
[86] 320 at 619–20 (Black and Murphy, JJ., concurring).
[87] 320 U.S. at 624–25 (Reed, J., dissenting).
[88] 320 U.S. at 630–34, 637, 645 (Jackson, J., dissenting).
[89] Charles A. Sprague, "It Seems to Me," *Statesman Journal*, January 22, 1944.
[90] 169 U.S. 466, 546 (1898); *see* Joseph R. Rose, "The 'Hope' Case and Public Utility Valuation in the States," *Columbia Law Review* 54 (1954) 188, 188–89, 190 (describing how the Court rejected fair value but "did not substitute . . . any cost method of valuation, but held the criterion to be the reasonableness of the end result and left commissions free to use whatever valuation principle they determined . . . to be best suited to the particular case."); Charles G. Ross, "Supreme Court Ruling Gives FPC Authority on Rates Up To 'Probable Confiscation,'" *St. Louis Post-Dispatch*, January 5, 1944 ("Smyth v. Ames . . . was knocked in the head by the court this week").
[91] 169 U.S. at 546. The Court used a plethora of factors to determine said fair value, the most important of which were original cost and reproduction cost. 169 U.S. at 547.
[92] Ferren, **Salt of the Earth**, 273; *see* "City Wins Gas Rate Victory," *Pittsburgh Sun-Telegram*, January 3, 1944 ("The Supreme Court ruled today that Federal courts are barred from passing upon a rate order of the Federal Power Commission unless the 'total effect' of the order might be 'unjust and unreasonable.'")
[93] "Olds Says High Court Paves Way for Large Cuts in Electric Rates," *Evening Star*, January 6, 1944; Ross, "Supreme Court Ruling Gives FPC Authority on Rates" (predicting the decision would lead to a "marked reduction" in the two-to-three-year lag between the Commission's ordering new rates and their implementation).
[94] "Supreme Court Feud Seen as Test for Chief Justiceship," *Evening News*, January 5, 1944.
[95] "The Supreme Court on Edge," *Fitchburg Sentinel*, February 19, 1944.
[96] "Supreme Court Feud," *Decatur Daily Review*, March 8, 1944.
[97] 319 U.S. at 665 (Frankfurter, J., dissenting).
[98] *Schneiderman v. United States*, 320 U.S. 118 (1943).
[99] 320 U.S. at 178–81, 175 (Stone, C.J., dissenting).
[100] 322 U.S. at 533.
[101] 322 U.S. at 534–36.
[102] 75 U.S. 168, 183 (1868).
[103] John Gibeaut, "Forces of Change," *American Bar Association Journal* 93 (2007) 40, 41.
[104] Gibeaut, "Forces of Change," 41.
[105] Drew Pearson, Radio Script (March 12, 1944) (unpublished) (Drew Pearson Box 175 Radio Scripts January 9–April 16, 1944).
[106] Bruce Allen Murphy, **Wild Bill: The Legend and Life of William O. Douglas** 210 (2003).
[107] Newman, **Hugo Black**, 324.
[108] Newman, **Hugo Black**, 324.
[109] Newman, **Hugo Black**, 324.
[110] *See* Memorandum from Hugo Black to William O. Douglas, Frank Murphy, Robert Jackson, and Wiley Rutledge (April 24, 1944) (Douglas's Papers Box 102, Folder 22) (indicating Black had already circulated a draft of his majority opinion).
[111] William O. Douglas, *United States v. S.-E. Underwriters Ass'n* Per Curiam Opinion (May 23, 1944) (unpublished draft opinion) (Douglas's Papers Box 102, Folder 21). An undated memorandum from Chief Justice Stone to the Court indicates that Douglas authored the per curiam opinion. Memorandum from Harlan F. Stone to the Court on *South-Eastern Underwriters* (Douglas's Papers Box 102, Folder 22) ("I have asked Justice Douglas to circulate proposed per curia in this case.")
[112] Letter from Hugo Black to Harlan F. Stone (May 16, 1944) (Douglas's Papers Box 102, Folder 22) (" [T]here has been a strong view that less than a majority of the

full Court should not strike down an Act of Congress as unconstitutional.").

[113] Douglas's Draft Per Curiam Opinion.

[114] Black Letter (May 16, 1944) ("[F]ew if any have expressed objections to sustaining Acts by a majority of four").

[115] 322 U.S. at 533. Some deemed *South-Eastern Underwriters* "an audacious step for the justices" for overturning *Paul v. Virginia*, 75 U.S. 168 (1868), which was nearly a century old. Gibeaut, "Forces of Change," 41; "Insurance Firms Lose in Decision," *Scranton Times*, June 5, 1944 ("The court boldly scrapped a seventy-five-year-old decision in the case of Paul against Virginia. . . .")

[116] 322 U.S. at 539–40.

[117] 322 U.S. at 541.

[118] 322 U.S. at 553.

[119] 322 U.S. at 565 (Stone, C.J., dissenting).

[120] 322 U.S. at 567, 572 (Stone, C.J., dissenting) (citing 75 U.S. at 183, then citing *Hooper v. California*, 155 U.S. 648, 655 (1895); and then citing *N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231 U.S. 495, 499 (1913)).

[121] 322 U.S. at 583–84 (Frankfurter, J., dissenting).

[122] 322 U.S. at 587–88 (Jackson, J., dissenting in part) (noting that "common sense and wisdom of the situation seem opposed" to the majority's holding); *see* Phil C. Neal, "Justice Jackson: A Law Clerk's Recollections," *Albany Law Review* 68 (2004), 549, 554 (" [Jackson] dissented in this instance because the decision would have widespread effects in upsetting an established regulatory system built on the old assumption that insurance was not commerce—he thought the reform should be left to Congress, which could make the necessary adjustments.").

[123] 322 U.S. at 591 (Jackson, J., dissenting).

[124] *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down regulation of the poultry industry); *United States v. Butler*, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act was unconstitutional).

[125] Sloan, **The Court at War**, 234.

[126] Alan M. Anderson, "Insurance and Antitrust Law: The McCarran-Ferguson Act and Beyond," *William & Mary Law Review* 25 (1983), 81, 85 (quoting N.Y. Ins. Dep't, "The Open Competition Rating Law: A Statement of Principles and Procedures" 71, *in* 111 **Annual Report of the Superintendent of Insurance to the New York Legislature** 355 (1969)).

[127] **Annual Report of the Superintendent**, 355.

[128] 15 U.S.C. §§ 1011–12 ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States").

[129] *Bridges v. California*, 314 U.S. 252 (1941).

[130] Harry Bernstein, "Harry Bridges; Marxist and Founder of West's Longshoremen Union," *L.A. Times*, March 31, 1990 (12:00 AM) https://www.latimes.com/archives/la-xpm-1990-03-31-mn-228-story.html.

[131] The Secretary of Labor was responsible for dismissing the proceeding because the Immigration and Naturalization Service was part of the Department of Labor from 1933–1940, during which Bridges' initial proceeding occurred. Executive Office for Immigration Review, U.S. Department of Justice, "Evolution of the U.S. Immigration Court System: Pre-1983," https://www.justice.gov/eoir/evolution-pre-1983.

[132] 326 U.S. at 138–40.

[133] 326 U.S. at 137–38 n.1.

[134] 326 U.S. at 140.

[135] Drew Pearson, Radio Script (May 20, 1945) (unpublished script) (Drew Pearson Box 175 Radio Scripts May–June 1945).

[136] Memorandum from Harlan F. Stone to Court (May 21, 1945) (Jackson's Papers Box 132, Folder 1).

[137] Memorandum from Stone to Court, May 21, 1945.

[138] Memorandum from William O. Douglas to Harlan F. Stone (May 21, 1945) (Douglas's Papers Box 255, Folder 5).

[139] *See* William O. Douglas, **The Court Years, 1939-1975 The Autobiography of William O. Douglas** 32 (1980).; William M. Wiecek, **The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953** 300 (2006) ("Roberts and Frankfurter accused Douglas, Black, and Murphy of leaking the information. Each, of course, denied doing so.")

[140] Douglas, **The Court Years**, 32. Douglas's autobiography has been criticized for its inaccuracy. *See, e.g.*, G. Edward White, "The Anti-Judge: William O. Douglas and the Ambiguities of Individuality," *Virginia Law Review* 74 (1988) 17, 19 ("[T]he accuracy of the Douglas's autobiographical works is often questionable.")

[141] Initially, neither could remember the name of the case, but Pearson eventually sent a letter quoting from his prediction of the *Bridges* outcome. Letter from Drew Pearson to William O. Douglas, (March 7, 1968) (Pearson "rack[ed] [his] brain for the name of a case"); Letter from Pearson to Douglas, (July 10, 1968) (both in Douglas's Papers Box 363, Folder 5). Pearson then mentioned that the first draft of the broadcast had included an assertion that Justice Burton had switched his vote, but Burton was not yet on the Court when *Bridges* was decided. Letter from Pearson to Douglas, (July 10, 1968) (Douglas's Papers Box 363, Folder 5); Daniel S. McHargue, "One of Nine—Mr. Justice Burton's Appointment to the Supreme Court," *Case Western Reserve Law Review* 4 (1953), 128, 131.

[142] Douglas, **The Court Years**, 32; *see also* Wiecek, **The Birth of the Modern Constitution**, 300 ("[T]he Justices decided to withhold announcement of the decision for a while to spite or frustrate Pearson.")

[143] "Bridges Wins, AP Loses in High Court," *Daily News*, June 19, 1945, 2.

[144] "Capital Outdoes Itself with Greeting to 'Ike,'" *Blackwell Journal-Tribune*, June 18, 1945, 1. The Justices themselves attended the joint session of Congress in the House chamber to welcome Eisenhower home from war. "Capital Outdoes Itself."

[145] 326 U.S. at 146.

[146] 326 U.S. at 143–46 ("It aired the grievances of the longshoreman. It discussed national affairs . . . . It declared against war. But we have found no evidence whatsoever which suggests that it advocated the overthrow of the government by force.")

[147] 326 U.S. at 149–53 (finding the statements of the government's witness O'Neil that linked Bridges to the Communist Party were hearsay, inadmissible as substantive evidence).

[148] 326 U.S. at 147, 154. Even though Bridges had been fending off deportation for years, he did not have much of a reaction to the Court's decision in his favor, only commenting "' O.K.'" when he was awakened and told of the outcome. "Tribunal Revokes Order to Deport Bridges by 5–3 Vote," *Buffalo Evening News*, June 18, 1945.

[149] 326 U.S. at 157.

[150] 326 U.S. at 157–58 (Murphy, J., concurring) ("Wiretapping, searches and seizures without warrants and other forms of invasion of the right of privacy have been widely employed in this deportation drive. . . . [A] special bill was introduced and actually passed the House of Representatives directing the Attorney General 'notwithstanding any other provisions of law' forthwith to take into custody and deport Harry Bridges . . ."); *see also* "In Re Harry Bridges," *Yale Law Journal* 52 (1942) 108, 129 ("Seldom has an individual in American life been subjected to so relentless a hunt").

[151] 326 U.S. at 156–57.

[152] 326 U.S. at 160, 162–64 (Murphy, J., concurring) (criticizing the statute for ignoring the requirement of personal guilt to penalize an individual, and not applying the clear and present danger test).

[153] 326 U.S. at 166, 168 (Stone, C.J., joined by Roberts and Frankfurter, JJ., dissenting) ("[W]hen the authority to deport . . . turns on a determination of fact by the Attorney General, the courts . . . are without authority to disturb his finding if it has the support of evidence of any probative value.")

[154] 326 U.S. at 168–71, 174, 178.

[155] 320 U.S. at 118.

[156] Letter from Felix Frankfurter to Harlan Fiske Stone, (May 31, 1943) (Stone's Papers Box 69, Folder 12).

[157] 320 U.S. at 119 (" [O]ur relations with Russia, as well as our views regarding its government and the merits of Communism are immaterial to a decision of this case.").

[158] Francis Biddle, **In Brief Authority** 300 (1962).

[159] Francis Biddle, **In Brief Authority**, 301.

[160] *See* Urofsky, **Division and Discord**, 55 (describing how the case would have come out differently had Schneiderman or Bridges been affiliated with Nazism).

[161] In an editorial, Frank Grimes believed the holding was part of "the same eternal drama" of Eisenhower's defeating Nazi "intolerance and bigotry." Frank Grimes, "Bigotry Is Worse," *Big Spring Daily Herald*, June 24, 1945.

[162] H.E.S., Editorial, "Fact and Fancy," *Gazette & Daily*, June 20, 1945, 14.

[163] Letter from Lewis S. Winans to William O. Douglas, (July 2, 1945) (Douglas's Papers Box 121, Folder 1).

[164] *See* Ritchie, **The Columnist**, 49.

[165] Westbrook Pegler, "Pegler Says There Has Been a News Leak from Supreme Court," *Post-Crescent Appleton*, August 17, 1945, 7.

[166] "Owen Roberts Dies; Former Justice, 80," *New York Times*, May 18, 1955, 1.

[167] Interview by Walter F. Murphy of William O. Douglas, Supreme Court, (December 27, 1961).

[168] Newman, **Hugo Black**, 323; Douglas, **The Court Years**, 32.

[169] Newman, **Hugo Black**, 322.

[170] Supreme Court of the United States, "The Court and Its Traditions," https://www.supremecourt.gov/about/traditions.aspx; Del Dickson, ed., **The Supreme Court in Conference 1940–1985** 4 (2001).

[171] Douglas, **The Court Years**, 33.

[172] Fowler V. Harper, **Justice Rutledge and the Bright Constellation** 322 (1965); Newman, **Hugo Black**, 322–23.

[173] Ruth Stevens, "Leading Constitutional Scholar Walter Murphy Dies at Age 80," *Princeton University* (April 22, 2010), https://www.princeton.edu/news/2010/04/22/leading-constitutional-scholar-walter-murphy-dies-age-80.

[174] Murphy Interview.

[175] *See* Murphy Interview.

[176] *See* Newman, **Hugo Black**, 322 ("At the conference [for the *Hope Natural Gas* leak] Roberts pulled out the newspaper story with Pearson's remarks.")

[177] Murphy Interview; Douglas Memorandum (January 5, 1944). *But see* Wiecek, **The Birth of the Modern Constitution**, 300 (attributing Roberts's refusal to shake the hands of the Brethren to the *Bridges* leak, and not discussing the *Hope Natural Gas* case or leak); Murphy, **Wild Bill**, 210 (attributing Roberts's frustration to the *South-Eastern Underwriters* leak but mentioning Douglas's illness-induced absence from the Conference discussing the leak, which suggests it was actually *Hope Natural Gas*).

[178] James F. Simon, **Independent Journey: The Life of William O. Douglas** 245 (1981); Urofsky, **Division and Discord**, 45.

[179] Wiecek, **The Birth of the Modern Constitution**, 67, 71; Newman, **Hugo Black**, 323 (attributing Justice Roberts's refusal to shake hands with Black or Douglas to both his anger over *Smith v. Allwright*, 321 U.S. 649, 666 (1944), and to the *Hope Natural Gas* leak).

[180] *Grovey v. Townsend*, 295 U.S. 45 (1935).

[181] 321 U.S. 649 (1944).

[182] Press Conference from President Harry S. Truman (July 5, 1945) https://www.trumanlibrary.gov/library/public-papers/76/presidents-news-conference; *see* Gerald T. Dunne, **Hugo Black and the Judicial Revolution** 230 (1977) ("Significantly, Roberts quit outright instead of retiring, which would have left him a pensioned member of the Court.")

[183] Dunne, **Hugo Black**, 230–1.

[184] Wiecek, **The Birth of the Modern Constitution**, 48.

[185] 410 U.S. 179 (1973).

[186] Jane Mayer, "Scooping the Supreme Court: The First Roe v. Wade Leaks Happened Fifty Years Ago," *New Yorker* (May 16, 2022), https://www.newyorker.com/magazine/2022/05/16/scooping-the-supreme-court (relaying historian Douglas Brinkley's assertion that "'Douglas leaked constantly to the press. . . . That was his modus operandi.'")

[187] "Move by Burger May Shift Court's Stand on Abortion," *Washington Post*, July 4, 1972, A1.

[188] "Move by Burger."

[189] Meilan Solly, "In 1973, a Leak at the Supreme Court Broke News of an Imminent Ruling on *Roe v. Wade*," *Smithsonian Magazine* (May 4, 2022), https://www.smithsonianmag.com/smart-news/the-original-roe-v-wade-ruling-was-leaked-to-the-press-too-180980016/.

[190] Rachel Treisman, "The Original *Roe v. Wade* Ruling Was Leaked, Too," *NPR* (May 3, 2022), https://www.npr.org/2022/05/03/1096097236/roe-wade-original-ruling-leak.

[191] David C. Beckwith, "The Sexes, Abortion on Demand," TIME, (January 29, 1973), https://content.time.com/time/subscriber/article/0,33009,903771,00.html.

Book Review

Two Views on Court-Packing

Laura Kalman, **FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism**. New York: Oxford University Press, 2022. 424 pp.

Michael Nelson, **Vaulting Ambition: FDR's Campaign to Pack the Supreme Court**. Lawrence, Kansas: University Press of Kansas, 2023. 124 pp.

Reviewed by Melvin I. Urofsky

Many years ago, when I was a graduate student at Columbia, I took a course on the Civil War and Reconstruction with Professor Eric McKitrick. At the time, the leading historiography of the era held the war inevitable, and that a series of bad judgments led to the firing of the first shot at Fort Sumter.[1]

McKitrick took a different view, and his idea of how historians should interpret the past would inform both my teaching and research throughout my career.[2]

Historians, McKitrick argued, too often started with the end result and then worked backwards, so that each step along the way looked as if it inevitably led to the next. As a result, "A" led to "B" which led to "C" and so forth until the tragic ending. What historians should do is start, not at the end, but at the beginning. What options did the actors have at "A"? Did they have any alternatives, such as "A-1" or "A-2," and examine why the participants at the time chose "A" over any of the alternatives. They could not know that choosing "A" would lead to a particular result, and historians needed to question why out of three or four options, the actors chose a particular one. Moreover, if we focus on choices at that stage, and put ourselves in the same state of knowledge as they had at the time, very often we will find that of all the options, the one chosen made the most sense. Yes, Stephen Douglas's "Popular Sovereignty" did negate the 1820 Missouri Compromise and was seen as horrible by many opponents of slavery, but it may have been the best and possibly the only way to placate the South and prevent the break-up of the Union *at the time.*

In the history of the Supreme Court, few events have drawn so much scholarly attention as the so-called Court-packing Plan put forth by Franklin D. Roosevelt in 1937. Starting with the 1938 instant history by Joseph Alsop and Turner Catledge, **The 168 Days**, the Court fight has been pictured as the idiotic brainchild of an arrogant president besotted by his great electoral victory in the 1936 election. The story as repeated in histories of the period and countless textbooks[3] can be summarized as follows:

During Roosevelt's first term, the president and Congress enacted the New Deal, a liberal—indeed revolutionary—program in order to confront the worst economic crisis in the nation's history. But the "nine old men," a term given the justices by Drew Pearson and Robert Allen,[4] struck down as unconstitutional one measure after another, often by a narrow 5–4 majority. In the 1936 presidential campaign FDR did not even mention the Court, and he won by the greatest margin in our history. He interpreted the popular vote as a mandate not only to continue the New Deal, but also to bring into line the judiciary,

so that, as he explained it, all three horses of the constitutional troika—the executive, the legislative, and the judicial—would be pulling together for the common good.

In February 1937, he introduced a bill to reorganize the judicial branch and help out the "overworked" high court by adding one new member for each justice who did not retire upon reaching the age of seventy (up to a total of six new justices). FDR had not had a single vacancy on the high court that he could fill in his first term, and the bill clearly aimed at the Four Horsemen—James C. McReynolds, George Sutherland, Pierce Butler, and Willis Van Devanter—who had resolutely voted against every state and federal measure involving economic reform. Time and again Roosevelt declared that there was nothing wrong with the Constitution; the problem lay with how the justices interpreted it.

A political firestorm erupted with horrified Republicans and many Democrats charging FDR with trying to "pack" the Court, and the president did little to help his cause by misleading Congress and the public about the real reasons for the plan. Even after the Court began handing down favorable decisions in the spring, Roosevelt ignored his advisors who urged him to abandon the plan. He continued to fight until July when the Senate recommitted his bill by a lopsided 70–20 vote.

Soon afterwards not only did the Court approve every New Deal measure that came before it, but resignations allowed FDR to appoint eight new justices, elevating a ninth to be chief justice. This was more than any president since George Washington. Roosevelt claimed that he may have lost the battle but won the war, a judgment few historians have accepted.[5]

We now have two new additions to the growing library on the Court fight, Laura Kalman's **FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism**, and Michael Nelson's **Vaulting Ambition: FDR's Campaign to Pack the Supreme Court.** Nelson's book, which we will discuss later on, hews a great deal toward the standard interpretation, starting with the title and the assumption that an arrogant president brought down all the troubles on his head. But he does a far more sophisticated job of treating the steps taken by Roosevelt in those 168 days.

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One of the pleasures enjoyed by reviewers is receiving a new book by an author whose work we know and admire. Laura Kalman is the doyenne of constitutional and legal historians. As I have told the readers of this journal over the years, this is a relatively small field, in which we all know each other and read each other's work. So in the spirit of "truth in advertising," or to be more specific, "truth in reviewing," let me say that I have known Laura for many years and have been impressed over and over again by her studies of Legal Realism,[6] her biography of Abe Fortas,[7] and other works.[8] It is not that I always agree with her, but I must take everything she says seriously, since it is always the result of extensive research and careful reasoning.

While Kalman did not study with Professor McKitrick, she did her doctoral work with another outstanding historian, John Morton Blum (whom, I might add, also influenced my own work).[9] What is new and stimulating in **FDR's Gambit** is Kalman's assertion that at each and every step—from Roosevelt's first decision to challenge the Court until the Senate buried the measure—FDR and his advisors could legitimately believe that circumstances were in their favor, that Congress would eventually back the plan, and that the overwhelming victory in the 1936 election would provide the momentum not only to see the plan through to success, but also to hammer home to the

justices how out of step they were with the American people.

From the very beginning, despite some opposition on Capitol Hill, "virtually all anticipated that Congress would soon approve" FDR's proposal. After all, there was the resounding electoral victory the previous November, the support of Majority Leader Joe Robinson in the Senate, the promise of patronage (some 100,000+ federal jobs), and easy access to radio and newspapers. (88) The fact that the Republicans opposed it meant little; the 1936 elections had left the GOP with pitifully small minorities in both the House and Senate.[10] Senator Carter Glass of Virginia opposed the bill but lamented "I will fight it. But what's the use? I think Congress will do anything in the world that the President tells them to do." (125)

Yet although the administration expected eventual success, FDR and his advisors were not naïve. No one thought victory would be swift or easy. Moreover, once the *Washington Evening Star* editorialized on February 8 that Roosevelt was trying to pack the Court with judges who would support the New Deal, the charge of "Court-packing" became the rallying cry of the opposition. Even so, in a survey of some thirty Washington news correspondents who knew and covered Capitol Hill, more than two-thirds predicted that although there would be a lot of "squawking," the bill would pass. Moreover, Roosevelt would not be the first president to challenge the Court; Congress had adjusted the Court's size seven times between 1801 and 1869. In addition, Attorney General Homer Cummings, the chief architect of FDR's plan, heard privately from members of Congress that even if the president did not get everything he wanted, he would certainly get most of it. (112)

Almost immediately after the president released his proposal, a number of representatives and senators, as well as some state officials, suggested alternative proposals that would, in effect, have given Roosevelt what he wanted. One bill would have given full salary pensions to justices who retired, since it was widely believed that a few members of the high court held on because they did not have the private wealth to live comfortably. This would have provided FDR two or three appointments immediately, but the question was whether they would actually resign. While in fact such a bill did pass later in the year, and Willis Van Devanter did step down, no one could count on that in February.

The other alternative involved a variety of constitutional amendments. Commentators at the time believed that any plan to change the make-up of the Court, or to require supermajorities to declare an act of Congress or of a state unconstitutional, or to give Congress an override by repassing any law declared unconstitutional by a two-thirds vote of each house, would appease those who worried that FDR's plan violated the Constitution. Here again, if we look at the alternatives available, only the repeal of Prohibition through the 21st Amendment had gone quickly; an amendment to outlaw child labor, although it had a great deal of popular support, had stalled after 33 states had ratified, and had never been adopted, a fact well-known to the administration.[11] In balancing options, a rational person could easily conclude that any proposed amendment might stall, and the relief the New Deal sought from hostile courts could be years in coming—if ever. In the meantime, every sign, every headcount, indicated that Congress would eventually accede to the president's request.

Roosevelt did make one mistake, when he justified his proposal as a means to make the courts, and especially the high court, more efficient. Chief Justice Charles Evans Hughes sent a letter to Senator Burton Wheeler (D-Mont.) declaring that the Supreme Court was up to date on its docket, and increasing the number of justices would not

enable the Court to work any more efficiently but would simply cause delay. "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." Many newspapers across the country treated the Hughes letter as front-page news, often printing it in full.

(If there is one criticism I have of this book, it is that Kalman does not treat in full the reaction of the justices—not just that to a man they opposed the bill, but that they actively let that opposition be known. The Hughes letter, for example, came about in part because Justice Louis D. Brandeis steered Wheeler to the phone to speak to the chief justice.[12] How effective the judicial opposition was can be inferred from Robert H. Jackson's comment to FDR after the fight that "the old man [Hughes] put it over on you."[13])

Yet, how effective was the Hughes letter? And how effective were the statistics privately supplied by Hughes to the *Washington Post* showing that the lower federal courts were no more backlogged because of aging justices than the Supreme Court?[14] Or to be more specific, how effective did the letter seem to the president and his allies? Michael Nelson believed it "had a powerful effect," and in 1943, Jackson declared that the letter "did more than any one thing to turn the tide of the Court struggle."[15]

Kalman, however, writes that the letter "did not end administration predictions of victory, halt calls for compromise, or transform public opinion." (165) Richard Friedman maintains that after the "first flurry of excitement" it was rarely discussed, and various Roper polls still showed a plurality of people supporting the bill, believing something had to be done to rein in the Court.[16] Here again, the facts available to Roosevelt and his close advisors made continuation of the fight perfectly logical. In the short run, she concludes "it does not seem that the Hughes letter mattered all that much." (166)

What followed closely upon the chief justice's letter may have mattered. On March 29, 1937, what many called "White Monday," the Supreme Court unanimously upheld the National Firearms Act as well as the revised Railway Labor and Frazier-Lemke Acts.[17] Opponents of the court bill immediately charged that the problem had never been the so-called "nine old men," but instead the New Dealers' sloppy bill drafting. The real shocker of White Monday, however, came with the Court's 5–4 reversal of a case they had decided the Term before.

In the earlier *Morehead* case, Owen J. Roberts had joined the Four Horsemen to strike down a New York State minimum wage law, resulting in a hue and cry from both liberals and conservatives. President Roosevelt charged that the decision created a "no-man's-land" in which neither federal nor state governments could act. Former president Herbert Hoover and most Republican newspapers also joined in denouncing the decision.[18]

Then in the fall of 1936 the Court heard another case dealing with the State of Washington's minimum wage law for women, a statute almost identical to the New York law. This time both Hughes and Roberts joined the three liberals—Brandeis, Stone, and Cardozo—to uphold the law.[19] A great deal has been written about this case as well as Roberts' vote,[20] but we are concerned here with how the administration reacted. Did these four decisions affect their evaluation of the situation? As one critic put it, now that Roosevelt had caught the train, why keep chasing it?

It seems that there was evidence aplenty that the opinions, even though they upheld New Deal measures, indicated weakness by the Court, as well as increased pressure to put FDR's bill through. Attorney General Homer Cummings noted that the shift of a single vote meant that the Constitution meant

something different on March 29, 1937 than it did on June 1, 1936. The *Herald Tribune* noted that if the *Parrish* decision had come a year earlier it would have had greater significance, "but now the political damage to the court has been done." The Washington Merry-Go-Round predicted that Roosevelt "seems sure of getting virtually what he wants." FDR allies such as Maury Maverick declared "we are getting along fine with our Supreme Court plans."

What did change was that both FDR supporters as well as opponents of the bill began talking about compromise, especially after the Court upheld the Wagner Labor Relations Act and government-supervised collective bargaining on April 12.[21] For supporters, with the Court finally paying attention to the real world, perhaps it wasn't necessary to put six more justices on the bench. Opponents said that if they sweetened the retirement package, the president would soon have vacancies. Why go through such an awful fight that, no matter who won, would weaken the court?

Today, we all know how the fight turned out, but in 1937, Kalman argues, "no one could be certain that the Court would not backtrack" after *Parrish* or the Labor Board decisions. After all, everyone had thought that the ultraconservative view of due process in *Lochner v. New York* (1905) had been dead and buried, but conservatives brought it back to life in *Adkins v. Children's Hospital* (1923).[22] Charles Wyzanski, who argued some of the labor board cases, believed that the pressure from the Court fight influenced the justices a great deal. Take that pressure away and no one could tell what the Court would do; after all, it still had the hard-core bloc of the Four Horsemen, and as had been made abundantly clear, all they needed was one more vote. Perhaps the battle had been won, but that certainly was not clear in the spring of 1937, and there were still important New Deal measures whose constitutionality had yet to be determined. A one-vote margin of victory was razor-thin, and "Roberts Land," FDR told reporters on April 16, was no safer than "No-Man's-Land." (186) Continuing the fight made sense.

Interestingly, many people did not really understand the Court very well, and although FDR hoped his fireside chats would serve as an educative seminar, reporters found that most Americans had little understanding of how the Court worked, or of its importance except when it impacted them personally, as farmers found out after the Court struck down the very popular Agricultural Adjustment Act.[23] Nonetheless, public opinion data found that a majority of Americans wanted change on the Court, with nearly two-thirds believing justices should have to retire at age seventy-five. Public opinion favored a more liberal court by a margin of six to four. (189–90)

Opponents of the measure, as well as some of Roosevelt's allies, began to seek a compromise that would end the fight. Looking back, perhaps this is the road that Roosevelt should have taken. He would have been able to name new blood to the bench, and instead of worrying that the Court would backtrack, he could have ensured that it remain friendly to New Deal measures. Moreover, nearly all of these proposals provided for full pay after retirement, a sure-fire lure to get at least two of the conservatives off the bench.

According to Kalman, though, the president and his advisors already had a number of bills in mind to expand the New Deal and were in no mood to compromise. They needed a Court that would not stand in the way of economic recovery. Postmaster General James Farley threatened to withhold patronage from any Democrat who failed to support the court plan, a step which apparently only stiffened the resolve of opponents. Yet, it is at this point that things went south.

Laura Kalman's *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism*, and Michael Nelson, *Vaulting Ambition: FDR's Campaign to Pack the Supreme Court*, offer different interpretations of the 1937 Court-packing episode. Kalman argues that there was enough positive evidence that FDR (pictured on the campaign trail in 1936) would win to justify his keeping up the nearly six-month battle, whereas Nelson claims that at every point an arrogant FDR ignored reality and made the wrong decision.

On May 18, Justice Devanter announced that he would take advantage of the newly enacted Sumners retirement bill and step down at the end of the Term. With one vacancy in hand, many supporters as well opponents of the measure believed that if the president was willing to compromise, he would still be able to get at least two more vacancies on the Court. A key would be whether the high court struck down Social Security as unconstitutional.

Then on May 24, the Court upheld the old-age pensions of Social Security by a vote of 7–2, with only Butler and McReynolds dissenting. It also sustained the unemployment insurance provisions by 5–4, and upheld a state unemployment compensation law, again by 5–4.[24]

It would seem that Roosevelt had won. For reasons that have still remained murky, Owen J. Roberts—who had voted against New Deal measures eleven times—had now joined Hughes and the three liberals permanently. Although many of his supporters urged the president to abandon the fight, FDR was not ready. "It was not certain," he said later, because "even with a liberal Court, the basic principle of ensuring a steady flow of new vigor and new intellectual approach into the personnel of the Court, would still be a sound one." The emergency that had led him to propose the bill, as far as he was

concerned, had not ended with the victory of Social Security. (207) He would, as Kalman claims, "come closer to victory than many expected." (208)

Then on June 14, the Senate Judiciary Committee voted the bill down by a 10–8 vote, and the majority attacked the proposal in blistering language. Saying nothing about the Court's decisions, it derided the bill as no better than a "temporary expedient," and within a short time an expanded Court would "become once more a court of old men, gradually year by year falling behind the times." The report attacked every reason the administration had given as a lie, and the measure should "be so emphatically rejected that its parallel never again will be presented to the free representatives of the free people of America."[25]

The vituperative wording of the report in some ways boomeranged, according to Kalman, giving FDR a legitimate reason to keep fighting. Talk of compromise ended after Senator Joe Robinson, who had been promised the first vacancy on the bench, dropped dead on July 15. Several senators opposed to the bill met the next day and admitted they did not have the votes to defeat it if it came to the floor. Right on up to the final floor vote—no matter what we now know—evidence existed that FDR could win, and so he carried on the fight. On Tuesday, July 20, the president's secretary Stephen Early wrote in his diary that "the belief was expressed today that this Court Bill is going to work out surprisingly and satisfactory to all concerned."

Two days later, on July 22, the Senate voted 70 to 20 to recommit the bill to the Judiciary Committee to draft procedural reforms for the lower courts. The 168 days had ended with what appeared to be a major defeat for Franklin D. Roosevelt.

One of the pleasures of Kalman's book is that it is illustrated, not by still photographs of the president and justices and members of the Senate, but by contemporary cartoons, which not only are more interesting (and more fun) but also buttress her argument that despite some setbacks, right up to the end it appeared Roosevelt would get his plan through.

Before going further, let us turn to the other book on the Court fight.

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Michael Nelson's **Vaulting Ambition** is the first in a new series from the University Press of Kansas, "Landmark Presidential Decisions," modeled after its highly successful series of "Landmark Supreme Court Decisions." According to David Congdon, the senior editor of the Press, all books will be short, with a maximum of 50,000 words. The Press has ten more volumes under consideration, including studies of George Washington's decision to step down after two terms, James Polk's annexation of Texas, and Dwight Eisenhower's interstate highway program. Nelson, a professor of political science at Rhodes College, is the editor of the series.

In some ways, Nelson's account seems to fall into the traditional story—Roosevelt, besotted by his great victory in the 1936 election, unwisely decides to take on the Supreme Court, and makes one mistake after another before the Senate vote in July finally killed the plan. On closer examination, however, Nelson is doing what Kalman does; he starts at the beginning and examines each step along the way. But where Kalman finds FDR making rational judgments that justify his actions, Nelson finds seven decisions to be wrong-headed and unjustifiable.

The seven decisions Nelson examines are:

1. Pack the Court—plus;
2. Present the Court-packing decision as something other than it was;

3. Take for granted the support of congressional Democrats;
4. Go public with a different justification for the court bill;
5. Attack the justices for acting politically, but underestimate their political savvy;
6. Do not compromise—until it is too late; and
7. Sacrifice the executive reorganization bill to campaign for the court bill.

Nelson also throws into the mix Roosevelt's plan to reorganize the executive branch, following the suggestions of a committee headed by public administration scholar Louis Brownlow. As FDR told Brownlow, "the primary object of the study should be to discover and invent ways and means to give the president effective managerial direction and control over all departments and agencies of the executive branch." (29–30) By itself, this would have been a major battle, since from the founding of the Republic Congress had considered it one of its prerogatives to determine the organization of the other branches. But Roosevelt had not consulted either the senior members of Congress or even his own Cabinet over the establishment of the Brownlow Committee or the provisions of the reorganization bill. A bill to reorganize the judiciary—again, one for which FDR did not consult with anyone except Attorney General Cummings—seemed to many people a bridge too far. Moreover, in presenting both bills, the president not only failed to solicit advice, but made it clear to congressional leaders that he was not seeking their opinion but informing them of what they had to do.

Looking back, we know that Roosevelt's explanation that the bill aimed at judicial efficiency and getting new blood on the Court was false. What he wanted, and according to Nelson it would have been better if he had come right out and said it, was that the Court was blocking reform and in doing so harming the American people. By the time he gave a Fireside Chat and spoke at a Democratic Party victory dinner in March, several weeks had passed and his new—and more honest—rationale that the Court was pulling against the people's will, seemed lame.

Kalman makes a strong case that Roosevelt relied on the magnitude of his 1936 election victory to justify his belief that the people approved of the New Deal and that the Democratic Party would recognize that the presidential victory had been the vehicle in which the super majorities in both houses had ridden to victory. Nelson believes this to be a mistake. FDR's success in getting all but one of his first-term legislative proposals passed by Congress led him—and many of his supporters as well as opponents—to believe him unbeatable.

Nelson and Kalman both make the point that many Americans, especially Roosevelt's opponents, worried that FDR's proposals, both on the judiciary and executive reorganization, mirrored steps taken in Italy by Mussolini and in Germany by Hitler. It did not help when Il Duce was quoted as endorsing America's "trend toward Fascism's idea of strong, central authority" or when the Nazi-controlled German press praised the Court-packing plan. Nelson makes more of a point of this and argues that the Senate was far more divided than many people, including FDR, believed. When several senators met with him at the end of February to suggest a compromise, Roosevelt laughed in their faces." He resolved to stick to his course and "let the opposition blow itself out."

Where Kalman claims that there was always sufficient reason for Roosevelt to push on, Nelson says that the president's assumption that Congress would support him blinded him to political realities. While most

Democrats agreed that something had to be done to allow the New Deal to pass constitutional muster, this did not translate into automatic support for the Court-packing bill. Many senators could not accept or even repeat FDR's initial false claim that all he was trying to do was improve judicial efficiency. When Roosevelt finally went public in his March 9 radio talk, most Americans still supported the bill, but a large number felt he should have been honest with them from the beginning.

As the situation deteriorated, and as the Court began to approve New Deal legislation, many Democrats suggested that it was time to abandon the court bill. According to Nelson, as late as June FDR could have negotiated a compromise, one in which he might have gotten at least two additional vacancies on the high court. But he refused to do so, and he lost not only on the court bill, but the antagonism he aroused doomed executive reorganization as well.

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So, who do we believe? Laura Kalman, who argues that at each step of the five and a half month fight there was enough positive evidence that Roosevelt would win to justify his keeping up the battle, or Michael Nelson, who claims that at every point FDR, due to his arrogance and ambition, ignored reality and made the wrong decision? The failure of the court bill would seem to support Nelson; in the end, Roosevelt lost. And yet . . .

Historians and political scientists every now and then run polls to determine who the best and worst presidents have been. In every one of them, the three top-ranked men have been George Washington, Abraham Lincoln, and Franklin Delano Roosevelt. While none of the three is perfect, historians seem to agree that Lincoln and Roosevelt were master politicians. (Political parties as we know them today did not exist in Washington's time, but he proved adept at negotiating political hazards in setting up the basis of government as we know it today.)

It is hard to believe that someone who so successfully negotiated the political hazards of both the Great Depression and World War II would be completely blind to the obstacles thrown against the court bill. While Nelson's characterization of Roosevelt as arrogant may be in some senses true, anyone who, as Disraeli put it, climbs the greasy pole, is to some extent arrogant. But being arrogant and ambitious does not necessarily blind one to political realities. Kalman makes, I think, a good case that Roosevelt read the situation accurately, although what is possible is that he failed to perceive that behind the overt support lay an opposition that would eventually overwhelm the effort. Nelson sees the opposition and places it up front, leading to inevitable failure. I am not so sure.

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Coda. The Court fight had consequences. Whether it led the justices to alter their view of New Deal measures is questionable. We shall probably never know the real reason that Roberts changed his mind, but the record shows that he voted on the *Parrish* case weeks before Roosevelt unveiled his plan. What is far more certain is that the appointments FDR made to the Court, starting with Hugo Black in August 1937, quickly provided the president with a majority that considered the administration's economic measures constitutional. "We lost the battle," he claimed, "but we won the war." The Court changed, he declared, "What a change!" (Nelson, 75)

But the Court fight gave new life to the near moribund Republican Party, and Roosevelt's efforts to purge the conservatives from the Democratic Party in the 1938 mid-term elections backfired. Not only did the Democratic numbers in both houses drop sharply, but Roosevelt would never again have the

control over the party and the Congress that he had enjoyed in his first term.[26] Congress passed the last of the New Deal measures, the Fair Labor Standards Act, in 1938.[27] Had World War II not happened, with the people electing Roosevelt to unprecedented third and fourth terms, one wonders whether he would enjoy the high ranking he has today.

While Nelson for the most part follows the traditional story of Roosevelt's reversal of fortune after the fight, Laura Kalman chooses to tell a different story, how all of the various strands of the Court fight led eventually to a new and dominant jurisprudence, the rise of Legal Liberalism.[28] But that is a story for another day.

ENDNOTES

[1] This is a view that still has its adherents. See James McPherson, **Battle Cry of Freedom** (1988); Paul Finkelman, **An Imperfect Union** (1981); and David M. Potter, **The Impending Crisis, 1848–1861**, completed and edited by Don E. Fehrenbacher (1979).

[2] Eric McKitrick, **Andrew Johnson and Reconstruction** (1960).

[3] The account in Melvin Urofsky and Paul Finkelman, **A March of Liberty**, 3rd ed. (2011), 2:763–771, I am pleased to say, takes an even-handed approach, noting that some scholars believe the whole plan was ill-considered, while some say that the plan had a better chance at success than many believed.

[4] **The Nine Old Men** (Garden City: 1936).

[5] How this narrative developed over the years is told in Kalman, **FDR's Gambit**, ch. 7.

[6] **Legal Realism at Yale, 1927–1960** (1986).

[7] **Abe Fortas: A Biography** (1990).

[8] **Yale Law School and the Sixties: Revolt and Reverberations** (2000); **Right Star Rising: A New Politics, 1974–1980** (2010).

[9] Blum published **The Republican Roosevelt** (1954), which was not a traditional biography of TR, but a collection of essays about him and his programs. It was the model for the first book I wrote about Brandeis, **A Mind of One Piece: Brandeis and American Reform** (1971).

[10] In the Senate, Democrats controlled seventy-five of the ninety-six seats, and twelve freshmen had to sit on the Republican side of the aisle. The Republicans, however, made a very smart tactical decision. Recognizing they did not have the votes to kill the bill and that many Democrats opposed it, they decided to remain silent and let the Democrats fight it out amongst themselves. In addition, the Democratic leadership of the House chose to let the Senate take the lead and wait to see how the vote turned out in the upper chamber before having to act on it.

[11] The proposed amendment had sailed through Congress; the House passed it by a wide margin on April 26, 1924, and the Senate, also by a wide margin, on June 2. From 1924 to 1932 only six states ratified. The Depression led other states, some of whom had rejected it earlier, to ratify. But by February 1937, fifteen states, mostly in the South, had still not ratified and the amendment was considered dead. See David E. Kyvig, **Explicit & Authentic Acts: Amending the U.S. Constitution, 1776–1995** (1996), 254–61, 307–13.

[12] The full extent of the justices' actions can be seen in William E. Leuchtenburg, "The Nine Justices Respond to the 1937 Crisis," *Journal of Supreme Court History* 22 (1997) 55.

[13] According to Jackson, the president did not deny it. Leuchtenburg, "Nine Justices," 72, citing Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** (1958), 117. John Q. Barrett, a leading Jackson scholar, suggests the story may be apocryphal.

[14] Nelson, **Vaulting Ambition**, 66. To be sure, the *Post* reported, thirty-four district courts were overworked, but only four of them had judges over seventy. At the time, FDR was seeking confirmation to the Tenth Circuit for Robert L. Williams, aged sixty-eight.

[15] Nelson, **Vaulting Ambition**, 66; Robert H. Jackson, "Justice Jackson Speaks of Brandeis," *A.B.A. Journal* 29 (1943) 424.

[16] Richard Friedman, "Chief Justice Hughes' Letter on Court Packing," *Journal of Supreme Court History* 22 (1997), 76, 83. For the various Roper polls see Kalman, 360 n.77

[17] *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Virginia Railway Co. v. Railway Employees*, 300 U.S. 515 (1937); and *Wright v. Vinton Branch*, 300 U.S. 440 (1937).

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

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

[20] See, for example, William E. Leuchtenburg, **The Supreme Court Reborn** (1995), ch. 6, "The Case of the Wenatchee Chambermaid."

[21] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

[22] *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[23] *United States v. Butler*, 297 U.S. 1 (1936). The Court later upheld the second Agricultural Adjustment Act in *Mulford v. Smith*, 307 U.S. 38 (1939).

[24] *Helvering v. Davis*, 301 U.S. 619 (1937) (old-age insurance); *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937) (federal unemployment insurance); and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) (state unemployment insurance).

[25] U.S. Senate, Committee on the Judiciary, 75th Cong., 1st Sess., "Reorganization of the Federal Judiciary," S. Rep.711 (1937).

[26] The GOP picked up eighty-one seats in the House and eight in the Senate. Although Democrats still controlled Congress, FDR had far less support than he had had previously.

[27] Upheld unanimously in *United States v. Darby,* 312 U.S. 100 (1941). There were, of course, some minor measures; see Kenneth S. Davis, **FDR: Into the Storm, 1937–1940** (1993). Many people consider the last great New Deal measure to be the G.I. Bill of Rights, also known as the Servicemen's Readjustment Act of 1944.

[28] The story is fully told in Laura Kalman, **The Strange Career of Legal Liberalism** (1996).

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Illustrations

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Cover Image: Helen H. Taft and William H. Taft at the White House, 1921. Harris & Ewing, photographer.