University of Pennsylvania
Law Review
FOUNDED 1852

Formerly
American Law Register

VOL. 148 APRIL 2000 NO. 4

ARTICLES

THE HISTORY OF THE COUNTERMAJORITARIAN DIFFICULTY, PART FOUR: LAW'S POLITICS

BARRY FRIEDMAN†

† Professor of Law, Vanderbilt University; Visiting Professor, New York University School of Law; A.B. 1978, University of Chicago; J.D. 1982, Georgetown University Law Center. I am deeply grateful for all the help I received with this project. Many colleagues read the manuscript or discussed the project with me; at the risk of forgetting someone, my thanks to Amy Adler, Louis Anthes, Yochai Benkler, Robert Burt, Erwin Chemerinsky, Jesse Choper, Barry Cushman, Neal Devins, Norman Dorsen, Chris Eisgruber, John Goldberg, Sally Gordon, Mark Graber, Helen Hershkoff, Vicki Jackson, Felicia Kornbluh, Larry Lessig, Scott Messinger, Henry Monaghan, Bill Nelson, Burt Neuborne, Julie Novkov, Eric Orts, Ed Purcell, Robert Pushaw, David Shapiro, Ted White, and Nick Zeppos. Special gratitude goes to those with the fortitude or kindness to stick with this project no matter how many times I approached them: Michael Dorf, Laura Fitzgerald, Mark Graber, Laura Kalman, Michael Klarman, and Larry Kramer. Many generations of research assistants had an able hand in this, spending many hours with the sources. Thanks to Elizabeth Blackwell, Randy Butterworth, Kenneth Edwards, Rebecca Hale, Tom Keating, Darren Lisitza, Laura Maines, and Eric Rogers. The librarians at Vanderbilt Law School have again outdone themselves; for their steady support I cannot offer enough thanks. The Article benefited from workshops at

INTRODUCTION: THE SEPARATION OF LAW AND POLITICS

We like to imagine that law operates in a world separate and apart from that of politics. We expect that judges will decide cases based on the facts and existing precedents, rather than on the preferences of those in power.[1] We understand that each judge may see a case differently based on life experience, and we recognize that politics influences the selection of the judges.[2] But that is where the influence of politics on judicial decision making is supposed to end.[3] We disdain the notion of judges rendering decisions under the threat of political retribution.[4] Article III's tenure and salary guarantees for federal judges are the constitutional embodiment of this value of judicial independence from political pressure.[5] When we speak of the rule of

---

Vanderbilt, the University of Pennsylvania, and the Legal History Colloquium at New York University, as well as from panel discussions at one or more Law and Society, and American Political Science Association meetings. Generous and essential support was provided by Vanderbilt Law School, New York University Law School, and the Vanderbilt University Research Council, and the project itself benefited—as I have said before—from my time at the Rockefeller Foundation Study Center in Bellagio.

[1] Don Herzog tackles what we mean by the distinction between law and politics, in the course of which he explains the fundamental conflict between positivist and liberal views of law. *See generally* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 110-47 (1989). Herzog explains:

> We could again cast the point as a matter of insulating law from the daily exigencies of politics. Or we can think of the point in terms of selective blindness. Judges should pay no attention to whether litigants are kingly or common; jurors should ignore the government's desires in deliberating and ruling....

Id. at 129.

[2] *See* STEPHEN L. CARTER, THE CONFIRMATION MESS ix-xi (1994) (criticizing the confirmation of Supreme Court Justices as overly politicized because they focus too much on the nominee's views on controversial legal issues); *see also* Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 930 (1995) (reviewing STEPHEN L. CARTER, *supra*) (criticizing recent Supreme Court confirmations as a rubber stamp of approval applied without ascertaining a nominee's views).

[3] Judges' political and extra-judicial activities are limited to reduce conflict with their judicial office and to avoid the appearance of impropriety. *See* AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT 5-7 (1998).

[4] *See* HERZOG, *supra* note 1, at 128 ("[L]egal interpretation may not be principled if judges are haunted by the fear that they will lose their jobs if they displease the powerful.").

[5] *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their continuance in office."); *see also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (finding that the purpose of judges' tenure and salary protection is to ensure independence of the judicial branch); Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 113 (1997) ("The conventional wisdom is

law—at home and abroad—this is in large part what we mean.[6]

Concern about the separation of law and politics has made a battleground of 1937.[7] In that year, while Franklin Roosevelt's threat to "pack" the membership of the Supreme Court was still pending, the Court appears to have done an about-face.[8] Prior to the "switch in

---

that Article III judges have the greatest independence because of the assurance of life tenure and the protection against decreased salary."). *See generally* Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, JUDGES' J., Winter 1997, at 4 ("Judicial independence [is] the ideal and lodestar that undergirds the American judicial system . . . .").

[6] As Christopher Larkins explains the matter:

> The courts' enjoyment of judicial independence will be important to the proper operation of any constitutional democracy, as it allows them to act as an institutional mechanism to safeguard the rule of law. This is especially the case for those countries undergoing processes of democratization, where institutionalizing respect for the rule of law is of utmost importance.

Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 625-26 (1996). We also mean that compliance with judicial decisions will not turn on agreement or disagreement with them. *See* Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 968-69 n.70 (1978) ("Fulfillment of the duty [of the Executive to back up judicial orders] does not depend upon agreement with the court orders.").

[7] Perhaps the single best exposition of the relationship among New Deal intellectual thought, New Deal events, post-New Deal developments, and persistent concern about the separation of law and politics is Michael Seidman and Mark Tushnet's book, *Remnants of Belief*. Seidman and Tushnet explain that although legal realism was a central tool in removing judicial review as an obstacle to economic regulation, realists already experienced anxiety about the separation of law and politics. This anxiety only increased when, in the wake of the New Deal, the Supreme Court engaged in active judicial supervision in the area of individual rights, while eschewing it with regard to economic regulation. Because no satisfactory answer to this problem has presented itself, anxiety persists. *See* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 31-39 (1996) (discussing the concern of realists over law's slide into politics). G. Edward White identifies the New Deal switch of the Court as the seminal point for adopting the political "it depends on the judge" perspective. G. Edward White, The Constitution and the New Deal 281-82 (2000) (unpublished manuscript on file with the *University of Pennsylvania Law Review*). Thurman Arnold captured the anxiety about the separation of law and politics present even on the eve of the Court-packing plan, describing the central role of law as a symbol of stability: "It saves us from the mob, and also from the dictator." THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 35 (1935) [hereinafter ARNOLD, SYMBOLS]. Then, in a prescient story, Arnold told of a Latin American country in which a "lawless executive" ordered a court-martial of some students implicated in a bombing. *Id.* at 43. The students' attorneys challenged the jurisdiction of the court-martial and were told to withdraw the motion: "[T]he Government had no objection to allowing the fullest defense," but "consequences" to the attorneys would follow if the motion were not abandoned. *Id.* Arnold observes of the executive: "He controlled the courts, yet he could not help believing that he did not control the law." *Id.*

[8] *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 216 (1995) ("In the spring of 1937, though, in the midst of the controversy over President Roosevelt's Court-packing message, the Court began to execute an astonishing about-face."). A

time that saved Nine,"[9] the Court invalidated a number of New Deal measures, one after another.[10] After the switch, the Court removed itself as an obstacle to economic legislation,[11] even as it gradually found a new role scrutinizing legislative enactments that threatened individual liberty.[12] Ever since the New Deal, commentators have debated whether the change was a result of political pressure,[13] or

---

recent revisionist account of the New Deal argues that there was no dramatic doctrinal shift. Rather, revisionist scholars argue, the seeming change in 1937 was the product of gradual doctrinal changes. Moreover, early New Deal legislation was struck, according to revisionists, because of poor draftsmanship. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 36-39 (1998) [hereinafter CUSHMAN, RETHINKING]; Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Decisions from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 146 (1992) [hereinafter Cushman, *Stream*]; Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 240 & n.16 (1996) (citing other sources for this argument); *see also* Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. SUP. CT. HIST. 79, 80 ("[I]n ways that Roosevelt apparently did not fully appreciate . . . the court was in fact . . . seeking to formulate solutions to the economic crisis of the 1930s."). For a view *dubitante*, see LEUCHTENBURG, *supra*, at 231-32 (arguing that neither the New Deal's "draftsmanship" nor the government's arguments before the Court can be said to have had a dispositive effect).

[9] Professor Philip Bobbitt and Roosevelt biographer Kenneth S. Davis credit Thomas Reed Powell with this phrase. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 39 (1982); KENNETH S. DAVIS, FDR: INTO THE STORM 1937-1940, at 81 (1993). At least three other variations exist. Joseph Alsop takes credit for the phrase "a switch in time saves nine." JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 135 (1938) [hereinafter ALSOP & CATLEDGE, THE 168 DAYS]. Leonard Baker credits Abe Fortas with the expression "the switch in time that serves nine." LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 174 (1967) (citing *High Court Assailed at Labor Institute*, N.Y. TIMES, June 15, 1937, at 19). Laurence Tribe credits Fortas with the more familiar, "the switch in time that saved the nine." LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 66 (1985). Professor Gerald Gunther and *The Oxford Dictionary of American Legal Quotations* also quote the phrase as "[t]he switch in time that saved the Nine." GERALD GUNTHER, CONSTITUTIONAL LAW 478 (13th ed. 1997); FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 393 (1993). Neither identifies the originator of the expression.

[10] *See* LEUCHTENBURG, *supra* note 8, at 215 ("The Supreme Court during these months frequently went out of its way to frustrate the Roosevelt administration."). See *infra* Part I.A for a discussion of these events.

[11] *See* LEUCHTENBURG, *supra* note 8, at 220 ("Beginning in 1937, the Supreme Court upheld every New Deal statute that came before it."); *see also id.* at 219 ("From 1937 on, the relationship among the branches of government shifted dramatically, as an era of 'judicial supremacy' gave way to deference by the Supreme Court to Congress. The New Court committed itself, at least in the realm of social welfare legislation, to the doctrine of judicial self-restraint. . . .").

[12] Writing in 1941, constitutional scholar Thomas Reed Powell explained: "Our new Supreme Court has, however, pointed to a distinction between judicial protection of economic interests and judicial protection of civil and political liberties." Thomas Reed Powell, *Conscience and the Constitution*, *in* DEMOCRACY AND NATIONAL UNITY 19 (William T. Hutchinson ed., 1941).

[13] An alternative account of political pressure is provided in Drew D. Hansen, *The*

whether the doctrinal change was unrelated to the threat of retribution that preceded.[14]

Among legal academics, New Deal historiography is again the rage[15]—and with good reason. New Deal commitments that have shaped the structure of American law and politics for the last sixty years show signs of crumbling.[16] Recent federalism and economic liberty decisions suggest greater supervision by the Supreme Court in areas long seen to be taboo.[17] Signs of this shift occur amidst renewed concern about the legitimacy of constitutional change that the New

---

Sit-Down Strikes and the Switch in Time, 46 WAYNE L. REV. (forthcoming June 2000). Hansen argues that the Court switched direction in response to the widespread sit-down strikes in the early months of 1937.

[14] As David Pepper recently explained, "much has hinged on the historical debate over the New Deal's 'switch' in time," including the "Court's status vis-à-vis popular politics" and "deeper questions of constitutional and democratic theory." David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 64 (1998); *see also* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 290-92 (1998) ("For legal realists, the political character of the centrists' 'switch in time' in 1937 is painfully apparent. For shocked legalists . . . [t]he so-called switch in time was not the product of politics, but the result of the law working itself pure."); G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 907 (1997) ("Thus the challenge is to advance an explanation for the constitutional 'revolution' that abandons the Court-packing crisis as a causative element."). A catalogue of the many works adopting the political view of the switch appears in Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 202 n.1 (1994). Discussions of, and citation to, the literature offering a legalist explanation for the apparent switch appear in Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994), and Pepper, *supra*, at 65-67 & nn.9, 10 & 15. For further discussion of the question whether the Court switched, see *infra* notes 361-64 and accompanying text.

[15] There is a flood of recent New Deal scholarship, some of it in response to recent events (or acknowledging the possible significance of them) and some longer in the making. For examples of New Deal scholarship with an eye on current events, see 2 ACKERMAN, *supra* note 14, at 258 ("With the Republican takeover of Congress in 1994, New Deal premises are an object of sharp legislative critique."); Devins, *supra* note 8, at 237 (observing that recent Supreme Court decisions "may soon give New Deal naysayers another nail to hammer into the coffin of Franklin Delano Roosevelt's increasingly beleaguered legacy").

[16] In addition to legal decisions, *see infra* note 17, there are political events that suggest this shift as well. For discussions of these events, see, for example, Larry Kramer, *What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 931-33 (1996) (arguing that current political activity appears to be a movement to devolve power from the federal government back to the states). *But see* Richard B. Stewart, *Evaluating the New Deal*, 22 HARV. J.L. & PUB. POL'Y 239, 240 (1998) ("[T]he likelihood of the courts drastically altering the regulatory landscape is slim.").

[17] *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498, 538 (1998) (relying on the Takings Clause to strike down congressional economic regulation for the first time since the New Deal); United States v. Lopez, 514 U.S. 549, 552 (1995) (striking down a congressional enactment as exceeding power under the Commerce Clause for the first time in sixty years).

Deal represents,[18] even though long acquiescence perhaps ought to have put such concerns to rest.[19]

The thesis of this Article is that if one is concerned about judicial independence from politics it may be more profitable to examine popular reaction to Supreme Court decisions, rather than the common approach in New Deal scholarship of investigating the Supreme Court's reaction to popular politics. Most accounts of the events of 1937 center on the question whether the Supreme Court shifted ground in response to the direct threat to its independence embodied in the Court-packing proposal, or whether there is another less political explanation for the Court's doctrinal change.[20] This question is probably unanswerable.[21] More important, it is of dubious value in re-

---

[18] *See, e.g.*, 2 ACKERMAN, *supra* note 14, at 280 ("Should the Roosevelt revolution be viewed as a constitutive act of popular sovereignty that *legitimately* changed the preceding Republican Constitution?"); *id.* at 344 ("I mean to raise a question of legitimacy."); Pepper, *supra* note 14, at 65 ("Put simply, every theory of constitutional law must contend with and account for 1937.").

[19] *See* Kramer, *supra* note 16, at 912 ("One might have thought the legitimacy of the New Deal settled, by acquiescence if by nothing else . . . .").

[20] For example, Barry Cushman's project is to provide a legalist or doctrinal explanation for the shift while raising questions about the political account. *See* CUSHMAN, RETHINKING, *supra* note 8, at ch. 1. Richard Friedman attributes the transformation in constitutional law to political appointments; the events of 1937 in particular are the result, he argues, of the appointments of Chief Justice Hughes and Justice Roberts. *See* Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1895-96 (1994). William Leuchtenburg's account is a political one. *See* LEUCHTENBURG, *supra* note 8, at 236. Michael Ariens takes aim at one part of the legalist account, Justice Roberts's explanation of the switch, as explained by Justice Frankfurter. *See* Ariens, *supra* note 14, at 623-24 (focusing on Justice Frankfurter's revisionist history of Justice Roberts's 1937 shift). For a very recent response to the legalists, see Pepper, *supra* note 14, at 66.

[21] *See, e.g.*, ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 140-41 (discussing speculation as to Justice Roberts's motives and concluding that "[t]hese are questions which cannot be answered"); CUSHMAN, RETHINKING, *supra* note 8, at 32 ("All of these theories have at least some facial plausibility . . . . [T]hese conjectures cannot be conclusively disproved on the evidence available."). Alsop and Catledge go on to provide a "political" guess as to what motivated the Court, *see* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 141 ("It seems probable, in the first place, that all the justices realized that their only chance to save the Court lay in more self-reversals."), while Barry Cushman provides a legalist one, *see, e.g.*, CUSHMAN, RETHINKING, *supra* note 8, at 32 ("The opinions themselves offer *legal* reasons for the results reached . . . ."). "Political" or "external" accounts attribute changes in law to the pressure of outside events. "Legal" or "internal" accounts focus on the doctrine, debating whether a shift occurred in 1937, or whether those decisions were imminent in pre-existing doctrine. *See id.* at 4 ("This conceptualization of the decisions of 1937 in externalist terms, as a political response to political pressures, has deflected scholars from inquiry into the plausibility of an internal—legal and intellectual—component to a more comprehensive explanation of the New Deal Court."). Both sets of stories contain much that is

vealing much about the future of judicial independence or the rule of law. After all, examinations of this question inevitably focus on whether one or two Justices switched their votes on critical issues in light of the specific events of the day.[22] It would be very difficult to generalize from this account to different times and different judges.

But what if we reversed the question, and instead tried to understand the *public's* response to the *Supreme Court*?[23] The premise here is that ultimately the separation of legal decision making from political action depends not only on what courts do in response to the measures that threaten them, but more importantly on what degree of freedom and independence the public generally is willing to extend to courts.[24] This, in turn, depends at least in part upon deeper strains

---

persuasive, but also many holes that simply cannot be plugged conclusively. Thus, there are critics of each approach. *See, e.g., id.* at 33-34 (explaining why "a purely political model, particularly a class politics model, can adequately account neither for the behavior of the New Deal Court as an institution, nor for the behavior of individual justices"); Kramer, *supra* note 16, at 928 n.120 (commending Cushman's work, but stating: "It is, nonetheless, implausible to explain these developments entirely as a product of internal legal debate. Competing arguments and conflicting lines of authority were always available, and . . . choices among these can only be made by looking outside the legal briefs.").

[22] *See, e.g.*, Friedman, *supra* note 18, at 1935-74 (examining in detail the votes of Hughes and Roberts in the 1936 and 1937 cases which gave rise to the claim that a "switch" had occurred).

[23] To some extent Bruce Ackerman takes on a similar assignment. His account of the New Deal transformation focuses at least as much attention on popular reaction to judicial decisions as it does on the Court's reaction to the Court-packing plan:

> To put my thesis in terms of a single (if much abused) word, the reigning myth is insufficiently dialectical. It focuses on each No handed down by the Supreme Court without trying to understand how these rejections helped shape the subsequent Yeses by the New Dealers in Washington and the American people at large.

2 ACKERMAN, *supra* note 14, at 313. The difference is that Ackerman still is developing a normative theory of why constitutional law was transformed in 1937 and thereafter. *See id.* at 280 (arguing that the Court was in all sincerity attempting to merely interpret the Constitution). This search for a normative theory to legitimize the transformation of constitutional law is common to much recent scholarship. *See, e.g.*, Kramer, *supra* note 16, at 921-30 (explaining the transformation as purposefully incremental, except for the Court's panic in 1935); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 443-72 (1995) (explaining the transformation as a faithful "translation" of prior doctrines in light of changing background understandings); White, *supra* note 14, at 870-71 (explaining the transformation as an interpretive shift to living constitutionalism, followed by an epistemic shift to the notion of judging as will and not law).

As explained *infra* at notes 395-403 and accompanying text, the account given here is descriptive, not normative, although it does have some implications for the normative inquiry.

[24] This approach, less common in legal scholarship, finds some affinity with political science scholarship. For a sample of political science literature focusing on public

of cultural thought regarding democracy and constitutionalism.[25] This Article thus is a historical examination of the strains of thought present in American society that operated separate and apart from direct political retribution, but appear to have influenced both Roosevelt's choice of the Court-packing remedy and its ultimate demise. The story told here zooms the camera out from the specific events of early 1937, to provide a more panoramic view of the culture in which those heated politics occurred. The focus is on broad social, cultural, and political understandings in the 1930s regarding the operation of democracy, the role of courts in that democracy, and the determinacy of constitutional meaning. These imbedded understandings provide a way to understand the events of 1937 as something more than either a threat of political retribution or simple doctrinal change. They also provide insight into how we have come to understand the rule of law the way we do.

As this Article explains, the battle in 1937 over the Court-packing plan was a collision between embedded notions of judicial supremacy and equally strong feelings that contrary to judicial rulings—and to prior conceptions about American democracy—the national government must have the power to deal with the Depression. These views were reconciled by recognizing that the Constitution was "living" or "elastic" enough to permit government the necessary power. The institution of judicial review was not perceived to be the problem (as it had been at other times in history); rather, it was the Justices themselves who were seen as out of touch with present needs. Thus, Court-packing made some sense as a remedy, because it involved a change in personnel without tampering with the institution of judicial review it-

---

support for the Supreme Court, and identifying factors that go into that support, see WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS (1973); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992); and Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court, in* CONTEMPLATING COURTS 356-57, 370 (Lee Epstein ed., 1995). GERALD ROSENBERG, THE HOLLOW HOPE (1991) goes beyond simply assessing public reaction to courts, to examine the extent to which court decisions actually are implemented. For an extremely helpful piece examining the impact of Supreme Court actions on public willingness to support the Court-packing plan, see Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1139-40 (1987) ("The argument is disarmingly simple: the justices themselves helped to shape events and build up institutional support with a series of well-timed decisions.").

[25] A recent study of public reaction to the Supreme Court supports this proposition. *See* Caldeira & Gibson, *supra* note 24, at 652 (arguing that support for the Supreme Court as an institution can be predicted by examining broader public values such as commitment to liberty or democratic norms).

self.[26]

The plan failed, however, because Roosevelt mistook the strength of two dominant ideas. First, he grossly underestimated public acceptance of judicial independence and supremacy. More important, he failed to understand that while the public was willing to cede power to the national government—and particularly to the Executive—to address the crisis, many also worried about the threat to civil liberty this might represent, a problem made apparent in the growth of totalitarian governments abroad. Thus, as the national government and Executive authority grew, the people resisted a fundamental change in the one institution they charged with protecting individual liberty—the courts.[27]

This examination of popular attitudes toward judicial review during the crisis of 1937 also provides insight into *the* central concern of the academy regarding the doctrinal change that occurred in the wake of the defeat of the Court-packing plan. Since 1937, the legal academy has struggled to resolve the apparent double standard reflected in the contrast between the Court's post-New Deal abdication of supervision of economic legislation and the more aggressive protection of individual liberty reflected in the famous footnote four of the *Carolene Products* decision. The standard account suggests judges erred in the pre-Court-packing period by imposing their own values on the Constitution.[28] But if imposing judicial values was inappropriate with regard to economic liberties, what possibly justified intrusive judicial decision making with regard to noneconomic, or "individual" liberties?

Although no single answer can resolve this difficult problem, it is worth observing that the Court's shift in doctrinal direction bears remarkable resemblance to a similar shift in the strains of political thought present at the time of the switch. In other words, the post-1937 constitutional regime mirrored deep social understandings about constitutional liberty and the role of the Supreme Court.

This Article thus is a comment on the legitimacy of constitutional

---

[26] See *infra* Parts I-I.A for a detailed account along these lines.

[27] See *infra* Parts I.F.1—.F.2 for a detailed account of this point.

[28] This problem is explained simply and with force in SEIDMAN & TUSHNET, *supra* note 7, at 35-39. The book discusses some of the possible theories offered to resolve the problem, finding none of them to be successful. The genesis of concern with the "double standard" is described in Barry Friedman, The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession 2-3 (Feb. 11, 2000) [hereinafter Friedman, Academic Obsession] (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

change. As used here, however, "legitimacy" takes on a special and specific meaning. There is already an enormous body of constitutional scholarship given over to the question of the legitimacy of constitutional change,[29] most of it theoretical and normative in nature. In contrast, this Article suggests legitimacy may be "empirical" as well.[30] The claim here is that in order to survive, a constitutional regime must tap into, and bear some consistency with, deeper public or social understandings of how that regime should be. This consistency with social understandings may not be a sufficient condition for legitimacy; the suggestion here is that it is a necessary one.[31]

There is a central lesson to this study, one that weaves together concerns about the separation of law and politics, and the legitimacy of constitutional change. This lesson is that law and politics *are* intertwined, but at a remove. In the rough and tumble of American politics, courts inevitably will be subjected to political pressure when judicial decisions are unpopular. Yet, what may matter most to judicial independence are deeper public sentiments about the role of judicial review itself.[32] It is not the specific retributive proposals that matter, but their likelihood of success. This depends in part, but only in part, on what the Court actually is doing at any moment. Equally important are broader social attitudes toward democracy and constitutionalism.

---

[29] *See, e.g.*, 2 ACKERMAN, *supra* note 14, at 4 (examining the validity of constitutional change through "an extra-ordinary process of definition, debate, and decorum"); Lessig, *supra* note 23, at 395 (proposing a theory to elucidate "how new readings of the constitution may maintain fidelity with past understandings of the document's meaning and purpose"); *see also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5-6 (1998) (offering, as an alternative to "anachronistic originalism" and "non-historical living constitutionalism," a theory that "takes *all* of our constitutional history into account").

[30] *See* Eric W. Orts, *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, 6 RATIO JURIS 245 (1993) (exploring the notion of legitimacy as an empirical issue).

[31] The Article argues in conclusion that these two understandings of legitimacy necessarily are related, but one need not have any sympathy for a normative account of popular legitimation of constitutional change to accept the descriptive account offered here.

[32] There is some disagreement in the political science literature on this point. For some time the view had been that general (or "diffuse") support for the Supreme Court as an institution varied in response to the reaction to specific decisions. *See, e.g.*, MURPHY, *supra* note 24, at 45-47. Even here, however, the relationship was not overwhelming. *See id.* at 46-47. Caldeira and Gibson recently concluded, however, that the connection between the *general public's* views of specific decisions and their general support for the Court was thin indeed. *See* Caldeira & Gibson, *supra* note 24, at 636, 642. Nonetheless, Caldeira and Gibson find a closer relationship between specific decisions and general support among "opinion leaders." *Id.* at 656.

Of course, there will be some symbiotic relationship between what the Court is doing and social attitudes about judicial review. But even here what matters most may be the Court's work over the long term, not any specific decision or body of decisions.[33]

A word is in order at the outset about the constant refrain here regarding "the public." Historians in particular are wary of broad assertions about "public" thought.[34] Is the "public" discussed here really the general public, or is it some subset of political elites, intellectual elites, or the "thinking public"? It may seem entirely plausible, for example, that elite views shifted in the 1920s and 1930s from an understanding of a static to a living Constitution, but can it be said that the general public even was paying attention, let alone that it held such a "sophisticated" perspective?

These questions need not necessarily be answered, because the story told here works whether it is understood as reflecting only elite views *or* those of the broader public. In other words if a reader believes this historiography captures only some set of elite views, then the causal story still ought to stand: all that one concludes, at that point, is that it is elite views that matter, that drive and protect judicial independence and the rule of law.

Nonetheless, this story *is* the people's story. Much of the commentary and actions discussed here are those of the general public. The New Deal fight provoked tremendous popular engagement.[35] Congress and the President were swamped with mail, much of it from ordinary citizens.[36] These citizens may have been swayed to write by

---

[33] This is not to suggest what the Court does in individual cases is irrelevant, a proposition that would border on the ludicrous. For elaboration of the view that the Court does not have an inexhaustible reserve of "institutional capital," see JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 129-70 (1980).

[34] Kramer, *supra* note 16, at 895-96 (observing that Ackerman's discussion of a "collective understanding" actually privileges the "professional narrative . . . of lawyers and judges" over that of the "general population").

[35] Ackerman's and Leuchtenburg's accounts make this plain. Leuchtenburg's book, in particular, contains a flood of quotations from citizens writing letters to politicians and the media. LEUCHTENBURG, *supra* note 8, at 136.

[36] *See, e.g.*, ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 72 ("[L]etters and telegrams, nine to one against the plan, began to pour in on a frightened Congress . . . [and] the shrieks of the editorial pages deepened to a roar of protest from all over the country."); LEUCHTENBURG, *supra* note 8, at 98-99 (quoting Secretary of the Interior Harold Ickes as saying: "[t]he President said that word is coming to him from widely separated parts of the country that people are beginning to show a great deal of interest in the constitutional questions that have been raised by recent Supreme Court decisions"); *id.* at 134-35 ("Constituents inundated members of Congress with communications on the Court bill . . . . [and one Senator said,] 'it has been impossible to

elite-driven interest groups,[37] but write they did. Elites did not burn Supreme Court Justices in effigy, ordinary citizens did.[38] Elites did not write all the angry letters to the President about the Court, many ordinary citizens did. Ordinary citizens also lambasted the Court-packing plan and expressed serious concern about tampering with an independent judiciary. Media coverage of the events was fierce. Popular opinion shifted in response to political events, and political tides shifted quickly with popular opinion—perhaps the first demonstration of a phenomenon of politicians driven by polls and public opinion that has become so prominent today.[39]

Even the "elite" views quoted here might well have reflected popular sentiment. Politicians and those in the media are both opinion leaders and opinion followers. There are obvious mechanisms that tie together "elite" and "public" views, making any such division—especially during the highly politicized times discussed here—quite impossible. The rich literature on policy entrepreneurs and the development of public opinion give every reason to believe that many of the "elites" quoted here were mediating forces between popular opinion and political action.[40]

Part I is the heart of the Article. Part I.A introduces this study of the New Deal by asserting that criticism of courts during the New Deal differed in an important way from criticism during the *Lochner* era. The traditional story of the events that culminated in 1937 errs in conflating these two periods. Differing criticisms of courts during these periods reflected changing notions of democratic governance, judicial supremacy, the role of courts, and the determinacy of the Constitu-

---

even read one-third, much less answer them.'"); Caldeira & Gibson, *supra* note 24, at 1143 (discussing the correlation between the number of stories in the *New York Times* and *Reader's Digest* on the Court in 1937 as indicating that elites and non-elites were following the story).

[37] *See* LEUCHTENBURG, *supra* note 8, at 137 (describing the influence of Frank Gannett's National Committee to Uphold Constitutional Government in motivating letter-writing campaigns).

[38] *See infra* note 89 and accompanying text (describing the public reaction to the Supreme Court's actions).

[39] *See* JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-1939, at 99 n.76 (1967) (citing a study indicating that Senators' votes reflected state polling data); Caldeira, *supra* note 24, at 1142-50 (examining shifting public opinion in response to the events of 1937).

[40] One study of New Deal voting indicated that Senators' votes almost invariably reflected "home state sentiment." PATTERSON, *supra* note 39, at 99 n.76; *see also* LEUCHTENBURG, *supra* note 8, at 135 (relating how one Senator overwhelmed by the mail pleaded for "some relief" and stated, "I feel fully informed of the wishes of my constituents").

tion between the time of *Lochner* and 1937.

Parts I.B through I.F then turn to history. After Part I.B provides a brief review of the tumultuous events of the New Deal crisis, Part I.C elaborates upon the claim that criticism of courts during the New Deal was not the same as criticism leveled during the *Lochner* era. Part I.D explains changing social views regarding democracy and constitutional determinacy. Part I.E demonstrates that together, these shifting views explain why criticism of courts in the 1930s differed during the two eras, and why Court-packing seemed the logical way to eliminate the Supreme Court's challenge to the New Deal. Despite logic, the plan failed, of course. Part I.F discusses two further sets of social and cultural understandings, those relating to judicial supremacy and those relating to the independent role of courts in society, which provide some reason why. Taken together, these social understandings can account for much of what happened in 1937. They also point to the direction of the Supreme Court's doctrinal shift, both in the short and the long term.

Part II identifies the lessons we can learn from this history. There are two in particular: one relating to the separation of law and politics, and the other to the legitimacy of constitutional change following the Court-packing plan.

As to the separation of law and politics, this history suggests that although politics (loosely defined) inevitably has some impact on the Court, that occurs at a remove. Looking at the events of 1937, this Part concludes that if the Court had continued its recalcitrant stance, action might have been taken against it. On the other hand, deeper social and cultural values complemented immediate political passions in determining whether retribution would be taken against the Court. Thus, the Court's independence is guarded on one side by deeper cultural and social strains that might protect the Court, but bounded on the other side by popular dissatisfaction with the Court that might threaten it.

This conclusion, in turn, offers some insight into the legitimacy of the constitutional change that followed the fight over the Court-packing plan. Scholars seek to explain the legal legitimacy of that change, as well as the present deference of the Court in the economic realm and its active protection of individual liberties. This history suggests that the post—New Deal Court took a course consistent with prevailing public views regarding the meaning of the Constitution. The Supreme Court's post-1937 jurisprudence mirrored the preferences of the body politic, and thus was in some sense "legitimated"

empirically by public opinion.

I. THE WILL OF THE PEOPLE

Modern constitutional theorists have struggled to reconcile the practice of judicial review with democratic governance. That dilemma generally is referred to as the "countermajoritarian difficulty," a term coined by Alexander Bickel in *The Least Dangerous Branch*.[41] At least since the early 1960s, when Bickel wrote, and actually much earlier than that,[42] academics have tried to justify what they see as a practice in which unaccountable judges interfere with the will of the people and their representatives.[43]

As the traditional story is told, from the end of the nineteenth century until the New Deal, judges regularly flouted the will of the people, striking down legislation intended to ameliorate the economic hardships inflicted by an industrializing society. The judges' actions infuriated the people, who attacked courts in both word and deed. The culmination of this period, so the story goes, was the New Deal Court-packing plan.[44]

As other scholars have observed, it is a mistake to treat the decisions of courts (and especially the Supreme Court) throughout this period as of one piece. Commentators point to rapid changes in the economy and the rise of administrative government as forces that caused judges to abandon laissez-faire notions prevalent at the turn of the century.[45] In terms of the legal legitimacy of legal change, the

---

[41] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[42] *See* Friedman, Academic Obsession, *supra* note 28, at 64. The debate began in the 1940s shortly after the Court's doctrinal shift became clear.

[43] Numerous citations are provided in Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-39 & nn.1 & 4 (1998).

[44] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 42-43 (1991) (describing the modern lawyers' story of the "fall from grace" that began after Reconstruction, "climax[ed]" with the New Deal Court-packing plan, and was finally defeated with Justice Roberts's "switch"); Lessig, *supra* note 23, at 446 & n.220 (explaining that in the "dominant view," post Court-packing plan jurisprudence "restored the original Constitution, after a period of constitutional usurpation by an activist conservative Court").

[45] Examples of reliance on such accounts to explain changing doctrine include CUSHMAN, RETHINKING, *supra* note 8, at 41-42; Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191-247 (1997); Kramer, *supra* note 16, at 919-30; and Lessig, *supra* note 23, at 453-72. A related account, relying on changed notions of constitutional interpretation, is found in White, *supra* note 14.

only question seems to be how sudden or gradual the shift in doctrine was. Gradual doctrinal change is considered legitimate, but if the doctrinal shift in 1937 was precipitous, then it requires (and engenders) a more complicated response.[46]

Just as it is a mistake to conflate the work of courts over this forty year period, it also is an error to believe that judicial review provoked uniform responses from the public throughout the period. From the Populist/Progressive era at the turn of the century, until the New Deal fight was resolved, courts regularly were subject to harsh attack for striking economic legislation.[47] The period at the turn of the century commonly is called the *Lochner* era, after one of the most reviled decisions of all time. The conventional story treats criticism of courts as one straight arrow from the time of *Lochner* through the New Deal, when the courts finally recanted.

Although courts were attacked during both the *Lochner* era and the New Deal, the nature of the criticisms differed, reflecting changing notions of judicial review.[48] To an ear tuned only to modern-day insistence that judicial review is problematic because it interferes with democratic governance, these criticisms may all seem to have a similar thrust. Careful attention to the specific words of the criticisms, and to change over time, would suggest otherwise.

During the Populist/Progressive, or *Lochner*, era, the criticism of constitutional courts was akin to that described by Bickel's "countermajoritarian difficulty" (and thus will be called, for want of a better term, "countermajoritarian criticism"). Courts regularly were attacked as interfering with, or frustrating, popular will.[49] Commenting on the

---

[46] *See* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 795 (3d ed. 1963) ("The 'revolution' of 1937 did not break the continuity of American constitutional development in any decisive respect. In that sense it was not a revolution at all."). The view that there is nothing revolutionary in gradual constitutional change is implicit in Barry Cushman's explanation of the doctrinal shift that resulted in the New Deal transformation, *see generally* CUSHMAN, RETHINKING, *supra* note 8, as well as Larry Kramer's discussion of the incremental shifts in doctrine mirroring the growth of the national administrative government, *see* Kramer, *supra* note 16, at 323.

[47] The criticism of the *Lochner* era is described at length in Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner* (Dec. 10, 1999) [hereinafter Friedman, *Lochner*] (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

[48] Any strict epochal approach will, of course, overstate matters. The "New Deal era" discussed here was all of roughly five years, but the "*Lochner* era" may have covered thirty-five years. It is unquestionably correct that at the beginning of the *Lochner* era, criticism of courts sounded more like that during the Reconstruction era, and at the end of the *Lochner* era, criticism began to take on a New Deal gloss.

[49] *See* Friedman, *Lochner*, *supra* note 47, at 14-30.

anti-Granger decisions, James Weaver wrote in 1892: "What responsibility could this judge assume? Both he and the Court for which he was speaking were beyond the reach of the ballot box . . . ."[50] In response to the Supreme Court's decision invalidating the income tax, the *Evening Star* ran a column "BY THE PEOPLE" in which it explained: "The argument is that the Supreme Court as at present constituted does not spring from the people, and therefore does not properly represent the people."[51] Theodore Roosevelt, running for President as the Progressive party standard-bearer in 1912, wrote: "Here the courts decide whether or not . . . the people are to have their will."[52] Robert LaFollette, playing the same role in 1924, received cheers from a huge crowd in Madison Square Garden when he argued: "If the court is the final and conclusive authority to determine what laws Congress may pass, then, obviously, the court is the great ruler of the country, exactly the same as the most absolute king would be."[53]

By the time of the New Deal, however, the dominant criticism was quite different. Although there assuredly was some countermajoritarian criticism during the New Deal, much more commonly judges (not courts) were attacked as being old, behind the times, and unwilling to see how the Constitution should be interpreted.[54] Thus, one correspondent wrote Roosevelt that "Nine OLD MEN, whose total age amounts to about 650 years, should have additional help."[55] Another wrote: "Business does not accept an applicant with twelve gray hairs on his head."[56]

Although attacks on judicial review as frustrating popular will, and criticism of judges as being behind the times, both suggest that judges were interfering with democratic politics, the criticisms are in fact quite different. One criticism sees the Constitution and judicial review itself as problematic for democracy. The other sees the Constitution as malleable, and the judges as unable to perceive its necessary present-day interpretation.

---

[50] JAMES B. WEAVER, A CALL TO ACTION 122 (1892).

[51] *By the People*, EVENING STAR (Wash., D.C.), May 21, 1895, at 1.

[52] Theodore Roosevelt, *Judges and Progress*, 100 OUTLOOK 40, 41 (1912).

[53] *Full Text of LaFollette's Speech Attacking Supreme Court*, N.Y. TIMES, Sept. 19, 1924, at 2; *see 14,000 Pack Garden, Cheer LaFollette in Attack on Court*, N.Y. TIMES, Sept. 19, 1924, at 1.

[54] *See infra* Part I.D (discussing critiques of the judges as too old that appeared in books and articles).

[55] LEUCHTENBURG, *supra* note 8, at 97.

[56] *Id.*

Understandings reflected in differing criticisms of courts also explain a change in the strategy in dealing with unpopular constitutional decisions. Throughout the *Lochner* era there were countless attacks on the institution of judicial review itself. Proposals were made to subject judicial decisions to legislative override and permit review of decisions by popular referendum.[57] Under these proposals majoritarian politics could control constitutional meaning. Some of these same proposals were floated during the New Deal crisis, but Roosevelt's plan aimed not at the institution of judicial review, but at the judges themselves.[58] Roosevelt stole a page from the Reconstruction book, when judicial supremacy had some currency but the judges also were seen (for partisan reasons) to be the problem.[59] The solution was to profess respect for constitutional rulings but to get new judges who would presumably hand down new decisions.

This story of the changing popular response to judicial review addresses a central paradox of the traditional New Deal story.[60] As almost universal agreement would have it, significant segments of the public during the New Deal supported both the rejection of the Court-packing plan *and* the sweeping constitutional change that followed the Court's "switch." The public's opposition to the Court could be taken as support for the existing constitutional order, yet that was hardly the case. But if the people demanded constitutional change, why reject the Court-packing plan? After all, Court-packing had some pedigree in American politics. Wholesale transformation of the Constitution by judicial fiat did not.

The answer is that shifting economic conditions had swept the foundation out from under the old legal regime, something the judges themselves were late to acknowledge. Thus, society already acknowledged greater power in the national government. At the same time, the potential of judicial review as a protection against govern-

---

[57] The very best account of this is WILLIAM G. ROSS, A MUTED FURY (1994).

[58] *See infra* notes 235-48 and accompanying text (explaining Roosevelt's opposition to a constitutional amendment as a result of his belief that judicial review played a central role in adapting the Constitution to changing times).

[59] *See* Barry Friedman, The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court (Feb. 11, 2000) 20-32 (unpublished manuscript, on file with the *University of Pennsylvania Law Review*) (describing the political tensions that led to a popular view of the Court as being opposed to the Reconstructionist agenda advocated by the Republican-dominated Congress).

[60] *See* JEFFREY D. HOCKETT, NEW DEAL JUSTICE 164 (1996) (contrasting responses to the Court-packing proposal with responses to "Roosevelt's efforts to restructure the Court through the regular process of appointment[s] [which] were, of course, much less controversial").

mental excess also struck many observers as essential. Thus, when judges left the bench through legitimate attrition, the public was quite comfortable with a constitutional transformation consistent with broader public opinion. But the attempt to hasten that transformation by attacking the judiciary was seen—despite Roosevelt's attempt to portray it otherwise—as threatening judicial review itself. It is possible that continued recalcitrance might have provided support for some action against the judges. Once the Court apparently had shifted, however—and that is assuredly how the public saw things[61]—support for the Court-packing plan evaporated.

This is the story of the changed societal views between the *Lochner* era and the New Deal, about their impact on Roosevelt's proposal of the Court-packing plan, and on its demise.

A. *A Capsule History of New Deal Events*

As FDR's regulatory program emerged following his election as President in 1932,[62] commentators expected a collision with the Supreme Court.[63] Surely it was coincidence that as the conflict loomed,

---

[61] *See infra* Part I.F.2 and accompanying text. At least, that is what newspapers and politicians told the public had happened.

[62] Roosevelt had promised a "New Deal" to lift the country out of the Great Depression.

> On the farms, in the large metropolitan areas, in the smaller cities and in the villages, millions of our citizens cherish the hope that their old standards of living and of thought have not gone forever. Those millions cannot and shall not hope in vain.
>
> I pledge you, I pledge myself, to a new deal for the American people.

Franklin D. Roosevelt, The Governor Accepts the Nomination for the Presidency (July 2, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 647, 659 (1938-1950) [hereinafter PUBLIC PAPERS]. There was considerable doubt, however, about what Roosevelt's program would look like. *See* 2 ACKERMAN, *supra* note 14, at 283-84 ("It would be a mistake . . . to suppose that Americans knew what they were bargaining for when they swept the Democrats into the White House and Congress in 1932."); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 171 (1956) ("Roosevelt was following no master program—no 'economic panaceas or fancy plans,' as he later called them derisively. He not only admitted to, he boasted of, playing by ear."). Some claim that the contours of his program were evident in campaign speeches, *see* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 12 (1963) (discussing this view), but the dominant view is that most of the program emerged after the election, *see id.* at 33-39. Indeed, according to Leuchtenburg and Burns, popularization of the phrase "New Deal" was not intended by Roosevelt, but resulted from a cartoonist focusing on the phrase following Roosevelt's acceptance address at the Convention. *See* BURNS, *supra*, at 139-40 (discussing how a cartoonist picked up on the phrase even though Roosevelt had not intended it to have any significance); LEUCHTENBURG, *supra*, at 8.

[63] *See Biggest News Rose in Supreme Court*, N.Y. TIMES, Dec. 26, 1935, at 19 (reporting

the Supreme Court moved into grander quarters, but the irony did not escape contemporary observers.[64] "It may be symbolic," wrote Drew Pearson and Robert Allen in their classic book *The Nine Old Men*, "that the Supreme Court of the United States took its most intransigent position athwart the path of progress at the very moment it moved into its first permanent abode and surrounded itself with the trappings of Oriental grandeur."[65] *Harpers Magazine* played up the isolation of the Court's new marble palace: "Withdrawn from all the noise and tumult sit the nine old men; they are waiting, waiting for the time when the question of this government control [to lead the country out of the Depression] must be brought before them."[66] Come the question did, and when it did the Supreme Court encountered both the greatest threat to its independence and the most surprising statement of public support in its history.

The Supreme Court's early New Deal decisions suggested that the Court was prepared to interpret the Constitution to reflect changing economic and social circumstances.[67] For instance in 1934, confront-

---

Supreme Court rulings affecting New Deal policies topped a poll of newspaper editors for leading story of the year); Ralph F. Fuchs, *The Constitutionality of the Recovery Program*, 19 ST. LOUIS U. L. REV. 1, 22 (1933) (commenting that while judicial acceptance of the Recovery Program would be a "tribute to the adequacy of the process of selecting the judiciary and to the effect of public office upon social attitudes," the current judges come from an "intellectual milieu" that "is outrageously hostile to economic and social change"); Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 671-72 (1933) (analyzing the impact of capitalism on the Court and the conflicts between judicial review and social and economic legislation).

[64] Actually, this "coincidence" occurred twice: the other instance was following the *Dred Scott* decision. *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 361-62 (rev. ed. 1926).

[65] DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 2 (1974).

[66] Mitchell Dawson, *The Supreme Court and the New Deal*, 167 HARPERS 641 (1933).

[67] The decisions in these cases are central to "legalist" stories told about the Court's "switch" in 1937. *See* CUSHMAN, RETHINKING, *supra* note 8, at 3-7 (arguing that a plausible account can be constructed of a single trajectory of legal reasoning linking both the pre- and post-"switch" decisions); Friedman, *supra* note 20, at 1915-27 (arguing that the Court's decisions between 1933 and 1936 were designed to give relief to the nation's economic straits). For example, Barry Cushman believes much of the transformation occurred with the *Nebbia* decision. *See* CUSHMAN, RETHINKING, *supra* note 8, at 7. Others, such as Bruce Ackerman, accept that the Court shifted ground on substantive due process at the time of *Nebbia*, but question whether that shift does much to explain the Commerce Clause change of direction in 1937 and thereafter. *See* 2 ACKERMAN, *supra* note 14, at 366 (asserting that although the Court did "shift," such shifts are fairly common as "mid-course corrections"). Larry Kramer believes the developments of 1934 were consistent with the Court's doctrinal evolution, but that the Court "panicked" in the 1935 Term due to the breadth of the "innovative social legislation" before it. *See* Kramer, *supra* note 16, at 927-29. A recent article by David Pepper argues vigorously that it was these few decisions of 1934 that were aberrational. *See*

ing issues of the states' power to enact economic provisions parallel to the federal-level New Deal legislation, the Court upheld Minnesota's Mortgagee Moratorium Law[68] and validated a New York law fixing milk prices in *Nebbia v. New York*.[69] Then, in 1935, to the great relief of Roosevelt and his advisers, the Court ruled for the government in the Gold Standard cases.[70]

When the Court began to strike down New Deal legislation in 1935, it attracted great attention but mixed reactions. First, the Court struck the Railroad Retirement Act, by a 5-4 vote.[71] Although this cast doubt on pending Social Security legislation, and some observers fretted over the fate of the New Deal,[72] Roosevelt had actually been reluctant to sign the railroad pension legislation in the first place.[73] Next, the Supreme Court invalidated the National Recovery Act ("NRA") in *Schechter Poultry*.[74] Roosevelt responded with a lengthy press confer-

---

Pepper, *supra* note 14, at 104-27.

[68] *See* Home Bldg & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding the Minnesota Mortgage Moratorium law); *see, e.g.*, Clarence Manion, *The Constitutionality of New Deal Measures*, 9 NOTRE DAME LAW. 381, 384, 386 (1934) (praising the *Blaisdell* decision for recognizing the practical need of regulation to protect "individual opportunity" and defending regulation "as the only means for individual protection"); *Elderly Men Surprise*, N.Y. TIMES, Jan. 12, 1934, at 22 (expressing relief over the *Blaisdell* decision).

[69] 291 U.S. 502 (1934).

[70] *See* Perry v. United States, 294 U.S. 330 (1935) (sustaining the government's attempt to avoid payment under gold clauses in public obligations); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935) (sustaining a 1933 joint resolution declaring gold clauses in private contracts to be against public policy).

[71] *See* Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935).

[72] The *Atlanta Constitution* began its reporting of the decision by proclaiming, "The word of one man in a black robe halted the New Deal's first venture into the realm of social legislation today," and went on to observe:

> It is not so much the loss of this one case that discourages the New Dealers as it is Roberts' enlistment with the conservative faction of the court. . . . This former Philadelphia lawyer—prosecutor of the Teapot Dome oil cases—holds the balance of power in the court now and has it within his power to write and rewrite the law of the land for the next two years.

Verdict of 5 to 4 Against Measure Given by Jurists, ATLANTA CONST., May 7, 1935, at 1; *see also* LEUCHTENBURG, *supra* note 8, at 42 ("The *Rail Pension* decision, then, loomed as far more important than the particular legislation at issue."); *id.* at 51 (arguing that the decision caused Roosevelt to begin to look for a solution to the Court).

[73] *See* LEUCHTENBURG, *supra* note 8, at 27 ("Roosevelt could barely bring himself to sign it into law."); *Rail Pensions Act Voided by Supreme Court, 5 to 4; Social Program in Peril*, N.Y. TIMES, May 7, 1935, at 1 (pointing out that at the time of its enactment, Roosevelt's endorsement of the Retirement Act had been regarded as "rather luke-warm," and that Roosevelt had asserted that while the Act was "in line with sound social policy," it was "crudely drawn" and would "require many changes and amendments at the next session of Congress").

[74] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The judgment

ence critical of the "horse-and-buggy" Court.[75] Congress temporarily stopped work on New Deal legislation,[76] and organized labor was highly critical.[77] Nonetheless, the impact of the decision was blunted by the unanimity of the Court, the imminent demise of the NRA, and great public hostility to many aspects of the program.[78] Press reports

---

was one of three 9-to-0 decisions that day curtailing government power. The other two were *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating the Frazier-Lemke Act on mortgage moratoria), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (circumscribing the President's power to remove members of independent regulatory commissions).

Humphrey's Executor is especially significant because Roosevelt (and others) took that decision as a sign that the Court was personally hostile to the President. *See* Devins, *supra* note 8, at 245 ("At one level, *Humphrey's Executor* seems anything but monumental.... Within the White House, however, *Humphrey's Executor* was considered a major blow to the President and his reform agenda."). The story of the case is related in LEUCHTENBURG, *supra* note 8, at 52-81.

[75] *See* LEUCHTENBURG, *supra* note 8, at 90. According to Leuchtenburg's characterization, Roosevelt argued through this press conference that "the Court had stripped the national government of its power to cope with critical problems." *Id.* Bruce Ackerman views this press conference as a vital move in the constitutional moment that he believes solidified New Deal commitments. *See* 2 ACKERMAN, *supra* note 14, at 297-99. Ackerman presents the press conference as "informally presented but carefully weighed in advance," *id.* at 297, while Alsop and Catledge describe it as more impromptu and angry, *see* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 17.

[76] *See All NRA Enforcement Is Ended by President as Supreme Court Rules Act and Codes Void; Whole of New Deal Program in Confusion*, N.Y. TIMES, May 28, 1935, at 1 (reporting on the deserted feeling in the Capitol as legislators awaited Roosevelt's response to the Court's actions). "At NRA headquarters officials and employees sat in gloom, wondering what is to become of them." *NRA Held Invalid, Enforcement Ends*, N.Y. TIMES, May 28, 1935, at 21. At a total loss, Congress waited for orders from the President. *See Congress Confused by NRA Decision, Halts All Work on New Deal Legislation*, N.Y. TIMES, May 28, 1935, at 20; *Congress at Standstill Waiting for Word on White House Plans*, N.Y. TIMES, May 29, 1935, at 1.

[77] Louis Stark, *Labor Leaders Much Disturbed*, N.Y. TIMES, May 5, 1935, at 17 ("Organized labor was dazed by the Schechter case decision today."); *Rail Labor Sees Blow at Security*, N.Y. TIMES, May 7, 1935, at 18 (quoting George M. Harrison, a railroad workers' labor representative, as saying, "The decision ... shows a total disregard of the social obligations of industry to its workers.... [I]t is a serious obstacle to the consummation of the whole New Deal program."); *see also Fight for the NRA on in New England*, N.Y. TIMES, May 29, 1935, at 8 (expressing view of Robert J. Watt, Secretary of the State Federation of Labor, that "[s]omething must be done at once," and of Margaret Wiesman, Secretary of the Consumers League of Massachusetts, predicting a return to sweatshops unless immediate remedial steps were taken).

[78] *See* PEARSON & ALLEN, *supra* note 65, at 272 ("With the press and a good part of the public, the NRA was anything but popular. And the general exclamation escaping from a General-Johnson-wearied public was: 'Whoopee! Good for the Supreme Court!'"); *A Deplorable Decision*, 27 COMMONWEAL 199, 199 (1936) (commenting on the NRA, "No one was amazed by the good it had accomplished; many were irritated by the flaws in its operation."). One commentator noted that

> By no means all the new dealers are blue, even assuming the worst possible fate for NRA. One group always did oppose the NRA and is now glad that it is

throughout the nation were generally positive.[79] Even in industry opinions differed.[80] Many businesses quickly stated that they would adhere to NRA codes.[81]

These 1935 decisions triggered a vigorous debate about the practice of judicial review.[82] There was, however, no clear opinion as to

---

out. Another group feel [sic] that the Blue Eagle has served its emergency purpose and should be permitted to die.

George B. Bryant, Jr., *Washington Letter*, WALL ST. J., May 28, 1935, at 2. Roosevelt himself admitted some faults with the program. *See* George Creel, *Roosevelt's Plans and Purposes*, COLLIER'S, Dec. 26, 1936, at 7 (commenting that "[n]ever at any time has the President shut his eyes to the defects of the NRA as developed after a noble beginning").

[79] A *New York Times* article summarized editorial comments from newspapers around the country. *See Press Generally Sees Ruling as a Victory for Fundamental Law*, N.Y. TIMES, May 28, 1935, at 12. The article included scathing headlines from several papers such as the *Philadelphia Inquirer*, "Wrecking Crew Attempts Futile," the *Boston Herald*, "End of Slovenly Legislation," the *Charleston News and Courier*, "Brain Trust Only a Relic," and the *Dallas News*, "End of Stricken Law." *Id.* The *Wall Street Journal* commented that:

> It must be expected that a flood of ill-considered gabble about how the Supreme Court defeats the will of the people for the sake of preserving an outmoded document will follow this week's decisions—indeed, it has already begun. But it should not take us long to realize that the will of the people is the Constitution. It remains the will of the people to hold Congress and President under specific restraints which the Constitution sets forth. The Supreme Court's respect for the Constitution is its respect for the will of the people.

Review and Outlook: Realists on the Bench, WALL ST. J., May 29, 1935, at 4.

[80] While many in industry welcomed the ruling as an end to close government supervision of business, some feared the effects of the resulting confusion and turmoil. *See Code Industries Under Pressure in Active Market*, WALL ST. J., May 29, 1935, at 1; *Decision Has Immediate Effect on Local Business*, N.Y. TIMES, May 28, 1935, at 18; *Effect of Ruling on Capital, Labor Widely Debated*, ATLANTA CONST., May 28, 1935, at 1; *Fight for the NRA on in New England*, *supra* note 77, at 8; *Industry Cheered by NIRA Ruling*, WALL ST. J., May 28, 1935, at 1 ("Industrial leaders were generally agreed that Supreme Court's ruling invalidating important sections of the [NIRA] will have many stimulating and few adverse effects . . . .").

[81] *See Perkins Is Hopeful, Green Is Optimistic on Future Outlook*, ATLANTA CONST., May 29, 1935, at 1 (reporting the decisions of large firms like R. J. Reynolds Tobacco Company, General Foods Corporation, Chrysler, du Pont, and Eastman Kodak to continue the NRA practices); *Some Stores Cut Prices at Once: Employees Are Reassured*, N.Y. TIMES, May 29, 1935, at 1 (reporting announcement from R.H. Macy & Co. that "the schedules of wages and hours it had adopted under the NRA would continue pending developments which we hope will insure the permanence of these important social benefits"); *Wall Street Hails New Deal Defeats*, N.Y. TIMES, May 28, 1935, at 1 (quoting Eugene G. Grace, president of the American Iron and Steel Institute, as stating that with or without the NRA, the steel industry "should have the common sense to realize the necessity of exerting every possible effort to prevent a recurrence of the evils, abuses and unfair business methods of the past").

[82] Letters to the editor of the New York Times, for example, expressed the full range of views on the Court. *Compare, e.g.*, Albert Stevens Crockett, Letter to the Editor, N.Y. TIMES, June 2, 1935, § 4, at 9 (stating that "apparently nobody knows what the

the appropriate outcome of the struggle. At the end of that year, newspaper editors voted the debate about judicial review and the Court's encounter with the New Deal the year's "biggest" news story.[83]

The real clash came in 1935 and 1936. The Supreme Court struck down the Guffey Act in *Carter v. Carter Coal*[84] and the Agricultural Adjustment Act ("AAA") in *United States v. Butler*.[85] *Butler* was a turning point of sorts. Although Roosevelt's reputed reaction was simply to smile,[86] and public opinion may have been opposed to the law the Court invalidated,[87] the decision met with vehement negative public reaction and the beginning of serious calls to do something about the Court or the Constitution.[88] In Iowa, six members of the Court were

---

laws of the United States are except the Supreme Court," including the House and Senate who are mostly "lawyers by profession"), *with* Frank H. Blumenthal, Letter to the Editor, *Function of Supreme Court Defined*, N.Y. TIMES, Feb. 3, 1935, § 4, at 9 (rejecting the notion that the Court's political views influence its decisions, saying that "it knows its duty to interpret and uphold the Constitution and to protect the country against rash legislation"), *and* Emanuel Redfield, Letter to the Editor, *Several Handicaps Seen*, N.Y. TIMES, June 11, 1935, at 20 ("So long as there is a written Constitution, expressing the ideals of the community[,] ... there must be an umpire to judge whether the Constitution is being followed."). Wondering whether a private citizen had the right to criticize a Supreme Court decision, the *New York Times* wrote:

> It all depends, really, on what you think about the New Deal. Say you are for the New Deal. Then it is perfectly right, of course, after the Supreme Court has handed down a decision declaring a New Deal law to be unconstitutional, to deplore the decision, to say that it throws us back into the horse-and-buggy age, and that it makes any really advanced legislation impossible. If, however, any group of men say prior to a decision of the Supreme Court that they believe a New Deal act to be unconstitutional, then they are to be denounced for trying to "anticipate" the Supreme Court, for showing "disrespect" for the court, and for "gross impertinence and flagrant impropriety." If, however, you are against the New Deal, then you deplore the statements of people who deplore the decisions of the court deploring acts of Congress, though you undertake to say in advance what the court ought to decide. The question is altogether too complicated to explain to a mere layman.

Subtleties, N.Y. TIMES, Nov. 1, 1935 at 20.

[83] *Biggest News Rose in Supreme Court*, N.Y. TIMES, Dec. 26, 1935, at 19 (reporting that Supreme Court rulings affecting New Deal policies topped a poll of newspaper editors for leading story of the year).

[84] 298 U.S. 238 (1936).

[85] 297 U.S. 1 (1936).

[86] *See Roosevelt Receives Decision with a Smile; Starts Conference on Steps To Be Taken*, N.Y. TIMES, Jan. 7, 1936 at 1.

[87] Scholars are of two minds on this point. *Compare* WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 139 (1988) (arguing that the *Butler* decision was generally unpopular and "supported only by the anti-Roosevelt right"), *with* LEUCHTENBURG, *supra* note 8, at 98 (citing a Gallup poll showing that a majority of the country disapproved of the AAA).

[88] *See Garment Workers Back Roosevelt*, N.Y. TIMES, May 30, 1936, at 3 (describing a union convention's resolution demanding "a Constitutional amendment to permit

hanged in effigy.[89] Perhaps the most controversial decision of the period was the one in *Morehead v. New York ex rel. Tipaldo*,[90] striking down New York's minimum wage law.[91] If reaction to *Butler* was mixed, reaction to *Tipaldo* was almost uniformly negative. Even conservative defenders of the Supreme Court were taken aback.[92] Roosevelt—observing that under the Court's decisions neither the national nor state governments had the power to address the situation—commented that the Court had created a "No-Man's Land."[93]

These 1936 decisions, frequently decided by closely divided courts (Pearson and Allen observed that the 1935-1936 Term had a record-

---

Congress to pass laws to safeguard the economic welfare of workers"); *Miners Demand Basic Law Change*, N.Y. TIMES, Nov. 21, 1936, at 6 (reporting resolution by Mine Workers demanding "a constitutional amendment, if necessary, to protect social and economic progress"); *Socialists Assail 'Judicial Tyranny,'* N.Y. TIMES, July 5, 1936, § 1, at 23 (reporting support of the Socialist party "for a new Declaration of Independence against 'judicial tyranny and industrial autocracy'"). *But see Review and Outlook—Farmer and Constitution*, WALL ST. J., Jan. 8, 1936, at 4 (questioning the effectiveness of farmer price support legislation even if it was validated by a Constitutional amendment); *Review and Outlook—Unconstitutional*, WALL ST. J., Jan. 7, 1936, at 4 (criticizing attempts by Congress to "interpret" the Constitution into "new and otherwise impossible legislation").

[89] *See Six Supreme Justices Hanged in Effigy in Iowa*, N.Y. TIMES, Jan. 8, 1936, at 15.

[90] 298 U.S. 587 (1936).

[91] *See* LEUCHTENBURG, *supra* note 8, at 105 ("*Tipaldo* produced a national outcry against the Court. . . . [I]t was not only the New Dealers who objected. The Court embarrassed Administration opponents who had been arguing that protection of the rights of labor should be left to the states."); Friedman, *supra* note 20, at 1947 ("*Tipaldo* prompted a furious reaction. . . . The firestorm spread far beyond the liberal camp."). The Court was criticized for depriving all governments of the power to deal with labor problems. State attempts at social legislation were held to violate the constitutional right of freedom of contract, while Congress's efforts were held precluded as infringements on state sovereignty. *See Wage Law Decision As Viewed by Press*, U.S. NEWS, June 8, 1936, at 12 (stating that 79% of newspapers found the *Tipaldo* decision "regrettable"); *Week by Week*, 24 COMMONWEAL 199 (1936) (comparing the decision overruling New York's minimum wage law "to a few activities by Louis XVI" and predicting that "[i]t will do more to undermine the prestige of the Court than everything else said or done during the past four years").

[92]

> At [the *Tipaldo* decision] even the reactionaries held up their hands in horror. The very stupidest among them realized that the Court could not tell the country, "These may be serious problems, but we're sorry; the Constitution simply does not let either the federal or the state governments handle them."

ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 9; *see also* LASSER, *supra* note 87, at 9 (reporting that the *Tipaldo* decision caused consternation among Republicans drafting the 1936 election platform, which, until *Tipaldo*, was going to take a strong line defending the Court).

[93] LEUCHTENBURG, *supra* note 8, at 106. Asked by a reporter to elaborate, the President merely replied, "I think that is about all there is to say on it." *Id.*

setting number of dissenting opinions),[94] aroused not only a storm of indignation, but also numerous proposals to curb the Court. Indeed, "[t]he years 1935-37 . . . saw more Court-curbing bills introduced in Congress than in any other three-year (or thirty-five year) period in history."[95] Proposals included requiring a supermajority vote for the Court to strike down acts of Congress,[96] using the "exceptions and regulations" clause to curtail the Court's jurisdiction,[97] and amending the Constitution to enumerate in explicit terms the powers supporting New Deal legislation.[98]

The election of 1936 could have become a plebiscite on the Court, but Roosevelt chose to avoid the issue entirely, seeking the broadest support he could for his program.[99] Popular accounts suggest the President's prior comments on the Supreme Court had been poorly received.[100] Changing his strategy, Roosevelt sat back and let

---

[94] *See* PEARSON & ALLEN, *supra* note 65, at 42.

[95] LEUCHTENBURG, *supra* note 8, at 102 (quoting Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 273 (1988)).

[96] *See* Louis Friedman, Letter to the Editor, *The Court: Curb Suggested*, N.Y. TIMES, Nov. 22, 1936, § 4, at 9 ("[T]he court would not be abolished and its right to declare acts of Congress unconstitutional would not be destroyed. It would only mean that the voice of the people would become again the ultimate power of government.").

[97] *See, e.g.*, Ashley Miller, Letter to the Editor, *Source of Power*, N.Y. TIMES, Nov. 17, 1935, § 4, at 9 (pointing out that under Article III, Section 2, the Supreme Court has the power to invalidate acts of Congress "only if Congress chooses to give it"); W.C. Rose, Letter to the Editor, *Selecting Phrases*, N.Y. TIMES, July 28, 1935, § 4, at 9 ("Congress is not, as is commonly assumed, helpless before the courts. Under this article it clearly has the right to establish a court with both original and final jurisdiction over all cases arising under this or that law."). *See generally* ISIDOR FEINSTEIN, THE COURT DISPOSES 114 (1937) (discussing four ways to limit the Supreme Court's power, including limiting the Court's jurisdiction, increasing its membership, amending the Constitution to prohibit judicial review, and amending the Constitution to facilitate constitutional change).

[98] For a discussion of the various bills, see Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965), and LEUCHTENBURG, *supra* note 8, at 102. *See also AAA and the Constitution*, N.Y. TIMES, Jan. 26, 1936, § 4, at 8 (urging constitutional amendment to deal with death knell dealt the AAA legislation because "[a]fter all, the Constitution must serve the changing needs of the people. Their welfare, in the last analysis, is more sacred than any written document."); Arthur Krock, *Barriers in Path of Constitutional Amendment*, N.Y. TIMES, Jan. 5, 1937, at 22 (explaining that the outcome of the pending Supreme Court decisions regarding the Wagner and Social Security Acts would determine "whether this Congress will prepare . . . a constitutional amendment relating to social and industrial conditions in the United States").

[99] *See Basic Law Change Gains in Congress*, N.Y. TIMES, Jan. 8, 1937, at 4 (divulging "some privately expressed theories" that Roosevelt "hoped for enlargement of the court or restriction of its powers if the justices did not show warmer hearts" but that he "proposed to play a waiting game before determining any future course of action").

[100] The *New York Times* explained:

the Court tie its own noose.[101] Not until his stunning victory in 1937 did Roosevelt move against the Court.

B. *The Relative Paucity of Countermajoritarian Criticism*

Given the frequency with which the Court struck legislation, one might have expected charges that the Court was interfering with popular will. As discussed above, this "countermajoritarian criticism" had been prominent during the *Lochner* era.[102] The measures struck down by the New Deal Court seemed to have even greater popular support than those struck down during the Populist/Progressive era.[103]

Nonetheless, countermajoritarian criticism took a back seat to other criticism of judges during the New Deal crisis. The claim here is not that the Supreme Court was without fierce critics, but that the nature of the criticism differed significantly from the predominantly countermajoritarian criticism of the Populist/Progressive era.

Even when countermajoritarian criticism is found during this period, the usage reveals its more marginal status. The statements often were quite weak or made in passing.[104] Typically, the countermajori-

---

> The way in which his [horse and buggy] comments were received convinced the President that the occasion and tone of his remarks constituted a blunder, and he contented himself with a single public reference to the court—the one about 'no man's land,' which followed the decision on the New York Woman's Wage Law.

Arthur Krock, *Roosevelt Charged with Court Design in 1932*, N.Y. TIMES, Feb. 11, 1937, at 22. In addition to the "horse and buggy" and "no man's land" comments, during the election campaign in 1932 Roosevelt made a comment about the whole government, including the Court, being in Republican hands, which was interpreted as accusing the Court of partisanship. *See* LEUCHTENBURG, *supra* note 8, at 83 ("'After March 4, 1929, the Republican party was in complete control of all branches of the government—the Legislature, with the Senate and Congress; and the executive departments; and I may add, for full measure, to make it complete, the United States Supreme Court as well.'" (quoting Roosevelt)).

[101] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 17-20 (describing how popular and editorial indignation toward Roosevelt's comments led him to delay any direct assault on the Court).

[102] *See* Friedman, *Lochner*, *supra* note 47, at 10 (referring to criticism of the courts on the ground that that they were interfering with popular will). This was also the case during the Depression era attacks on the Supreme Court. *See* Friedman, *supra* note 43, at 356-81.

[103] The Democratic Congress and President responsible for the initiatives of the First Hundred Days received the greatest electoral support in history. *See* 2 ACKERMAN, *supra* note 14, at 310.

[104] *See, e.g.*, Lloyd K. Garrison, *The Constitution and Social Progress*, 10 TUL. L. REV. 333, 349 (1936) (giving a complicated analysis of the economics of federalism, surpluses, and natural resource allocation; providing only a one-line criticism in the middle stating that the Court exercises "a veto of the legislative and popular judgment in

tarian criticism was a throwaway argument following a criticism the author apparently thought was much stronger.[105] Many of the stronger statements about judicial review interfering with popular will came from old-time, Progressive era politicians who could be expected to continue to echo familiar themes.[106] The most "counterma-

---

economic affairs"); Thomas F. Konop, *Reorganization of the Federal Judiciary*, 12 NOTRE DAME L. REV. 347, 351 (1937) (haranguing the court in a several page blustering speech that simply throws away the line "What about the power of ONE MAN, the FIFTH JUSTICE, to thwart the will of the people as expressed through their representatives?"); Alpheus Thomas Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 85 U. PA. L. REV. 659, 666 (1937) (dropping the phrase that "the Court increasingly substitutes its own views for those of Congress and the electorate" in a 30-page attack on the Court).

Anticipating the struggles ahead, Ralph Fuchs wrote an article in the *St. Louis Law Review* largely discussing the merits of the constitutionality of the New Deal. He began with the extended observation that the proverbial Man from Mars would have a difficult time understanding a court striking down New Deal measures:

> Upon asking who it is that could deny the authority of the responsible heads of a democratic government to carry out policies which they have evolved with popular approval, the Gentleman from Mars would be told that it is a hierarchy of judges, the most important of whom are elderly gentlemen holding office for life.

Fuchs, *supra* note 63, at 2 (footnote omitted). Nonetheless, after introducing the problem he dropped the countermajoritarian theme altogether. Yet, this is one of the most countermajoritarian references. Notably, it came two years before the New Deal struggle began.

[105] *See, e.g.*, Osmond K. Fraenkel, *What Can Be Done About the Constitution and the Supreme Court?*, 37 COLUM. L. REV. 212, 226 (1937) (ending a sustained, 15 page criticism of the Court for rendering unpopular decisions with the countermajoritarian criticism not leveled earlier that "the people . . . could rewrite the Constitution step by step so that their will rather than that of the justices might prevail"); D.O. McGovney, *Reorganization of the Supreme Court*, 25 CAL. L. REV. 389, 406 (1937) (commenting that the Court is "an undemocratic feature of our system" after 18 pages of case-by-case, substantive criticism of the Court's reasoning); Mitchell Dawson, *The Supreme Court and the New Deal*, 167 HARPERS 641, 642-43 (1933) (arguing that the Court "stands as the great defender of private property against the attempts of popular legislatures to encroach upon the privileges of that property," despite commenting that the Court is "far removed from the will and behest of the people").

[106] For example, despite the government's success with the Gold Clause cases, Senator George Norris still protested: "These five to four Supreme Court decisions on the constitutionality of congressional acts it seems to me are illogical and should not occur in a country like ours." LEUCHTENBURG, *supra* note 8, at 88. Norris also advocated requiring at least a 7-to-2 vote by the Supreme Court to invalidate legislation following the three Court decisions handed down on "Black Monday." *Id.* at 91. Norris was a Progressive, and his proposal mirrored Progressive-era ideas. *See* ROSS, *supra* note 57, at 297, 307-08. In explicit countermajoritarian language, Fiorello H. La Guardia criticized conservatives who seemed "to believe that the Constitution was written for no other purpose than to guarantee exploitation of the many by the chosen few." Fiorello H. La Guardia, *For 2/3 High Court Vote to Make Laws Invalid*, N.Y. TIMES, May 18, 1935, at 1. LaGuardia, too, was a Progressive. *See* ROSS, *supra* note 57, at 231-32. Moreover, "Robert M. LaFollette, Jr., [the son of a famous Progressive,] was the

joritarian" of books attacking the Court followed the meandering, polemic style of Populist/Progressive literature.[107]

Perhaps the most telling evidence of the relative absence of countermajoritarian criticism is that it was barely mentioned in places where one would most expect to find it. This, after all, had been a slogan for a long time, coming easily and quickly to the lips of many that fought Progressive-era battles. Yet, when strident attacks were leveled at the Court in the New Deal period, critics really did neglect this early criticism, shifting to a new and different one. For example, it is almost completely missing from Pearson and Allen's famous book, *The Nine Old Men*.[108] This book captured the tone of the period, and its theme was—as the title suggests—age, not countermajoritarianism. Literally hundreds of articles were written in bar journals and law reviews both before and after the Court-packing plan was announced. For the most part these authors supported judicial independence, thus countermajoritarian criticism would not have been expected. But such articles defending the Court did not feel the need to rebut the countermajoritarian claim. Even in those articles criticizing the Court, countermajoritarian criticism was not prominent.[109]

---

only senator who consistently and unequivocally supported the Court-packing plan." *Id.* at 303. Roosevelt's Court-packing plan ultimately proved too extreme even for some Progressive-era politicians. For example, Senator Burton K. Wheeler of Montana, who in 1924 had been "the vice-presidential nominee on the Progressive ticket headed by Robert M. LaFollette, Sr., who charged the federal judiciary with usurpation and wanted to authorize Congress to override Supreme Court rulings," denounced Roosevelt's Court-packing plan. LEUCHTENBURG, *supra* note 8, at 137.

[107] *See, e.g.*, MORRIS L. ERNST, THE ULTIMATE POWER 321 (1937) ("Words of necessity have changing contents. Whose content do we wish applied? Appointed judges or elected representatives?"); FEINSTEIN, *supra* note 97, at 11, 20 (titling chapters "Judges Rule Us" and "The Roll of the Judicial Dice").

[108] The closest possible reference is PEARSON & ALLEN, *supra* note 65, at 322, which explores the relation of justice to popular will when unpopular presidents have the opportunity to appoint numerous Justices and well-liked presidents do not.

[109] There were at least 177 journal articles written between 1932 and 1938 involving the controversy over the Court. Of that number, 41 clearly defended the Court, and 34 clearly attacked or criticized it. Only in the 34 articles clearly attacking the Court was countermajoritarian criticism made, and even there the primary basis of criticism in these articles was not countermajoritarian. Of the 34 articles, 21 made the countermajoritarian criticism, but many of them only in passing. A small number of articles were, however, strongly countermajoritarian in tone. *See, e.g.*, Theodore Francis Green, Proposed Supreme Court Changes, *reprinted in* 7 LAW SOC. J. OF MASS. 806, 806-14 (1937) (describing the courts as possessing "an attitude which has thwarted the efforts and the will of the people, and has raised problems so serious that 'crisis' is the only word adequate to describe the situation"); Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816 (1936) (criticizing judical review); Konop, *supra* note 104, at 347 (arguing that the Supreme Court was usurping the power of Congress and the President). A number of these authors had

The claim is not that countermajoritarian criticism was entirely absent. It was not. The exercise of judicial review was discussed in countermajoritarian terms in many letters to the editor.[110] *The Nation* suggested Court-packing did not go far enough, as "[i]t clearly does not meet the issue of the judicial power as an obstruction to democratic action."[111] A speech given by Senator Logan also had a countermajoritarian flavor.[112] Collections of comments on the Court-packing plan included a number that clearly talked of thwarting popular will or the will of the people.[113] Some authors did not agree with

---

cut their critical teeth during the Populist/Progressive era, so it is less of a surprise that their criticisms were in countermajoritarian terms. For example, a prominent Populist/Progressive critic, Louis Boudin, published a two-volume, highly countermajoritarian history attacking the Court. *See* 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY viii (1932). He leveled the same countermajoritarian criticism in his 1932 work as in his 1911 essay of the same name. *See* Louis B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238-70 (1911).

[110] *See, e.g.*, Francis J. Bassett, Letter to the Editor, *Judicial Autocracy*, N.Y. TIMES, Jan. 25, 1936, at 14 (decrying 5-4 judicial decisions because "[i]n a true democracy taken from the Greek ideal the people must be given final authority"); James E. Heath, Letter to the Editor, *Judicial Review of Laws*, N.Y. TIMES, Jan. 16, 1936, at 20 (opining that judicial review should only be used when an act is clearly unconstitutional and that "when . . . a measure has passed the scrutiny of the judiciary committees of the two houses . . . [and] has met with the approval of three members of the court, it certainly cannot be said that its unconstitutionality is plain beyond any question"); Richard A. Lindblad, Letter to the Editor, *Supreme Court Opinions*, N.Y. TIMES, Sept. 17, 1934, at 16 (ruing the possibility of "one man overruling the will of the people" if [the New Deal] laws are made void by a five to four vote).

[111] *Purging the Supreme Court*, NATION, Feb. 13, 1937, at 173-74, *reprinted in* FRANKLIN D. ROOSEVELT AND THE SUPREME COURT 34 (Alfred Haines Cope & Fred Krinsky eds., 1969).

[112]

> Any body having supreme and absolute power in a republic, uncontrolled by the people or their representatives, is something that cannot be imagined by anyone unless he believes that for the protection of property and property rights it is necessary to have such a tribunal with supreme power over the life, liberties, and property of all the people.

81 CONG. REC. 7376, 7380 (1937) (speech of Sen. Logan).

[113] *See, e.g.*, THE SUPREME COURT ISSUE AND THE CONSTITUTION 50 (William R. Barnes & A.W. Littlefield eds., 1937) ("The proposal of the President is nothing more nor less than a call to Congress to exercise its power under the Constitution to prevent the majority of the Supreme Court from thwarting the popular will." (comment of Robert M. LaFollette, United States Senator from Wisconsin)); *id.* at 65 ("[T]he judiciary should be as representative of the people as are the executive and legislative branches of our government." (comment of Robert R. Reynolds, United States Senator from North Carolina)).

> That an act may be passed by the Congress, representing the sovereign will of a sovereign people, approved by the Executive, also representing all of the people . . . only to have it stricken down years later by the assumed unconstitutional exercise of power by an appointive judiciary, is, I say, an anomalous and unbearable state of affairs and one wherein we fall short of the ability to exer-

the argument but felt the need to answer it. For example, Dean Alfange wrote a book in which he addressed the tension he felt between democracy and judicial review.[114] Merlo Pusey responded to the argument, perhaps "the most persuasive argument" leveled in favor of Court-packing.[115] But one has to go looking for such references, in contrast to the *Lochner* era when it was difficult to avoid stumbling over them.

Skeptical readers may temporarily withhold judgment on whether there was a shift in attitudes toward judicial review from the Populist/Progressive era to the New Deal era.[116] As the following story establishes, there was a good reason for the shift in criticism. Indeed, Robert Jackson's own odyssey is further evidence of this point. On October 12, 1937, after the court battle was over, Jackson, then FDR's Assistant Attorney General and one of the Court's fiercest critics, gave a speech at the University of North Carolina at Chapel Hill. In it he set out the countermajoritarian difficulty quite plainly, stating that "[e]ither democracy must surrender to the judges or the judges must yield to democracy."[117] This was to become a theme of Jackson's in

---

cise the sovereign powers of a nation.

Id. at 71 (comment of Fred J. Sisson, former Representative from New York).

[114] *See* DEAN ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL (1937) (exploring the relationship between the changing national will and the Supreme Court crisis).

[115] MERLO J. PUSEY, THE SUPREME COURT CRISIS 63-74 (1937) (acknowledging the strength of the argument that remodeling the Supreme Court would be necessary to make "democracy effective," but arguing against the President's Court-packing plan by stating that "we . . . cannot afford to compromise with fascistic methods to gain immediate objectives").

[116] There is an irony prominent at the time but often overlooked: countermajoritarian concern about courts often appeared in articles that ignored the same concern with regard to administrative agencies. For a critique along these lines, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 629-43 (1992) [hereinafter Friedman, *Dialogue and Judicial Review*]. The most prominent dismissal of the notion that the countermajoritarian criticism applies equally to administrative agencies may be BICKEL, *supra* note 41, at 19-20 (dismissing the argument).

At the time of the New Deal, those who attacked the courts undoubtedly supported the work of agencies, yet there were those who actually attacked agencies as countermajoritarian while approving of the role of courts. *See* THURMOND W. ARNOLD, THE FOLKLORE OF CAPITALISM 73-74 (1937) [hereinafter ARNOLD, FOLKLORE] (describing this criticism of agencies); *see also* SEIDMAN & TUSHNET, *supra* note 7, at 37 (describing the problem with the "policy science" approach to law: "Law as policy science, however, was equally undemocratic . . . .").

[117] *Jackson Calls Court Curb on Democracy; Says Law Reviews Block United Functioning*, N.Y. TIMES, Oct. 13, 1937, at 6. Jackson's opinion on how the conflict should be resolved was clear: "Why should democracy discipline itself to accept decisions at the polls, if its enemies reject election and appeal to another forum where the decisions of the polls are reversed?" *Jackson Hits Court in Celebration Talk*, DAILY TARHEEL, Oct. 13,

later years, and was the focus of a book he published while on the Supreme Court entitled *The Struggle for Judicial Supremacy*.[118]

During the battle over the Court-packing plan, however, Jackson's tone was quite different, with countermajoritarian criticism completely absent.[119] Jackson developed his countermajoritarian attack on the Court only after Court-packing had been defeated and it became clear to him the Court could not be controlled by the political branches. Prior to that time, Jackson shared many popular perceptions regarding judicial review, perceptions which differed significantly from those held at the height of the Populist/Progressive era.

C. *What Changed?: External Influences on Perceptions of Judicial Review*

1. From "Popular Democracy" to "National Government"

The first fundamental shift was in popular perceptions about the relationship between government and the people, about the way de-

---

1937, at 2.

When Jackson first made the countermajoritarian argument in 1937, there was protest of Jackson's understanding of the Court's role. *See* John F. Curran, Letter to the Editor, *Mr. Jackson on Decisions*, N.Y. TIMES, Oct. 18, 1937, at 16 ("Either [Jackson] does not understand the Constitution, which he has taken an oath to defend, or he wishes to overthrow it by substituting a centralized consolidated government for our Federal Republic of limited powers."); *Self-Checking Democracy*, N.Y. TIMES, Oct. 14, 1937, at 24 (doubting that popular majorities will always be as "reasonable and self-restrained" as Jackson claims). Frank Gannett even tried to arrange for Jackson to debate Albert Levitt on this point. *See Jackson Declines to Debate Court*, N.Y. TIMES, Oct. 16, 1937, at 11. Jackson responded with a challenge to debate Gannett over whether Roosevelt had been justified in sending his court proposal to Congress. *See Jackson Offers Debate*, N.Y. TIMES, Oct. 21, 1937, at 10. Gannett declined the challenge as well. *See Gannett Declines Debate*, N.Y. TIMES, Oct. 23, 1937, at 24; *Mr. Gannett to Mr. Jackson*, N.Y. TIMES, Oct. 28, 1937, at 24.

[118] ROBERT JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1949).

[119] For example, Jackson said to Congress:

> "A majority of the justices have made it apparent that the great objectives of this Administration and this Congress offend their deep convictions. . . . Prediction of 'impending moral chaos,' grief over the fear that 'the Constitution is gone,' characterization of the Securities & Exchange Commission as a 'star chamber,' accusation that the Congress and the Executive have coerced farmers, taken freedom of contract away from working women and despoiled the states, indicate an implacable, although unquestionably sincere, opposition to the use of national power to accomplish the policies so overwhelmingly endorsed by the voters."

Quiet Crisis, TIME, Mar. 22, 1937, at 14, 16.

mocracy should operate.[120] At the height of the Populist/Progressive era, the *sine qua non* of democracy was responsiveness to popular preference.[121] Majoritarian rhetoric supported reforms to foster direct democracy, such as the initiative and referendum, the direct primary, and the popular election of United States Senators. By the mid-1930s, however, there was grave doubt about the capacity of the popular democratic experiment to deal with modern problems. Even fascism held a certain appeal in some quarters.[122] But most people simply looked to "government" to resolve what they could not. As Robert Wiebe has explained, "[t]he modern individual's growing reliance on government marked a shift with momentous consequences: the state replaced the People as democracy's last resort."[123] "[T]he meaning of democracy shifted from process to results.... Now the crucial ques-

---

[120] As Henry Monaghan has made clear, the democratic nature of American constitutionalism was subject to change (and has changed) since the founding. *See* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 165-77 (1996) (critiquing the notion that populist understandings had any place in the original Constitution and describing some of the early shifts in thought).

[121] William Nelson explains the rise of post-Reconstruction majoritarianism in light of a failure to reach agreement on pre-political moral principles for governing. *See* WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 62-72 (1982). Admittedly, the highly populist imagery of the time was a bit of a fiction. Many Progressives were elitists and had far greater faith in expertise than popular will as the means of governance. *See infra* text accompanying notes 128-33 (discussing the Progressive preference for policy experts). Moreover, any broad categorization is likely to have exceptions. On the differing views of Progressives about democracy and free expression, see MARK GRABER, TRANSFORMING FREE SPEECH 82-87 (1991), and see generally the excellent work on democratic thought throughout this period by EDWARD A. PURCELL JR., THE CRISIS OF DEMOCRATIC THEORY (1973). Eldon Eisenach's work provides a good description of the complexity of Progressive era thought. ELDON EISENACH, THE LOST PROMISE OF PROGRESSIVISM (1994). Despite this complexity, Eisenach notes the powerful majoritarian strains present in progressive thought: "Distrustful of governing institutions dominated by political parties and disdainful of the stilted and artificial language of the courts, they pursued two related options: to appeal directly to a broad public and to dominate institutions that had or could achieve popular acceptance and autonomous political influence." *Id.* at 74; *see also id.* at 115 ("But just as courts are giving way to legislative majorities, and legislative majorities, in turn, to direct democracy, so parties must now yield to democratic will, expressed as a coherent national program of social justice.").

[122] *See, e.g.*, Les K. Adler & Thomas G. Paterson, *Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's-1950's*, 75 AM. HIST. REV. 1046, 1047 (1970) ("[M]any Americans, until the Italian attack on Ethiopia and the rise of Hitler 'gave Fascism a demonic image,' saw Fascist Italy as an attractive political and social experiment." (quoting John P. Diggins, *Flirtation with Fascism: American Pragmatic Liberals and Mussolini's Italy*, 71 AM. HIST. REV. 499 (1966))).

[123] ROBERT H. WIEBE, SELF-RULE 202 (1995).

tion was what came out of the state rather than what went into it."[124] And, importantly, the "state" to which the people looked for help increasingly was the national government.

The seeds of this new statism assuredly were sown during the Populist/Progressive era. Volunteerism and individualism, even among those who decried laissez-faire, limited confidence in government action.[125] In this environment courts dominated,[126] in part because they often appeared to have the last word.[127] Over time, however, Progressives in particular came to see courts as lacking the knowledge to address novel social problems.[128] Instead, Progressives turned to policy experts, often in the guise of commissions and executive agencies.[129] As James Landis explained, this "sprang from a distrust of the ability of the judicial process to make the necessary ad-

---

[124] *Id.* at 215.

[125] *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 167-68 (1991) (noting that the AFL embraced an anti-statist outlook, assailed protective legislation, and turned to politics only for voluntarist ends).

[126] *See* FORBATH, *supra* note 125, at 26 (describing the emergence of the "court-centered American state"); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 170 (1992) (noting that "pre-war reformist legal thought tended to be court-centered—with the dramatic exception of the movement for workers' compensation").

[127] *See id.* at 32 (stating that nineteenth-century and early twentieth-century America lacked an administrative state elite to counterpoise the courts' primacy and noting that "[n]owhere else among industrializing nations did the judiciary and judge-made law so fully define state policy toward industrial relations throughout the nineteenth century").

[128] *See* HORWITZ, *supra* note 126, at 225 ("As the Progressive disenchantment with the competence of courts to perform social engineering tasks combined with a loss of faith in the sensitivity of judges to questions of social justice, the effort to replace courts with administrative experts became more pronounced."). Stephen Skowronek has commented:

> [A]t the turning point in American state development, when the nature of the demands on government began to change, courts and parties came under direct attack as the pillars of the old order.... National administrative capacities expanded through cracks in an edifice of rules of action and internal governmental controls articulated by courts and parties.

STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 287 (1982).

[129] *See* ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 60 (1983) (describing Progressives' distrust of legislatures and efforts to entrust new functions of government to executive agencies perceived to have greater administrative sophistication and less interest in patronage); *see also* RICHARD HOFSTADTER, THE AGE OF REFORM 265 (1955) (describing the Progressive notion that centralized authority is more open to public view, less corrupt, and therefore preferable to courts and legislatures); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 184-85 (1967) (noting that those in search of political favors began soliciting administrators rather than legislators).

justments in the development of both law and regulatory methods as they related to particular industrial problems."[130]

The gradual change in thinking engendered a shift to executive control that was well underway in Theodore Roosevelt's administration,[131] and reached a height in the 1920s in the wake of the first World War.[132] Felix Frankfurter, writing two years before Franklin Roosevelt's first election, said:

> There is something touching about the Congressman who only the other day introduced a joint resolution for a Commission on Centralization which is to report "whether in its opinion the Government has departed from the concept of the founding fathers" and "what steps, if any, should be taken to restore the government to its original purposes and sphere of activity."[133]

Despite this trend, it would nonetheless be a mistake to emphasize similarity over discontinuity.[134] The World War I boom of national

---

[130] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 30 (1938).

[131] For brief descriptions of Theodore Roosevelt's administrative philosophy, see HORWITZ, *supra* note 126 at 170; LINK & MCCORMICK, *supra* note 129, at 36; and WIEBE, *supra* note 123, at 202-03.

[132] *See* Kramer, *supra* note 16, at 930 ("No more than the world was the welfare state created in seven days, or even 100. It evolved over at least a half century of political and judicial turmoil."); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1489 (1998) (noting that during World War I, "[n]othing like this explosion of federal regulatory power had ever happened before"); *id.* at 1491 (quoting George Sutherland as stating that "Congress is passing extraordinary legislation and the Administration is doing many extraordinary things"). For an excellent discussion of the change engendered by the World War—as well as the reactive element of post-War America—see DAVID KENNEDY, OVER HERE (1980).

[133] FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 28 (1930) (quoting H.R.J. Res. 185, 71st Cong. (1930). As political power shifted, there was also a subtle but important shift underway in the mechanism of democratic action, as individualism gave way to group activity. *See* WIEBE, *supra* note 123, at 115 ("The unorganized fell to the bottom of these hierarchies: no group, no voice. At best, atomized citizens became the political cartoonist's beleaguered, befuddled John Q. Public, honest enough but utterly lost in the intricacies of modern government.").

[134] Perhaps the best source on this discontinuity is Otis Graham's study, in which he endeavors to explain the reaction of Progressives to the New Deal. *See* OTIS GRAHAM, AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL (1967). As Graham astutely points out, it was quite natural for New Dealers to attempt to claim the Progressive mantle. Far more interesting is the question of how Progressives regarded the New Deal: some of them were supportive, but many were opponents. Robert Post also quotes Charles Evan Hughes conceding in 1924 that "it was doubtless impossible to cope with the evils incident to the complexities of our modern life . . . by the means which were adapted to the simpler practices of an earlier day," but nonetheless saying "*there is no panacea for modern ills in bureaucracy.*" Post, *supra* note 132, at 1538 (quoting *President Hughes Responds for the Association*, 10 A.B.A. J. 567, 569 (1924)) (emphasis added).

administration collapsed to some extent after the war.[135] Herbert Hoover was no stranger to active government, but his idea of government primarily was a federalist reliance on the states. He never accommodated himself to the necessity for national action to address the ravages of the Great Depression.[136] Richard Hofstadter, granting "that absolute discontinuities do not occur in history," nonetheless observed that "what seems outstanding about [the New Deal] is the drastic new departure that it marks in the history of American reformism. The New Deal was different from anything that had yet happened in the United States."[137]

This fairly dramatic shift in views about government power was the result in part of the cataclysmic economic turmoil of the Depression.[138] It would be difficult to overstate the impact of the Depression, both in its magnitude as an economic catastrophe, and in its influence on ways of thinking about the role of the government, particularly the national government.[139] Attacking the Supreme Court, Robert Carr

---

[135] *See* KENNEDY, *supra* note 132, at 231-95 (discussing the uphill battle of Progressives to maintain their agenda in the years after the First World War); Post, *supra* note 132, at 1490 n.9 ("Wilson . . . 'allowed his administration to close in a riot of reaction.'" (quoting RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 274 (1948))); *id.* at 1496 (describing the Court's concern "to limit the abnormal reach of wartime power"); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberal, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 9 (1999) ("[F]rom the end of World War I to the beginning of the Great Depression, a laissez-faire ideology that focused on the sanctity of the individual's right to contract was in its ascendancy.").

[136] *See* 2 ACKERMAN, *supra* note 14, at 281 ("Hoover was a social engineer who believed in the affirmative uses of government power. His response to the Great Crash of 1929 was quite activist. . . . At the same time, Hoover was clear that the Constitution did not give the federal government plenary powers to manage the national economy."); RONALD L. FEINMAN, TWILIGHT OF PROGRESSIVISM xi (1981) (calling Hoover an "opponent of intervention by the national government in the economy"); HOFSTADTER, *supra* note 129, at 306 (noting that as an "old Bull Mooser" Hoover was equipped with a Progressive mind, but was unprepared for the Depression nonetheless); JAMES T. PATTERSON, THE NEW DEAL AND THE STATES, 29-32 (1969) (discussing the grudging efforts of the national government to aid states during the Hoover administration).

[137] HOFSTADTER, *supra* note 129, at 303. Hofstadter contends that the New Deal was different from Progressivism in its ideas, spirits, techniques, and most strikingly in its principal difficulty: The Great Depression. *See id.* at 303-04.

[138] *See* Lessig, *supra* note 23, at 468 ("By the mid-1930s, these structures of thought were to collapse, falling victim to an obvious shock, the Depression. . . . 'With amazing speed,' the dominance of the ideals of nonintervention disappeared.'" (quoting ARNOLD, SYMBOLS, *supra* note 7, at 265)).

[139] *See* PATTERSON, *supra* note 39, at 11-12 (explaining the impact of the Depression on the willingness to extend great authority to Roosevelt); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115, 2130 (1999) ("[The New Deal] was a re-

detailed the miseries facing Americans and asked: "Why not use government to solve such problems?"[140] Karl Llewelyn and Max Lerner, speaking to the League of Women Voters in 1936, both spoke of the need and inevitability of government aid to people in distress.[141]

The failure of government to alleviate the impact of the Depression coincided with widespread global skepticism about democracy.[142] Referring to Congress's ineffectual lame-duck session in 1932-1933, James Patterson reports that Alf Landon (Roosevelt's opponent in 1936) said, "[e]ven the iron hand of a national dictator is in prefer-

---

sponse to a *crisis*. The Great Depression was one of the most serious political and economic crises in American history. Such crises create unique opportunities for state building . . . ." (footnotes omitted)); Lessig, *supra* note 23, at 468 (explaining how existing structures of thought fell victim to the Depression); Post, *supra* note 132, at 1542 (ascribing the collapse of *Lochner*ism to the fact that "dominant opinion in the country" no longer saw economic transactions as "significant sites for the enactment of independence from state control"). The magnitude of the Depression and its influence on thinking about government somewhat undermine Larry Kramer's incrementalist explanation of the constitutional transformation in one respect, though it strongly supports it in another. Kramer argues the transformation only looked dramatic because of the "panicked" decisions of 1935-1936, and that otherwise the doctrine was moving apace with the growth of administrative government from the turn of the century. Kramer, *supra* note 16, at 916-30. But Kramer's own numbers establish that although there was gradual growth (and doctrinal change), the growth during the Depression years still was quite dramatic. *See id.* at 924 (detailing that during the 1930s "the federal bureaucracy increased by another 60%"). Given the depth of the Depression, however, the "panic" in the Court's jurisprudence that Kramer describes is all the more dramatic.

[140] ROBERT CARR, DEMOCRACY AND THE SUPREME COURT 3 (1936). Carr's discussion of the role of government differs markedly from the populist discussions of the prior era:

> In other words, it is government that brings order out of chaos, it is the government that makes the robber baron, the captain of industry, the would-be tyrant, the potential destroyer of liberty, toe the mark and respect the rights of others. The abolition of child labor, the fixing of minimum wages for women and children, and maximum hours of labor for men, the creation of machinery for collective bargaining between employers and workers, the establishment of a system of social security providing insurance against unemployment, accident, disease, and old age, the regulation of money lenders, brokers, and stock markets; these are the necessary policies of government if the position of the common man in the midst of the welter and confusion of modern society is to be made secure.

Id. at 128-29.

[141] *See* Winifred Mallon, *Urge Women Back Federal Powers*, N.Y. TIMES, May 2, 1936, at 8.

[142] For a collection of views turning the fascism card against the Supreme Court during the Court-packing battle, see *infra* note 308. Edward Purcell, in describing the changing character of democracy, discussed the fear (or appeal) of dictatorship spreading to the United States. *See* PURCELL, *supra* note 121, at 126. "Had democracy failed and was dictatorship alone capable of meeting the problems of advanced industrial society?" *Id.* at 117.

ence to a paralytic stroke."[143] Corwin even explained the New Deal concept of delegation as "*an effort to attain some of the results of dictatorship by a mergence of legislative power with Presidential leadership.*"[144] Contemporary scholars of the time such as Felix Frankfurter, and subsequent commentators such as Hofstadter and Wiebe, all have noticed the loss of faith in democratic rule as totalitarian regimes were springing up around the globe.[145] "A growing sense that only the state stood between its citizens and impending disaster lent new urgency to the need for decisive leadership."[146]

Into this breach strode Franklin Roosevelt. Roosevelt offered to utilize the massive power of centralized government to address the needs of a nation calling for help, signaling a significant shift from the attitudes of the Populist/Progressive era. Roosevelt proclaimed that the "accustomed order of our formerly established lives does not suffice to meet the perils and problems which today we are compelled to face."[147] Instead, "[m]ere survival calls for a new pioneering."[148] In the 1936 elections, the people offered Roosevelt a stunning mandate for his vision.[149]

---

[143] PATTERSON, *supra* note 39, at 2.

[144] EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT 140 (1934).

[145] *See* FRANKFURTER, *supra* note 133, at 123 ("Epitaphs for democracy are the fashion of the day."); WIEBE, *supra* note 123, at 215 (noting historian Carl Becker's concern about the survival of a democracy that betrayed the industrial poor); *see also* PURCELL, *supra* note 121, at 126 (quoting *The Nation* as saying, "[u]nless we can find through democracy a way to efficiency, justice, and liberty, we shall get dictatorship—and we shall deserve it"); *id.* at 126-27 (discussing this problem in depth).

[146] WIEBE, *supra* note 123, at 217.

[147] 3 PUBLIC PAPERS, *supra* note 62, at 457. *Cf.* HOCKETT, *supra* note 60, at 161 ("'By the pressure of experience, . . . legislative regulation of economic and social activities turned to administrative instruments.'" (quoting Felix Frankfurter)). As G. Edward White observes, "Frankfurter had concluded that the onset of modernity required an expanded conception of government. Earlier generations of American legal and social theorists had reacted to perceptions of economic, social, and scientific transformations without concluding that government should be the primary mechanism to respond to those changes." White, *supra* note 7, at 351.

[148] 3 PUBLIC PAPERS, *supra* note 62, at 457. For examples of that New Deal innovation, see JOHN MORTON BLUM, ROOSEVELT AND MORGENTHAU chs. II, V (1970), and ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 85-176 (1959).

[149] *See* ALAN BRINKLEY, THE END OF REFORM 15 (1995) (identifying Roosevelt's victory as unprecedented—60.8 % of the popular vote, 523 of 531 electoral votes, and decisive Democratic majorities in both houses of Congress); *see also* Joseph Alsop & Turner Catledge, *The 168 Days: The Story Behind the Story of the Supreme Court Fight*, SATURDAY EVENING POST, Sept. 18, 1937, at 9 [hereinafter Alsop & Catledge, *Behind the Story*] ("[Roosevelt] took the 27,000,000 votes cast for him as an endorsement as personal as an appointment to be trustee and guardian of a friend's children. He be-

The most dramatic "departure" was the turn to the *national* government. As Richard Stewart has said:

> [T]he New Deal firmly established the proposition that the federal government ought to take responsibility for the overall productivity and health of the economy at the macro-economic level.... [T]he New Deal established the proposition that the federal government has a basic responsibility for protecting individuals and families against the economic risks of an industrial market economy through various means of social insurance and assistance.... [T]he New Deal experimented with an economy-wide approach to central planning and economic regulation,... [and] the New Deal greatly intensified and extended national regulation of particular industries....[150]

The federal government assumed an unprecedented fiscal role,[151] one that grew by leaps and bounds,[152] as federal agencies sprang up to address social and economic problems.[153] Passage of the National Industrial Recovery Act signaled a turn from the trust-busting of the Progressive era to cooperation with big business, although business was to be under the yoke of governmental control.[154] As Corwin explained, "Business, being capable of affecting the lot in life of most of us fully as much as Government itself, is no longer to be considered a purely private enterprise."[155]

In his classic work, *The Age of Reform*, Hofstadter summarized this change in attitude. He explained that while Progressives often looked to enterpreneurial freedoms for solutions to problems, the New Deal

---

lieved... that the people had given him carte blanche to go forward....").

[150] *See* Stewart, *supra* note 16, at 240-42. Stewart's analysis is part of broader remarks evaluating the lasting impact of each of these elements of New Deal policy, some of which—Stewart points out—we have since abandoned as unwise.

[151] *See* COLIN GORDON, NEW DEALS 1 (1994) (describing the New Deal as the "'big bang' of institutional innovation" and the central landmark of the modern U.S. political economy); HOFSTADTER, *supra* note 129, at 308-09 (noting the imposing new fiscal role of the federal government as an addition to the traditional progressive social base of reformism).

[152] *See* Kramer, *supra* note 16, at 924 (describing the number of administrative agencies as "nearly doubling" during the New Deal).

[153] *See* BRINKLEY, *supra* note 149, at 63 ("A modern state, [New Deal liberals] believed, required the proliferation of independent executive agencies and expert administrators, insulated as far as possible from political pressures.").

[154] *See* HOCKETT, *supra* note 60, at 228 (discussing the conflict after the death of the NRA between Robert Jackson and those "within the administration [who] were still devoted to the proposition that industry cooperation under the eye of a government regulator was the appropriate strategy for dealing with concentrated economic power" (internal quotation omitted)).

[155] CORWIN, *supra* note 144, at xxvii; *see also* FRANKFURTER, *supra* note 133, at 4 (discussing the collapse of the public/private distinction); HORWITZ, *supra* note 126, at 223 (noting that "regulation increased massively at the state level as well").

focused on government intervention: "[The Progressives'] conceptions of the role of the national government were at first largely negative and then largely preventative."[156] However,

> [e]ven before F.D.R. took office a silent revolution had taken place in public opinion, the essential character of which can be seen when we recall how little opposition there was in the country, at the beginning, to the assumption of the New Dealers that henceforth, for the purposes of recovery, the *federal government* was to be responsible for the condition of the labor market as a part of its concern with the industrial problem as a whole.[157]

Emphasis needs to be placed on both of the italicized words in the Hofstadter analysis. When Americans looked to government, they looked to the national government.[158]

As the focus shifted toward government, it moved away from notions of popular democratic control.[159] Reforms critical to Progressives, such as toppling political machines, simply fell off the political radar screen.[160] Commentators emphasized "representative" (rather than popular) democracy.[161] Robert Wiebe observed that Thurman

---

[156] HOFSTADTER, *supra* note 129, at 305.

[157] *Id.* at 307 (emphasis supplied); *see also* BRINKLEY, *supra* note 149, at 9.

[158] This was an important reason for the split from the New Deal by Progressives whom one might have expected to be supportive. *See* GRAHAM, *supra* note 134, at 29, 45, 66. These Progressives felt the "New Deal was unforgivably coercive," *id.* at 66, and deplored "New Deal spending, labor policy, bureaucracy," *id.* at 29. "The fight [during Progressive days] was for individualism then and is for individualism now [during the New Deal]. The enemy was regimentation attempted by big business; the enemy now is regimentation attempted by the government." *Id.* at 45 (quoting Mark Sullivan). On the other hand, Progressives supportive of the New Deal liked the effort of government in the areas of "relief, public works, public housing, social security—which meant that the federal government was now committed to intercession against want." *Id.* at 103. These Progressives favored policy change over moral reform, *see id.*, and welcomed the experimentation of the New Deal. *See id.* at 110, 113.

[159] *See* Kevin Baker, *Why Americans Loved FDR*, WASH. POST NAT'L WKLY. EDITION, Apr. 17, 1995, at 23 ("More shocking than the conditions in which Americans of 1933 lived was how little say they had in anything that mattered .... Politics in every large city was usually controlled by corrupt political machines.").

[160] Indeed, Roosevelt relied on the machines when it suited his purposes. *See* HOFSTADTER, *supra* note 129, at 310 (noting that FDR not only ignored the democratic "problem" of machines, but worked with the bosses "[i]n the interest of larger national goals and more urgent needs"); *see also* BRINKLEY, *supra* note 149, at 9 (explaining New Dealers' indifference to the moral aspects of earlier progressive reform attempts, and the Roosevelt administration's unwillingness to assault political machines as earlier generations of reformers had done); ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 90 (noting help of political machines in the Court-packing plan).

[161] CARR, *supra* note 140, at 7 (pointing out that representatives of the people can make more informed decisions, especially on technical matters); *see also* B.F. Affleck, Letter to the Editor, N.Y. TIMES, Aug. 11, 1935, at E9 (explaining that the founding

Arnold's *Folklore of American Capitalism*, "often cited as the New Deal's most significant commentary on government, derisively dismissed the very thought of popular rule. Despite the image of an approachable President and his open government, New Deal decisions occurred even more commonly than ever behind Washington's closed doors."[162]

Perhaps it is Roosevelt's classic words in defense of the Court-packing plan that best sum up this shift in attitude. In his fireside chat of March 9, 1937, Roosevelt spoke aggressively on the necessity of his plan. But it is the vivid image he used to describe the Court's failure that best captures the change in attitude toward the state:

> Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not.[163]

In a world in which embrace of federal control prevailed over popular determination, the nature of criticism leveled at courts took a different tone. When the Coal Act that bore his name was invalidated in *Carter Coal*, Senator Guffey did not say that the Court's decision was thwarting popular will, as he almost certainly would have some twenty years earlier. Rather, he accused the Court "of blocking the social-reform program of the Roosevelt administration."[164] A significant shift in rhetoric and temperament had occurred. Rather than insisting on

---

fathers "intended to found a republic—a representative not a democratic form of government").

[162] WIEBE, *supra* note 123, at 207.

[163] Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 1937 PUBLIC PAPERS, *supra* note 62, at 123-24. In the course of his talk, Roosevelt discussed the "mandate" the people had given him and Congress, and he joined the relatively rare countermajoritarian critic who actually said the Court was "thwart[ing] the will of the people." *Id.* at 126.

[164] FRANKLIN D. ROOSEVELT AND THE SUPREME COURT, *supra* note 111, at 91 (statement of Sen. Joseph F. Guffey). Similarly, Robert Carr spoke of the Court blocking not the people, but Congress and the states:

> And it is here that the Court and not Congress becomes the enemy of liberty, for it is the Court and not Congress that has said many of these things may not be done. Congress, confronted by the insistent demands of a determined public opinion has from time to time been willing to provide the necessary legislation, and so have some of the states. But the Court has used first one device and then another to thwart the hand of progress. When Congress has acted, the Court has said "This is a matter for the states." When the states have tried, the Court has said, "This is a matter for Congress." And when both have tried, the Court has still said, "No, the Constitution won't permit either of you to do this."

CARR, *supra* note 140, at 129.

popular control of government, the people saw the federal government as an entity charged on its own with addressing pressing problems.

2. The Malleable Constitution: The Triumph of Anti-Formalism

Criticism of judges was also influenced by two critical shifts in thinking with regard to constitutional determinacy and the understanding of what judges did when interpreting the Constitution.[165] First, at the time of *Lochner* it was thought that judges were adopting interpretations that reflected their own biases.[166] Milder critics would simply say, "To the courts the Constitution is a peg on which to hang predilections in politics and sociology and call them law."[167] Harsher ones would accuse the Court of out-and-out class bias. Thus, Corwin complained that the Court used the Constitution as a vehicle "to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency."[168] And William Trickett, Dean of the Dickinson Law School, decried judges with "narrow, sectarian, professionally biased or class-biased views of the Consti-

---

[165] In his work on the New Deal transformation, G. Edward White identifies the shift in interpretive methodology from formalism to living constitutionalism as the single most important factor explaining the "revolution" of 1937 and thereafter. *See* White, *supra* note 14, at 871 ("The 'constitutional revolution' of the 1930's was not only a doctrinal revolution but an interpretive revolution."). White develops this theme in his book-length historical treatment of the period. *See* White, *supra* note 7, at 289-97. As White says:

> An important function of judges in constitutional cases affecting government and the economy has been to implement a conception of the Constitution as an adaptive document, one whose meaning could change to reflect the context and mores of its times. This conception . . . [was] embodied in the phrase "the living Constitution," which began to appear in constitutional discourse just prior to the New Deal period.

Id. at 289-90. Accompanying this shift, according to White, "came a potentially radical constriction in the role of judges as constitutional interpreters, at least in the realm of political economy." White, *supra* note 14, at 873. White's story mirrors to some extent the one told here, and lends support to the thesis that criticism of judges during the New Deal differed from that of the *Lochner* era because the complaint about judging invariably would change as visions of the Constitution and the role of judges changed.

[166] This view has been challenged by recent revisionist scholarship. For a discussion of this *Lochner* era criticism, and a response to revisionist difficulties with it, see generally Friedman, *Lochner*, *supra* note 47.

[167] Jackson Harvey Ralson, *Shall We Curb the Supreme Court?*, 71 FORUM 561, 564 (1924).

[168] Edward S. Corwin, Book Review, 6 AM. POL. SCI. REV. 270, 271 (1912).

tution."[169]

Second, the culprit that permitted the judges to impose their own views was the perceived malleability of the constitutional text. The anti-formalist critique that later blossomed into the Realist movement was a result of this belief.[170] Thus the "rights" found to trump legislation during the *Lochner* era were attacked as "new" or "novel": as Learned Hand said, "There can be little doubt that so to construe the term 'liberty' is entirely to disregard the whole juristic history of the word."[171] Louis Greeley would call the right to contract "theoretic . . . which has no existence in fact."[172] The problem was the Constitution left judges too free to adopt these interpretations. As early as 1890, Eaton Drone would say about the Fourteenth Amendment: "Time has shown that the operation of the amendment is capable of restriction to a narrow sphere, or extension to a scope well-nigh illimitable."[173] By the 1920s journalists would join academics in wondering about constitutional indeterminacy. For example, *The Nation* commented negatively on the Court's decision striking child labor legislation as outside the commerce power: "It found no such vacuum when Congress forbade the transit across State lines of lottery tickets, alco-

---

[169] W. Trickett, *Judicial Nullification of Acts of Congress*, 186 N. AMER. REV. 848, 856 (1907).

[170] Formalism is the notion that legal tests and texts provide fixed answers to questions, a practice that reached its height at the end of the nineteenth and beginning of the twentieth century. *See* NELSON, *supra* note 121, at 133; *see also* Friedman, *Lochner*, *supra* note 47 (describing challenge to this method of judging during the *Lochner* era). Those who attacked formalism were "anti-formalists." From today's perspective we also tend to see realism as a more narrow movement than formalism, focusing on the sociology of judging, and then turn to other disciplines to answer the formalist challenge. Nonetheless, it is also common to speak of the New Deal anti-formalists as "realists" (some of whom were part of the realist movement and some of whom were not). *See, e.g.*, PURCELL, *supra* note 121, at 79 (referring to those who attacked the "inconsistencies between the practices of a rapidly changing industrial nation and the claims of a mechanical juristic system" as "realists"); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1119-37 (1997) (questioning whether practicing lawyers ever adhered to law as "formalism" and referring to the alternative as "realism"). More important, at the time of the New Deal "realism" was used to describe the broader movement we might today call "anti-formalism." *See* ARNOLD, SYMBOLS, *supra* note 7, at 37 ("So far as the public is concerned, the struggle of the so-called school of realism [is] against the tenets of an older group of devoted priests . . . . Realists prove incontrovertibly that there can be no objective reality behind the law as a brooding omnipresence in the skies . . . .").

[171] Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495 (1908).

[172] Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 ILL. L. REV. 222, 223 (1910).

[173] Eaton S. Drone, *The Power of the Supreme Court*, 8 FORUM 653, 663 (1890).

holic drink, and impure foods, and restrained men and women on interstate errands of vice."[174]

By the time of the New Deal, thinking on both of these points had changed. The Constitution's malleability was now seen as a virtue. The power of judges to interpret the Constitution was accepted, but it was felt that use should be made of the malleability of constitutional meaning to keep the Constitution current with the times.[175]

Two common words used to describe the Constitution during the New Deal were "flexible" and "living."[176] According to Roosevelt, "[o]ur Constitution is so simple and practical that it is possible always to meet the extraordinary needs by changes in emphasis and arrangement without loss of essential form."[177] Felix Frankfurter ex-

---

[174] Thomas Reed Powell, *The Child-Labor Decision*, NATION, June 22, 1918, at 730.

[175] *See Constitution Held Ample in New Deal*, N.Y. TIMES, Jan. 26, 1936, § 1, at 34 ("Existing Federal powers under the Constitution [will] be sufficient to solve the new social and economic problems of the country without the necessity of constitutional amendment[,] ... the Constitution has proved to be adequate in every test of peace and war."). Another New York Times article noted FDR's belief that:

> [T]he Constitution is a living document; that its authors were fully aware that changing conditions would raise for a new Federal Government problems which they themselves could not foresee; that they intended and expected that a liberal interpretation of it in the years to come would give Congress the same relative powers over new national problems as they themselves gave Congress over the national questions of their day.

The Ways of Democracy, N.Y. TIMES, Jan. 8, 1937, at 18. High school civics books following the New Deal reflect the view that the Constitution is a fluid, and not static document:

> Do the courts ... 'change' the constitution of any government, national, state, or local? There are those who assert that they do not. To them the law is an inexorable thing that follows perfect laws of logic to incontrovertible conclusions. The courts, they say, merely 'declare what the law is,' as when the arithmetic teacher assures the pupil that two and two make four. This view is really too naïve to merit serious consideration .... Courts are made up of judges, and judges are human beings, fallible like all the rest of mankind .... They declare what they think the law is, but where no signs point a clear path they naturally say the law 'is' what they think it 'should be.' ... [C]ourts undoubtedly make changes in the framework of laws controlling government in the United States.

WILLIAM ANDERSON, AMERICAN GOVERNMENT 80 (1946). This viewpoint was in contrast to the language of civic books from the early part of the 1930s. One book urges that the Supreme Court must "preserve our fundamental law in its integrity," indicating a static view of the Constitution. S.E. FORMAN, THE AMERICAN DEMOCRACY 167 (1930).

[176] For a discussion of the "move" to living constitutionalism during the New Deal, see Gillman, *supra* note 45, at 230-46.

[177] LASSER, *supra* note 87, at 150 (quoting 2 PUBLIC PAPERS, *supra* note 62, at 14-15). Roosevelt's message to Congress in early 1937 revealed his strong conviction that the interpretation of the Constitution must change with the times: "'Means must be found

plained that "[t]he framers of the Constitution intentionally bounded it with outlines not sharp and contemporary, but flexible and prophetic."[178] Charles Beard argued that the vague phrases of the Constitution left room for "indefinit[e]" disagreement; "[i]f such words are 'law,' then moonshine is law."[179] Both at home,[180] and abroad,[181] commentators claimed that the Constitution afforded ample room to deal with the pressing problems that the country faced.

Advocates of "living constitutionalism" argued that their method of interpretation was grounded in sentiments of the framing era.[182]

. . . to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world.'" Turner Catledge, *Basic Law Upheld*, N.Y. TIMES, Jan. 7, 1937, at 1 (quoting Roosevelt). Roosevelt added that the "vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it. Difficulties have grown out of its interpretation; but rightly considered, it can be used as an instrument of progress, and not as a device for prevention of action." *Text of President Roosevelt's Message Read in Person Before Congress*, N.Y. TIMES, Jan. 7, 1937, at 2.

[178] FRANKFURTER, *supra* note 133, at 75. Others believed in the malleable nature of the Constitution. Joseph O'Meara, Jr. remarked that, "The Constitution does not speak with mathematical exactitude. Its provisions are couched in broad and general terms capable of being read in different ways. . . . [T]he fact is that the Supreme Court is constantly making and remaking the Constitution." Joseph O'Meara, Jr., *The Court and Democracy*, 26 COMMONWEAL 10, 10 (1937); *see also* Raymond Moley, *Today in America*, NEWSWEEK, Mar. 20, 1937, at 5 ("[O]ur Constitution was not intended to impose rigid limitations upon progressive legislation in the public interest. . . ."). Others, disagreeing, believed that change should only come through an amendment to the Constitution. *See* Andrew F. Burke, *The Court and the People*, 26 COMMONWEAL 5, 7-8 (1937); Michael Collins, *To the Roots of Court Reform*, 26 COMMONWEAL 122, 122 (1937).

[179] Charles A. Beard, *The Living Constitution*, 2 VITAL SPEECHES 631 (1936). Beard argued forthrightly that constitutional phrases should be interpreted by "good conscience in the light of expediency." *Id.* The title of Beard's article indicates the view of the Constitution common at the time. *See also* WILLIAM DRAPER LEWIS, INTERPRETING THE CONSTITUTION 43 (1937) (discussing how common law interpretation of the Constitution permits adoption to "changing conditions").

[180] *See, e.g.*, Lewis Wood, *'Pessimists of '39' Chided by Byrnes*, N.Y. TIMES, July 13, 1939, at 42 (quoting Senator Byrnes's assertion that "[t]he Constitution must always be flexible enough to meet the needs of changing years").

[181] The *New York Times* quoted a *London Times* editorial response to the *Butler* decision striking down the AAA:

> Can the United States afford to allow the national government to be stopped from exercising any direct control over matters of vital national concern? . . . The Constitution was written in 1787. Since then modern methods of production, trade, transport and communications have largely obliterated State boundaries in matters of business and economic development.
>
> Is it possible to continue to regard the questions raised by this change of conditions as the exclusive affair of the States?

Ruling Poses Issue, Says London Times, N.Y. TIMES, Jan. 7, 1936, at 12.

[182] *See* Gillman, *supra* note 45, at 222 ("By separating the more abstract goals of the framers from their specific intents and purposes it became possible to make the case for a style of constitutional interpretation that floated free from original meaning.").

John Marshall, vilified at other times of Court controversy for creating judicial review out of whole cloth, was praised for a statesman's perspective the current Court seemed to lack. Critics of the Court repeatedly invoked Marshall as authority for interpreting the document to take account of national growth and national problems.[183] For example, Senator Logan declared:

> If the Supreme Court had consistently adhered to the theories of Marshall, . . . we would be in no difficulties today, but trouble came in each instance when the Court departed from the principles of Marshall, who was looking toward the future and believing that the Constitution was an elastic instrument.[184]

Even the *New York Times*, a constant critic of the push for new constitutional interpretations, used the language of "living constitutionalism" by the end of the Court-packing battle.[185] Commenting on Frankfurter's appointment to the Supreme Court, the *Times* reconciled itself to changing times, commenting that "he will reveal the organic conservatism through which the hard-won victories won for liberty in the past can yield a new birth to freedom."[186] "Organic conservatism" was symbolic of the old coming to grips with the revolution that had occurred.

This shift in views about a living Constitution, and the New Deal struggle over this interpretation on the Supreme Court itself, is documented in Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 15-21 (1998).

[183] *See* FRANKFURTER, *supra* note 133, at 75-76 ("As a mere lawyer, Marshall had his superiors among his colleagues. His supremacy lay in his recognition of the practical needs of government. . . . The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."). For a discussion of New Dealers' efforts to claim Chief Justice Marshall's legacy in the first AAA cases, see PETER H. IRONS, THE NEW DEAL LAWYERS 137-38 (1982). Story was also praised. *See* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY 74 (1995) ("'What is needed today is . . . to recognize and apply canons of interpretation based on Story's conception of the Constitution as permitting a continuous evolutionary growth within its own provisions.'" (quoting John Dickinson, *The Professor, the Practitioner, and the Constitution*, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING 63 (1935))).

[184] 81 CONG. REC. 7377-78 (1937) (speech of Sen. Logan); *see also* George Creel, *Roosevelt's Plans and Purposes*, COLLIER'S, Dec. 26, 1936, at 9 (describing the "stupid failure or stubborn unwillingness to recognize the vast changes that have taken place in American life" as an obstacle to progress).

[185] Commenting on the Reed appointment to the Court in 1938, the *Times* seemed relieved that "there has been no evidence of intolerance in his advocacy of the law as a living instrument designed to meet the changing needs of changing times." *The President's Choice*, N.Y. TIMES, Jan. 16, 1938, § 4, at 8.

[186] *Felix Frankfurter*, N.Y. TIMES, Jan. 6, 1939, at 20; *see also Justice Frankfurter*, N.Y. TIMES, Jan. 18, 1939, at 18 ("No real doubt was expressed that the living Constitution, and the liberties of the citizen under the Constitution, will be safe in his hands.").

The second significant change in belief was that in the face of textual malleability, the meaning of the Constitution was what the judges said it was.[187] Thus, the Court had leeway to read the Constitution with a favorable eye toward New Deal legislation. Ronen Shamir reports an American Bar Association Executive Committee member as saying: "[T]he truth of the business is we don't know what is constitutional or unconstitutional until the Supreme Court says it is or it isn't."[188] According to Larry Lessig, "the act of judging came to appear more like *will* and less like *judgment*."[189]

There were resisters. Justice Roberts may be most famous for his "switch in time," but his second claim to fame was insisting in *Butler* that "the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[190] His colleague Justice Sutherland, dissenting in *West Coast Hotel* after the switch was complete, continued to resist: "[I]t is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events."[191]

This was the minority view, however. Scholars and citizens favored judicial activism to interpret the Constitution consistent with the needs of the times. Commenting on Roberts just a few years later, Charles Curtis said "[c]onstitutional law is not much like poetry, but it is far more like poetry than like geometry. Roberts's figure of speech must be left behind."[192] Writing in the *New York Times Magazine*, Howard McBain, a constitutional law professor at Columbia, wondered

---

[187] As Stephen Presser recently observed, "the view that the Constitution is a malleable document . . . permits justices to change course the way the Court did in 1937." Stephen B. Presser, *What Would Burke Think of Law and Economics?*, 21 HARV. J.L. & PUB. POL'Y 147, 149 (1997) (approving neither of realism nor its impact on constitutional interpretation.).

[188] SHAMIR, *supra* note 183, at 74, (citation omitted).

[189] Lessig, *supra* note 23, at 463. Lessig goes on to say, "Thus, for the *same reason* that the possibility of a general federal common law collapsed, so too did the possibility of a general judicial policing of legislative action collapse as well." *Id.* That, of course, did not hold true of the jurisprudence of rights that was to blossom after the New Deal transformation, and particularly during the Warren Court.

[190] United States v. Butler, 297 U.S. 1, 62 (1935); *see also* CARR, *supra* note 140, at 32 (criticizing the Court for straying from a strict interpretation of the Constitution).

[191] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402 (1936) (Sutherland, J., dissenting).

[192] CHARLES P. CURTIS, LIONS UNDER THE THRONE 19 (1947).

"how the result could be otherwise" given the "vague phrases of the Constitution".[193] Charles Fairman suggested "we do not flinch from the fact that the justices do make constitutional law and that in exercising their prerogative of choice between possible constructions they are performing what is, in the highest sense, a political function."[194] In accord was Max Lerner, who said "[t]he prevailing view of the function of the Court is thoroughly realistic. It sees the Court as a definite participant in the formation of public policy, often on matters of far-reaching economic and social importance."[195] Thus, the Court's concern is "more significantly with power politics than with judicial technology."[196] Indeed, Dean Acheson, addressing the Maryland Bar Association in 1936 and complaining about judges imposing their personal values on the vague clauses of the Constitution such as "due process" seemed quite out of step.[197]

The notion of a flexible Constitution became official administration policy during the New Deal and strongly influenced popular understandings.[198] Realists trained many of the young lawyers of the New

---

[193] Howard Lee McBain, *The Issue: Court or Congress?*, N.Y. TIMES, Jan. 19, 1936 (Magazine), at 2. As Charles Curtis explained, "[w]ords are living things, and *il faut vivre entre les vivants*, as Montaigne well knew." CURTIS, *supra* note 192, at 19.

[194] Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 399 (1938).

[195] Lerner, *supra* note 63, at 696.

[196] *Id.* at 669.

[197]

> In the field of the due process clauses of the Fifth and Fourteenth Amendments there is equal need for judicial self-restraint. In cases of this sort the Court is asked to set aside national and State laws for reasons which in most instances defy statement convincing to the man in the street. The Court has shown a tendency to make this vague phrase—due process of law—a congeries of specific concepts drawn from the beliefs and ideology of some of the judges. Such a limitation upon a democracy, as militant as it was in Taney's day, cannot be reasonably expected to endure. And little is gained by the interpretation that the clause prohibits what a majority of judges find to be arbitrary or unreasonable. Anything with which we strongly disagree seems unreasonable and arbitrary.

Dean G. Acheson, Roger Brooke Taney: Notes upon Judicial Self-Restraint, Address Before the Maryland Bar Association, *in* PROCEEDINGS OF THE FORTY-FIRST ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION 147 (1936).

[198] Although the division was by no means strict, many of those attacking Realism also were opponents of the New Deal, which is indicative of some correlation between the two philosophies. *See* PURCELL, *supra* note 121, at 159-72 (describing anti-realists as opponents of New Deal, but indicating the division was not strict). These anti-formalist—if not realist—understandings of the Constitution and constitutional interpretation also help explain a famous document often taken to indicate Roosevelt's reluctance to accept judicial supremacy. In 1935, as Congress was considering the Bituminous Coal Conservation Act, Roosevelt wrote Congress, urging it to enact the bill

Deal,[199] and then themselves took up important roles in government, abandoning the intellectual movement for law in action.[200] Laura Kalman reports that "[a]fter Jerome Frank agreed to write a brief for the government in the Nebbia case, . . . 'for a month the [Yale Law] School seemed to know of nothing but the Nebbia case—Charlie [Clark] writing in his office, Thurman [Arnold] bellowing wherever he happened to be, seminars writing briefs and papers.'"[201] "It was in the New Deal," writes Ronen Shamir, "that legal realism, heretofore confined to academic circles, became the active program of the administration's legal-policy agenda."[202] Stephen Presser explains that the "immediate result" of the realist movement "was the New Deal and the great judicial 'revolution' of 1937 in *Jones & Laughlin* and *West Coast Hotel*."[203]

This change in views regarding constitutional determinacy was even reflected in high school civics textbooks.[204] A book published before the start of the New Deal insisted that the Supreme Court must "preserve our fundamental law in its integrity."[205] Yet, a text from the 1940s called "naïve" the view that courts do not "change" constitutional meaning, given that where "no signs point a clear path" judges

---

despite "doubts as to [its] constitutionality, however reasonable." He went on to say that "[a] decision by the Supreme Court relative to this measure would be helpful as indicating with increasing clarity the constitutional limits within which this government must operate." CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 935 (1943). As will be evident shortly, Roosevelt indeed was reluctant to concede judicial supremacy. This excerpt, however, seems to suggest just the opposite, that Roosevelt was inviting a decision precisely to clarify the meaning of the Constitution. In addition, what it emphasizes is that the Constitution's meaning was felt to be both flexible, and was in flux, and the decisions of the Justices were necessary to provide coherence.

[199] *See* IRONS, *supra* note 183, at 7 ("Courses at Columbia such as Llewellyn's in Law and Society, Handler's in Trade Regulation, and Berle's in Corporation Finance prepared budding New Deal lawyers to look on judges as manipulators of law and on regulation as a modern necessity.").

[200] *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 130 (1986). Kalman contends that so many legal professors at Yale were involved with the New Deal, teaching and writing inevitably suffered. *See id.* at 130 ("In such an atmosphere, theoretical discussion of legal realism was bound to wane."); *see also* PURCELL, *supra* note 121, at 93 ("Frank, Oliphant, Clark, Arnold, Douglas, and Felix Cohen all became ardent New Dealers . . . .").

[201] KALMAN, *supra* note 200, at 130-31 (quoting a letter from Harry Shulman to Felix Frankfurter).

[202] SHAMIR, *supra* note 183, at ix.

[203] Presser, *supra* note 187, at 148.

[204] Thanks are due to Don Langevoort for suggesting a look at such civics books.

[205] FORMAN, *supra* note 175, at 137.

naturally "say the law 'is' what they think it 'should be.'"[206] "There is a wide range of choice for the judges in many cases. In exercising this choice they fill gaps in the clauses of the Constitution and help turn the course of government this way or that."[207]

D. *Nine Old Men: Criticizing the New Deal Court*

Changed notions regarding the nature of democratic government and the malleability of the Constitution were reflected in criticism of the courts. These changes drove both the public's criticism of the Supreme Court and the action Roosevelt took to discipline the Court. Countermajoritarian criticism was replaced largely with a flood of criticism aimed at the Justices for failing to interpret the Constitution in a manner consistent with the needs of the times. As William Lasser explains, "To these men, the Constitution as written was not inherently anti-democratic; it was simply in need of updating to cope with economic realities."[208]

Roosevelt's response to the *Schechter Poultry* decision was typical, and frequently repeated. "We have been relegated to the horse-and-buggy definition of interstate commerce," he said in a phrase picked up by many newspapers.[209] Roosevelt evidently told an associate that when he took the oath of office and swore to uphold the Constitution, "I felt like saying, 'Yes, but it's the Constitution as I understand it, flexible enough to meet any new problems of democracy—not the kind of Constitution your Court has raised up as a barrier to progress and democracy.'"[210] This would become a Roosevelt theme. In his inaugural State of the Union address, for example, he insisted that "means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."[211]

---

[206] ANDERSON, *supra* note 175, at 80.

[207] *Id.*

[208] LASSER, *supra* note 87, at 149.

[209] Roosevelt "argued that the Court had stripped the national government of its power to cope with critical problems," saying, "'We have got to decide one way or the other . . . whether in some way we are going to . . . restore to the Federal Government the powers which exist in the national Governments of every other Nation in the world.'" LEUCHTENBURG, *supra* note 8, at 90.

[210] BAKER, *supra* note 9, at 33.

[211] Catledge, *supra* note 177, at 1 (quoting Roosevelt). Roosevelt continued, "'[t]he vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it.'" *Id.* at 4; *see, e.g., id.* at 1 ("'Means must be found to adapt our legal forms and our judicial interpretation to the actual present national

Advancing the notion that the Court was failing to keep step with the times, Roosevelt tapped into public sentiment about the Supreme Court.[212] After *Butler*, Roosevelt received a huge volume of mail. Most writers focused on the age of the Justices and their failure to grasp the present situation.[213] Similarly, in response to *Tipaldo* one member of the regional NLRB and state minimum wage board said, "all we want is a fair court—not a court remote and detached from the conditions in the world today, a world in which the majority of the court have not even lived for the past twenty years."[214] On the Senate floor sentiments were often similar to those expressed by Senator Norris: "Our Constitution ought to be construed in the light of the present-day civilization instead of being put in a straitjacket made more than a century ago."[215] Robert Jackson, suggesting with only a thin veil of irony that Supreme Court Justices need not and perhaps should not be lawyers, told the

---

needs of the largest progressive democracy in the modern world.'" (quoting Roosevelt)); Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 1937 PUBLIC PAPERS, *supra* note 62, at 128 (expounding the need "to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances"); Franklin D. Roosevelt, "If We Would Make Democracy Succeed, I Say We Must Act—NOW!" The President Continues the Court Fight. Address at the Democratic Victory Dinner (Mar. 4, 1937), *in* 1937 PUBLIC PAPERS, *supra* note 62, at 115 ("[T]he most striking feature of the life of this generation—the feature which men who live mentally in another generation can least understand—[is] the ever-accelerating speed with which social forces now gather headway.").

[212] This apparently was true despite disapproval of Roosevelt actually criticizing the Court. *See infra* note 218 (noting the many letters Roosevelt was receiving that were critical of the Court). There is no contradiction here: as polls showed, people disagreed with the Court but were unwilling to challenge the institution of judicial review. *See infra* note 249 (noting that while Roosevelt was extremely popular, a majority of Americans opposed his Court-packing plan).

[213] Roosevelt was flooded with letters from citizens concerned about the "age problem." One writer reasoned, "'Business does not accept an applicant with twelve gray hairs on his head.'" From Virginia came a demand for Roosevelt to increase the Court to "'at least twenty or more members. Nine OLD MEN, whose total age amounts to about 650 years, should have additional help.'" LEUCHTENBURG, *supra* note 8, at 97.

[214] *Ruling Disappoints Leaders Here*, N.Y. TIMES, June 2, 1936, at 19.

[215] 81 CONG. REC. 2144 (1937) (statement of Sen. Norris); *see also* 81 CONG. REC. 7379 (1937) (statement of Sen. Logan) ("We cannot stand still. Society must move forward. National power must be expanded to meet the exigencies of all occasions, and if the Nation has a Supreme Court that will not allow this, then the Nation must begin to wither and die."). Some time later, Senator Byrnes commented:

> The real danger to our constitutional system has not been the readiness of courts to amend their decisions. The real danger has been the tendency of courts to disregard the lessons of experience and the force of better reasoning, and thus to produce hardening of the constitutional arteries. That disease might be fatal to the body politic.

James F. Byrnes, *The Constitution and the Will of the People*, 25 A.B.A. J. 667, 668 (1939).

New York Bar, "In dealing with a nation, whose genius is invention, we cannot outlaw every action that can not show a precedent."[216] Commenting on the architecture of the Supreme Court's newly-constructed quarters, Pearson and Allen wrote:

> [W]hat could be more appropriate than that a Court which fails to take cognizance of the speed of modern civilization in industrial and economic development, and which denies posterity the right to express itself in regard to social and economic reform in its own way, should be housed in a building symbolic of the court's intransigence?[217]

So central was this complaint that it resulted in sustained criticism of the ages of the Justices of the Supreme Court. William Leuchtenburg reports a wealth of such complaints, many of them mailed to Roosevelt by ordinary citizens.[218] Instead of being nine men who interfered with the present program, it was invariably nine *old* men,[219] a phrase popularized by Drew Pearson and Robert Allen in their book by that name. The ages of the Justices were the subject of ridicule. One man wrote Roosevelt questioning the "fitness of 'that body of nine old hasbeens, half-deaf, half-blind, full-of-palsy men.... That they are behind the times is very plain—all you have to do is look at Charles Hughes' whiskers.'"[220] Indeed, a Gallup Poll showed that a majority of Americans thought that "advanced age is a drawback on the Supreme Court in most cases and that justices should be required

---

[216] Robert H. Jackson, Address Before the New York Bar Association (Jan. 29, 1937), *in* 81 CONG. REC. 124 (1937); *see also Quiet Crisis*, *supra* note 119, at 16 ("Judges who resort to a tortured construction of the constitution may torture an amendment. You cannot amend a state of mind.").

[217] PEARSON & ALLEN, *supra* note 65, at 2-3.

[218] *See, e.g.*, LEUCHTENBURG, *supra* note 8, at 97 ("From different parts of the nation, Roosevelt heard calls for additional Justices 'with younger minds.'"); *id.* at 104-05 (reporting letters to Roosevelt after *Carter Coal* that commented frequently on the Justices and their age); *id.* at 136 (quoting press reports and letters concerning the ages of the Justices).

[219] Many focused on the age problem. For example, the *New York Times* quoted Senator Green as supporting Roosevelt's Court-packing plan by claiming:

> We must, however, legislate for the average man, and the average older man is more apt than a younger one to have a closed mind. He is apt to become fixed in his habits of action and of thought. Certain of his principles have become settled beyond the reach of argument. Old precedents with him outweigh new conditions.

Held Gain for Democracy, N.Y. TIMES, Feb. 10, 1937, at 10; *see also Too Early Start?*, N.Y. TIMES, Mar. 23, 1939, at 22 (noting that conservatives and liberals alike agree that appointment of a judge under 40 is "too much, if the Supreme Court is to keep step with changes in the nation.... He will be around too long.").

[220] LEUCHTENBURG, *supra* note 8, at 96-97.

to retire after reaching a certain age."[221]

More restrained critics also focused on age. Many academics expressed approval of the Court-packing plan on the ground that it would bring "new blood" to the Court.[222] One witness at the Court-packing hearings provided a graph to show how overrulings increased dramatically the older the Justices were.[223] Charles Fairman also wrote a piece favoring early retirement of federal judges and addressing the problems of age on the Court.[224]

In short, the primary problem as people saw it in 1937 was the *Justices* themselves, *not* the inherently countermajoritarian nature of the institution of judicial review. The Supreme Court was part of government, and government's job was to solve problems facing the people. The Constitution was capacious enough to permit the Court to join hands with the rest of government and to cast a more open eye upon New Deal legislation. As the reaction to *Schechter Poultry* suggests, no one expected the Justices to approve all the legislation, but the popular perception was that the current occupants of the highest bench were particularly hostile to the needs of changing times, in no small part because of their age.

E. *The Contemporary Logic of the Court-Packing Plan*

This criticism of the Justices and their age was reflected in the solution Roosevelt and his advisors settled upon to discipline the Court. Although Roosevelt's Court-packing plan took many people by surprise, in fact it had been the subject of tremendous study and attention. Long before the events of 1936, Roosevelt anticipated the need

---

[221] Dr. George Gallup, *Bench Retirement at 70 Is Favored*, N.Y. TIMES, May 29, 1938, at 8N. Obviously, not all commentators agreed. *See Age Limit for Judges*, N.Y. TIMES, Feb. 15, 1939, at 22 ("There should be no hard and fast rule in the matter of age. The Supreme Court should not be deprived by an arbitrary prohibition of men who might be numbered among its brightest ornaments.").

[222] *See, e.g.*, *Law Teachers Divided*, N.Y. TIMES, Feb. 6, 1937, at 9 ("The President is acting fully within his constitutional rights and prerogatives. It seems to me a good idea to get some new blood into the Supreme Court." (quoting John V. McCormick, Dean of Loyola University Law School)); *id.* ("The President's plan affords an opportunity for injecting a little much-needed new blood into the Supreme Court without in any way detracting from its power or independence." (quoting William W. Crosskey, Associate Law Professor at the University of Chicago)).

[223] *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. 2429 (1937) [hereinafter *Hearings*] (statement of Justin Miller, member of the United States Board of Tax Appeals), *reprinted in* 2 CONGRESS AND THE COURTS 129 (Bernard D. Reams Jr. & Charles R. Haworth eds., 1978).

[224] *See* Fairman, *supra* note 194, at 398.

to do something about the Court. Precisely what that would be remained an open question, and Roosevelt's thinking on the question shifted over time. Ultimately he settled on the popular, in both senses of the word, criticism of the Justices themselves.

FDR saw his huge electoral victory in 1936[225] as a mandate for his policies and views, including the removal of obstacles—such as the Supreme Court—from his path. In his State of the Union address to Congress in 1937, Roosevelt focused on the Supreme Court, seeking its cooperation.[226] Every word in the speech that could be construed as an attack on the Court was cheered heartily.[227] Following the speech, members of Congress advanced numerous plans to curb the Court or amend the Constitution.[228]

On February 5, Roosevelt sprang his Court-packing plan on the nation. He argued that the entire federal judiciary was behind in its work,[229] due primarily to the age of the judges.[230] He justified the plan

---

[225] Roosevelt's 1936 win "rolled up the greatest victory in the history of two-party competition by capturing the electoral votes of all but two of the forty-eight states." LEUCHTENBURG, *supra* note 8, at 108.

[226]

> Roosevelt transformed the usually dull occasion of the State of the Union message into a national spectacle. He appeared in person before Congress to deliver it in the evening. What is standard in the television age seemed sensational then.... Only once before had a president addressed Congress at night, and that had been when Wilson called for a declaration of war against Germany. No previous president has so utilized radio as did Roosevelt....

FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 195 (1990).

[227] *See, e.g.*, Catledge, *supra* note 177, at 1 (discussing Congress's very favorable reaction to the speech).

[228] *See, e.g., Basic Law Change Gains in Congress*, N.Y. TIMES, Jan. 8, 1937, at 1 (noting the growing sentiment to put Roosevelt's social policies into a constitutional amendment).

[229] *See* LEUCHTENBURG, *supra* note 8, at 133 (discussing the "overcrowded Federal court dockets"). In the press conference announcing the plan, Roosevelt stated, "[d]elay in any court results in injustice. It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost.... The Supreme Court is laboring under a heavy burden." *Judiciary: De Senectute*, TIME, Feb. 15, 1937, at 17. *But see* Charles P. Taft, *More Than This Would Be a Revolution*, SATURDAY EVENING POST, Apr. 10, 1937, at 19 ("It is difficult to understand where the President secured the evidence upon which he bases this statement [that the Supreme Court is overburdened].").

[230] *See Judiciary*, *supra* note 229, at 17 (discussing Roosevelt's concerns over the advanced age of federal judges). Roosevelt proposed to solve the problem of an overburdened court with the infusion of younger Justices:

> "Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts

in terms of workload and judicial efficiency,[231] rather than confronting directly the question of Supreme Court interference with the New Deal agenda.[232] The plan would have permitted the President to add a Justice to the Supreme Court for any Justice over the age of seventy who failed to retire.[233] According to Alsop and Catledge, this decision "horrified" FDR's many advisors who had been kept in the dark, as they believed "no one, in Congress or out, would be deceived by the fantastically disingenuous cloak of argument in which the President and [Attorney General] Cummings had wrapped their bill."[234]

Despite the "disingenuous cloak," it is useful to recognize how closely the remedy on which Roosevelt finally settled tracked the very changes in public sentiment that framed popular criticism of the Supreme Court, how much "the plan seemed to have an inherent logic and even inevitability."[235] Many in Congress and around the country advocated amending the Constitution to grant the federal government the powers withheld by the Supreme Court.[236] Roosevelt re-

---

become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future . . . ."

Id. (quoting Roosevelt).

[231] *See id.* (noting that additional judges were required to make certain "that the affairs of the court . . . be properly and adequately discharged").

[232] It is very difficult to assess how much the original presentation of the plan contributed to its defeat. Surely Roosevelt's approach was attacked widely, and he may have done better by using candor. Yet, it could be that the "taboo" against court packing, *see infra* note 235, was so ingrained that a more direct approach would also have failed.

[233] S. 1392, 75th Cong. § a (1937). The President took special glee in the fact that the most recalcitrant of Justices, Justice McReynolds, had made just such a suggestion when he was Attorney General in 1913. *See* BURNS, *supra* note 62, at 297. ("And Roosevelt, with his penchant for personalizing the political opposition, must have delighted in the thought of hoisting McReynolds by his own petard.").

[234] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 58.

[235] LEUCHTENBURG, *supra* note 8, at 131. The Court-packing plan was well-considered by Roosevelt. *See* 2 ACKERMAN, *supra* note 14, at 319 (stating that the plan "came after years of reflection"). He had considered it early in his first term. *See* LEUCHTENBURG, *supra* note 8, at 85-86 (tracing Roosevelt's discussions with Cabinet members regarding the Court). Even the disingenuous cloak made some sense. There was a certain "taboo" against Court-packing, ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 29; LEUCHTENBURG, *supra* note 8, at 118, and the thought was that the judicial reform idea might erase the taboo. *See id.* at 124.

[236] *See* LEUCHTENBURG, *supra* note 8, at 91 (noting that members of FDR's "Brain Trust," including Senators James F. Byrnes Jr., and Robert M. LaFollette Jr., favored a constitutional amendment following the three 9-0 decisions of "Black Monday," May 27, 1935); *see also President and Court*, BUS. WK., Jan. 9, 1937, at 56 (asserting that if the Supreme Court did not validate New Deal legislation, Roosevelt might try to amend the Constitution to restrain the Court's power). After the announcement of the Court-

jected the amendment route in part because of its many hazards, the time that would be required, and doubt that any one amendment could be framed to address the specific problems posed by the New Deal program and the Court's decisions.[237]

Yet, for Roosevelt, the problem with the amendment process went beyond drafting and enactment to deeper beliefs about the necessity or efficacy of such an approach in light of the Constitution's flexibility and the fact that the Justices retained the last word as to its meaning.[238] Even if an amendment were feasible, it still would be subject to judicial interpretation. Roosevelt explained this to his listeners:

> Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.[239]

Similarly, Robert Jackson told Congress: "Judges who resort to a tortured construction of the Constitution may torture an amendment."[240]

As several commentators have observed, advocacy of an amendment was fundamentally inconsistent with the Realist belief that the Constitution was adaptable to changing times.[241] If the Constitution was truly flexible, why was an amendment even necessary? Jackson

---

packing plan by Roosevelt, two of the five proposals that liberals presented as compromises included amending the Constitution. *See The Big Debate*, TIME, Mar. 1, 1937, at 11 (detailing five proposals: to keep the Court young; to keep the Court up-to-date; to limit the Supreme Court's power; to amend the Constitution; and to make it easier to amend the Constitution).

[237] *See* CUSHMAN, RETHINKING, *supra* note 8, at 23 (discussing the "framing difficulties of a constitutional amendment); LEUCHTENBURG, *supra* note 8, at 109 (noting that "[t]wo years of study in the Justice Department had not yielded a satisfactory draft" amendment); *see also* Alsop & Catledge, *Behind the Story*, *supra* note 149, at 9 (stating that the President thought the amendment process was "too slow and too uncertain").

[238] *See* LEUCHTENBURG, *supra* note 8, at 111 (noting that not only would legislation enacted under authorization of an amendment still be subject to judicial review, but "an amendment enlarging federal powers" might also "seem tantamount to conceding that [Roosevelt] had been wrong" in his disputes with the Supreme Court over New Deal legislation).

[239] Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 1937 PUBLIC PAPERS, *supra* note 62, at 132.

[240] *See* 2 CONGRESS AND THE COURTS, *supra* note 223, at 2343.

[241] *See, e.g.*, SHAMIR, *supra* note 183, at 72 ("The calls for constitutional amendments, however, were somewhat at odds with the frequent emphasis of many of the New Deal's legal minds on the 'uncertainty' of the law and the 'flexibility' of the Constitution."); *see also id.* at 74 ("'[T]he talk about amending the Constitution is on par with the talk about liberal judges. It assumes that there is something in the present Constitution which says that the NIRA is unconstitutional.'" (quoting Louis Boudin)).

made precisely this point to Congress, explaining: "Experience has shown that it is difficult to amend a constitution to make it say *what it already says.*"[242]

For this reason, Roosevelt's plan was consistent with his own and many advisors' conclusion that the problem rested with those who held seats on the Court, not with the institution of judicial review.[243] As Homer Cummings wrote to the President, "The real difficulty is not with the Constitution, but with the Judges who interpret it."[244] Cummings's conclusion echoed that reached by Felix Frankfurter seven years earlier[245] (although Frankfurter is said to have been reluctant about the plan once announced,[246] and later in life took pains to es-

---

[242] *See* 2 CONGRESS AND COURTS, *supra* note 223, at 2342 (emphasis added).

[243] *See* CUSHMAN, RETHINKING, *supra* note 8, at 23 ("[I]t was Roosevelt's view that the Court, not the Constitution, was the problem."). Of course, many argued that adding judges may not prove a long-term solution either, if judges had so much discretion to interpret the Constitution. *See* FEINMAN, *supra* note 136, at 124 (describing those who advanced this argument).

[244] Letter from Homer Cummings to Franklin D. Roosevelt (Jan. 26, 1936), *quoted in* LASSER, *supra* note 87, at 150; *see also* JACKSON, *supra* note 118, at 180 ("[I]t was men, not the institution, that needed correction.").

[245] Frankfurter warned the Court's critics to avoid "mechanical contrivances" when crafting court reform. Felix Frankfurter, *The Supreme Court and the Public*, 83 FORUM 334 (1930). "The ultimate determinant," he wrote, "is the quality of the Justices." *Id.*

[246] Dean Acheson believed that Frankfurter was "dead against" Roosevelt's plan. DEAN ACHESON, MORNING AND NOON 202 (1965). Indeed, Frankfurter wrote an article in 1934 arguing that "to enlarge the size of the Supreme Court would be self-defeating." Felix Frankfurter, *The Supreme Court of the United States*, *in* ENCYCLOPEDIA OF SOCIAL SCIENCES 45 (1934), *reprinted in* LAW AND POLITICS 28 (Archibald MacLeish & E.F. Prichard Jr., eds., 1938).

However, Frankfurter supported the plan, albeit with a measure of unease. Upon hearing of the plan, Frankfurter wrote Roosevelt and praised him for "the deftness of the general scheme," criticized the Court for a "long series of decisions not defensible in the realm of reason," and expressed his belief that "some major operation was necessary" in order "to save the Constitution from the Court, and the Court from itself." Letter from Felix Frankfurter to Franklin D. Roosevelt (Feb. 7, 1937), *in* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 380-81 (1967) [*hereinafter* ROOSEVELT AND FRANKFURTER]. Roosevelt incorporated that phrase into his fireside chat of March 9. *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 268 (1982) (detailing Roosevelt's use of Frankfurter's phrase). Both in letters and in person he gave Roosevelt encouragement and advice on how to successfully pursue his Court-packing plan. *See id.* (describing such encouragement). In a letter to Roosevelt, Frankfurter criticized New York Governor Herbert Lehman for opposing the proposal. *See* Letter from Felix Frankfurter to Franklin D. Roosevelt (July 20, 1937), *in* ROOSEVELT AND FRANKFURTER, *supra*, at 403 (quoting Frankfurter as saying he was "hot all over regarding Herbert Lehman's letter"). At Frankfurter's suggestion, Henry M. Hart Jr., a recent Frankfurter protégé, wrote an article favorable to the plan in the *Harvard Alumni Bulletin*. *See* PARRISH, *supra*, at 268. Privately, Frankfurter did express shock at the "longevity point" of Roosevelt's plan, explaining, "You may

tablish that the Court never bowed under the pressure of it).[247] In his Storrs Lectures, Frankfurter wrote: "In simple truth, the difficulties that government encounters from law do not inhere in the Constitu-

---

think it sentimental of me, but I have a real feeling of reverence for old age." Letter from Thomas Reed Powell to Felix Frankfurter (Dec. 20, 1937), *quoted in* PARRISH, *supra*, at 269. However, at no time during the five month Court-packing struggle did Frankfurter "suggest[] that Roosevelt retreat." MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 42 (1991).

Frankfurter's behind-the-scenes encouragement was coupled with a public silence about the plan. He never openly endorsed the President's plan. He took pains to avoid being drawn into the public debate about the plan and wrote Roosevelt that "foolish folks (enemies of yours) are doing their damndest to make me attack the court so as to start a new line of attack against your proposal. They miss their guess. I shan't help them to divert the issue.... There are various ways of fighting a fight!" Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937), *in* ROOSEVELT AND FRANKFURTER, *supra*, at 392. This silence has been explained as a function alternatively of Frankfurter's blind loyalty, self-interest, hypocrisy, cowardice, or doubt. *See* PARRISH, *supra*, at 268-69 (describing Frankfurter's states of mind). However, Frankfurter's course of action defies such simple explanation. A letter Frankfurter wrote but never mailed to Brandeis is the fullest exposition of his complex view of the plan:

> Tampering with the Court is a very serious business. Like any major operation it is justified only by the most compelling considerations. But no student of the Court can be blind to its long course of misbehavior. I do not relish some of the implications of the President's proposal, but neither do I relish victory for the subtler but ultimately deeper evils inevitable in the victory for [Evans] Hughes and the [Pierce] Butlers and their successors.... It is a complicated situation and an unhappy one that F.D.R. has precipitated, but the need, it seems to me, more important than any is that in a handful of men ... the fear of God should be instilled so that they may walk humbly before their Lord.

PARRISH, *supra*, at 270 (quoting Letter from Felix Frankfurter to Louis Brandeis (Mar. 26, 1937)).

[247] Frankfurter's first reaction to the switch in time was that Roberts's "somersault" was

> incapable of being attributed to a single factor relevant to the professed judicial process. Everything that he now subscribes to he rejected not only on June first last, but as late as October twelfth.... I wish either Roberts or the Chief had the responsibility of conducting the class when we shall reach this case shortly. It is very, very sad business.

Letter from Felix Frankfurter to Harlan Stone (Mar. 30, 1937), *reprinted in* PARRISH, *supra* note 246, at 271. Later, however, Frankfurter wrote an article in the *University of Pennsylvania Law Review*, explaining that Roberts's vote was not the result of the pressure of the Court-packing plan. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-14 (1955) (arguing that Roberts was prepared to overrule the *Adkins* decision in the spring of 1936). For an account of Frankfurter's desire for his revision to become accepted history in order to protect the reputation of the Court, see Ariens, *supra* note 14, at 667-69. Ariens goes so far as to imply that Frankfurter manufactured a memorandum from Roberts on the subject, *see id.* at 645-49, a point disputed by Richard Friedman, *see generally* Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985, 1985-86 (1994) (arguing that the idea that Frankfurter forged the memorandum is "demonstrably false" and "should be put aside and forgotten").

tion. They are due to the judges who interpret it."[248]

F. *The Values That Spelled the Plan's Demise*

Despite strong public frustration with the courts, something went wrong. By the commencement of Senate hearings, the plan had run into a gale of public resistance.[249] Then, according to the traditional story, the proposal was devastated by the "switch in time."[250] In several decisions in 1937, notably including *Jones & Laughlin Steel*[251] and *West Coast Hotel Co. v. Parrish*,[252] the Court narrowly upheld social welfare legislation, seemingly changing direction on the meaning of the Due Process and Commerce Clauses.[253] These decisions took pressure off the Court and diminished the sentiment that Court reform was necessary.[254] Next, Justice Van Devanter resigned,[255] suggesting to many that

---

[248] FRANKFURTER, *supra* note 133, at 79.

[249] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 70-73 (describing immediate negative reaction); CUSHMAN, RETHINKING, *supra* note 8, at 13 ("Polls taken between February and May of 1937 indicate that the first major domestic initiative of Roosevelt's second term was consistently opposed by a majority of the same American people who had so overwhelmingly returned him to office the preceding November."); LEUCHTENBURG, *supra* note 8, at 145 (noting that mail ran heavily against the plan and polls showed a majority against the Court-packing bill).

[250] *See* LEUCHTENBURG, *supra* note 8, at 143 ("The switch by Roberts had ironic consequences. On the one hand, it gave Roosevelt the victory he wanted, for the Court was now approving New Deal legislation .... But, on the other hand, Roberts's 'somersault' gravely damaged the chances for the Court plan."). The debate on this point is discussed *infra*, notes 390-94 and accompanying text (discussing the prospects for the plan's success).

[251] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[252] 300 U.S. 379 (1937).

[253] Many commentators agree that the earlier decision in *Nebbia* might have signaled a significant switch with regard to the Due Process Clause, which is why the *Tipaldo* decision caused such a stir. *See, e.g.*, 2 ACKERMAN, *supra* note 14. Barry Cushman stands almost alone, however, in arguing that *Jones & Laughlin* was not a tremendous doctrinal shift. *See* CUSHMAN, RETHINKING, *supra* note 8, at 168 ("No departure from existing commerce doctrine was necessary in order to sustain the [Wagner] Act. Indeed, the current of commerce doctrine would have appeared to require that the Act be upheld.... Had [the Justices relied on this doctrine], a great deal of historical confusion ... might have been averted."). For further discussion of this issue, see *infra* notes 361-94 and accompanying text.

[254] *See* CUSHMAN, RETHINKING, *supra* note 8, at 21 ("The retirement for which both Roosevelt and Van Devanter had thirsted for so long had sealed the fate of the Court-packing plan."); *see also* Turner Catledge, *Split on Court Bill*, N.Y. TIMES, Apr. 13, 1937, at 1 (reporting that opponents to the Court plan called the decision a "death-blow" and that even Roosevelt conceded that the decision "tended to relieve the urgency for court reorganization"); *The Federal Power Broadens*, WALL ST. J., Apr. 13, 1937, at 4 ("[I]t can no longer be asserted with even a color of plausibility that the high bench interprets the basic law without reference to changing economic or social conditions. The

the problem would be solved by natural attrition from the Court.[256] At this point, talk of compromise began.[257] As of July 2, a compromise was being considered that would allow a maximum of one Justice to be added a year.[258] This plan might have passed, giving Roosevelt

---

immoral judicial bill is now bereft of its only pretense of justification."); Arthur Krock, *Wagner Act Decisions Viewed from Political Angle*, N.Y. TIMES, Apr. 13, 1937, at 24 (explaining that "some members of Congress who will vote for the bill as a last resort found renewed hope they may not be obliged to do so"); *Press Views on the Labor Decision*, N.Y. TIMES, Apr. 13, 1937, at 21 (summarizing headlines from across the country which included "Blow to Court Packing" in the *Kansas City Star*, "Should Remove Plan's 'Last Prop'" in the *Hartford Courant*, and "Roosevelt View Held Disproved" in the *Los Angeles Times*). Even this was not enough for some, however. *See* Louis Stark, *Labor Predicts Sweeping Gains*, N.Y. TIMES, Apr. 13, 1937, at 19 (quoting John L. Lewis, President of the United Mine Workers of America and head of the CIO as saying, "[t]he Court is as variable as the winds, and the people wonder how long they are to be the victims of its instability. Obviously the situation needs change. The President's court plan is the immediate answer.").

[255] Van Devanter's timely retirement may not have been coincidental. Some suggest that it was gently engineered by Senator William Borah, a prominent member of the Court-packing opposition. *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 206-07 (discussing Borah's influence on Justice Van Devanter); LEUCHTENBURG, *supra* note 8, at 143-44 ("Van Devanter's action was believed to have been the result of counsel from Senators Borah and Wheeler."). Nonetheless, Van Devanter had wanted to retire and had been dissuaded from doing so earlier by a concern that Congress might act to reduce his retirement compensation. Van Devanter feared that he would receive the same treatment given to Justice Oliver Wendell Holmes after his retirement in 1932. *See* 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 760 (1951) (noting that Justice Van Devanter "clung to [his seat] chiefly because of the unfairness of Congress to Justice Holmes"). Shortly after Holmes resigned, Congress enacted the Economy Bill of 1933, reducing the retirement compensation of all retired Supreme Court Justices. *See id.* (noting that Congress had reduced compensation for retired judges); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 302-03 (David J. Danelski et al. eds., 1973) (discussing compensation and privileges of retirement for Supreme Court Justices). This economy measure had the ironic effect of keeping judicial opponents of New Deal legislation on the Supreme Court longer than they otherwise would have chosen to remain. *See* BAKER, *supra* note 9, at 87-88, 202-03.

[256] *See Court: Champions of the Senate Wage Wordy War over President's Plan*, NEWSWEEK, July 17, 1937, at 8 ("The resignation of Mr. Justice Van Devanter, coming as it did on the morning when the Senate Judiciary Committee was voting on the Reorganization Bill, was especially well timed." (quoting Sen. Joseph R. Guffey)).

[257] *See Court Program Status Unsettled*, WALL ST. J., Apr. 14, 1937, at 2 (divulging that the administration "has quietly begun to explore new routes to economic control over big business" which the *Jones & Laughlin* decision would permit, and predicting that "it is entirely possible that the judicial plan will be modified, toned down or allowed to simmer along until it can be quietly ditched"); *see also* Turner Catledge, *Roosevelt Still Presses His Bill to Change Court; May Take a Compromise*, N.Y. TIMES, Apr. 14, 1937, at 1 (reporting that several of Roosevelt's supporters in Congress were suggesting compromise plans); Arthur Krock, *Three Apply Commerce Clause to Manufactures First Time*, N.Y. TIMES, Apr. 13, 1937, at 1 ("The political community fell to instant argument over the question whether now the President's judiciary bill should be withdrawn.").

[258] *See Court Bill Shelved by Senate Chiefs; Substitute Ready*, N.Y. TIMES, July 2, 1937, at 1

much of what he asked,[259] but any wind fell out of the sails of compromise when the Majority Leader in the Senate, and Roosevelt's staunchest legislative lieutenant, Joe Robinson, died of a sudden heart attack.[260] On July 22, the legislation was recommitted to committee never to emerge again.[261]

Given the outrage at the Court, leadership on the issue by a President who had just won an impressive mandate,[262] ample patronage to bestow and the will to do it,[263] and a large Democratic majority in both Houses,[264] one might have expected the legislation to have easily passed through Congress. To the contrary, however, the plan aroused vociferous opposition. Many members of his own party deserted Roo-

---

(stating that the age limit would be lifted "from 70 1/2 years to 75" and the plan would be modified to "limit the President to the appointment of one additional Justice to the Supreme Court each year to supplement the activities of any Justice more than 75 years old who did not elect to retire").

[259] On this point the most noteworthy commentators diverge sharply. For recent commentary on this question, see *infra* notes 381-83 and accompanying text.

[260] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 268-271 (quoting Burton Wheeler's demand that the President withdraw his bill "lest he appear to be fighting against God," and describing how despite Roosevelt's vow that "they can't use Joe Robinson's death to beat me," the compromise failed because of disruption from finding a successor to Robinson's post); LEUCHTENBURG, *supra* note 8, at 152 (noting that many interpreted Senator Robinson's death as a warning against proceeding with the plan); *Congress: Mr. Roosevelt's Court Plan Dies; Garner Arranges for Burial and for Party Truce*, NEWSWEEK, July 31, 1937, at 5 (suggesting that Robinson's death signaled the effective end of Roosevelt's plan). Alsop and Catledge emphasized the drama of the senator's death in their description:

> Joe Robinson was found sprawled on the floor of his ovenlike apartment bedroom, still clutching a copy of the Congressional Record. He had arranged his compromise; he had made his lists of votes; he had obtained his personal commitments from the senators—and then his death released the senators from their commitments.

Joseph Alsop & Turner Catledge, *The 168 Days: The Ghost of Justice Robinson*, SATURDAY EVENING POST, Sept. 25, 1937, at 50 [hereinafter Alsop & Catledge, *The Ghost*].

[261] *See* LEUCHTENBURG, *supra* note 8, at 153 ("[T]he Senate unceremoniously returned the legislation to committee, from which it never emerged."). The utter defeat of the Court-packing plan did not occur until July 22, 1937, when it was permanently buried in the Judiciary Committee of the Senate. *See Congress: Mr. Roosevelt's Court Plan Dies*, *supra* note 260, at 5 (discussing the path the bill took to its demise). Senator Logan of Kentucky announced in the Senate chamber, "The Supreme Court is out of the way." The response in the Senate chamber was by Senator Johnson of California: "Glory be to God!" The silence in the chamber galleries was broken by exuberant clapping. *Id.*

[262] *See supra* note 149 and accompanying text (discussing Roosevelt's overwhelming election victory).

[263] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 190-92 (discussing use of patronage as a "weapon" in the Court fight).

[264] *See* PATTERSON, *supra* note 39, at 81 (describing the magnitude of Democratic victory).

sevelt.[265] Indeed, a large part of the Republican strategy was to lie back and allow the Democrats to lead the charge against the plan.[266] It thus becomes impossible to attribute the opposition to mere politics. Deeper reasons explain why opposition was so fierce.

The same sorts of broad social forces that determined the contours of Roosevelt's Court-packing plan also can explain its demise. Roosevelt made two critical miscalculations about public opinion in believing that his plan could succeed, surprising ones for such an otherwise astute politician.[267] The first mistake was in missing critical changes in popular views of judicial supremacy since the time of Reconstruction. The second was in failing to give sufficient credence to developing public understanding about the role of an independent judiciary. The two were interrelated.

1. Shifting Views of Judicial Supremacy

Roosevelt failed to recognize or account for substantial changes in public sentiment about the idea of judicial supremacy that had occurred between Reconstruction and the 1930s.[268] Reconstruction is

---

[265] *See* BURNS, *supra* note 62, at 297-98 ("Two noted progressives, Burt Wheeler and Hiram Johnson, were opposed. So were Democrats Joseph O'Mahoney of Wyoming, Tom Connally of Texas, Bennett Clark of Missouri, Ed Burke of Nebraska, and a dozen others of the kind of men on whose loyalty the President had counted."); *Crisis in the Court Fight*, BUS. WK., May 15, 1937, at 72 ("The fight must be pressed both at Washington and back home. It is because of the immediate sturdy protest back home that so many senators of the President's own party have found the courage to oppose him on this issue.").

[266] *See* BURNS, *supra* note 62, at 298 (noting that something had changed in the coalition that carried Roosevelt through the election, and that "something was happening to the Republicans too. Knowing that their little band in Congress could not overcome the President in a straight party fight, they resolved to stay silent and let the Democrats fight one another."); Alsop & Catledge, *Behind the Story*, *supra* note 149, at 96 ("The Republicans agreed that if [they] lay low, if they avoided partisan expression like the plague, the Democrats would be greatly encouraged to fight among themselves."); *Court: Champions of the Senate Wage Wordy War over President's Plan*, *supra* note 256, at 8 ("Sly Republicans slouched in their seats and let their political opponents bicker and snarl . . . .").

[267] *See* LEUCHTENBURG, *supra* note 8, at 131 ("In retrospect, it appears that the President misjudged the state of opinion and underestimated the resiliency of the Court . . . .").

[268] Judicial supremacy may refer to a variety of different concepts, but by the time of the New Deal, the term referred not only to the notion that courts could interpret the Constitution in the context of a case, but also to the idea that compliance with such a decision was expected of government officials party to that case. Little more need be said in the context of the New Deal. For a broader discussion of the varied meanings of judicial supremacy, however, see generally Friedman, *supra* note 43, especially at 351-56.

the right point on which to fix attention, for Roosevelt's view of the Court as partisan and political—and thus subject to political control—bore a remarkable similarity to Reconstruction era understandings.[269] But times had changed, as is evident in the disparity between public understandings of judicial supremacy and those of Roosevelt and Robert Jackson.[270]

Roosevelt was ambivalent at best about judicial supremacy. In a 1932 speech Roosevelt lumped the Court together with the other "Republican" branches of government.[271] In a conversation with one Senator he expressed frustration that the Chief Justice would not simply come over and discuss with him what was needed, in order to get the Court's opinion before Roosevelt acted.[272] Harold Ickes reports that the President suggested he might go to Congress following judicial invalidation of a law and ask Congress whether he was to follow their mandate or the Court's. "If the Congress should declare that its own mandate was to be followed, the President would carry out the will of Congress through the offices of the United States Marshals and ignore the Court."[273] As Alsop and Catledge point out, Roosevelt's "reverence for the Supreme Court as an institution was of a distinctly limited sort."[274]

Indeed, Roosevelt's planned reaction to a negative decision in the Gold Standard cases would have been one of the greatest challenges to Supreme Court—and judicial—supremacy by any American president.[275] As the Court deliberated, the Administration anticipated the

---

[269] *See generally* Friedman, Reconstruction's Political Court, *supra* note 59.

[270] *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 116-19 (1995) ("Legal realists—some of whom were, by this stage, active New Dealers—tended to be surprised less by the heavy-handed authoritarianism of the Supreme Court than they were by the willingness of the American public to accept the Court's decisions.").

[271] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 15 (noting that Roosevelt stated "that the Court was a mere annex of the Republican administration"); LEUCHTENBURG, *supra* note 8, at 83 (noting that Roosevelt's partisan characterization of the Court was not part of the original speech, and when given the opportunity to modify his position the day after the Baltimore address, FDR said: "What I said last night about the judiciary is true, and whatever is in a man's heart is apt to come to his tongue—I shall not make any explanations or apology for it!").

[272] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 16 (discussing Roosevelt's failed attempt to discuss "important plans concerning the general welfare" with the Chief Justice).

[273] LEUCHTENBURG, *supra* note 8, at 101.

[274] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 15.

[275] Lincoln's instructions to ignore the order in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), may be the most defiant:

[A]re all the laws, *but one*, to go unexecuted, and the government itself go to

financial burden that might be placed upon the government in one fell swoop.[276] Arthur Krock reported that he had confirmed the existence of a draft speech prepared for FDR, in which FDR would "ask[] the public specifically to choose between the 'legalism' of the courts and the 'facts,'" which required legislative and executive action,[277] Krock said that

> [h]ad the President delivered it, the clearest issue yet presented by the New Deal would have been made between those who believe that, under all circumstances and regardless of consequences, the word of the Supreme Court must be final, and those who believe that a situation could exist which would require a President and Congressional majority, elected by the people, to circumvent the ruling.[278]

In the draft speech, FDR detailed the financial catastrophe involved in obeying the Court.[279] Then, disclaiming any desire to "enter into any controversy with the distinguished members of the Supreme Court of the United States who have participated in this (majority) decision," who have "decided these cases in accordance with the letter of the law as they saw it," Roosevelt concluded,

> It is nevertheless my duty to protect the people of the United States to the best of my ability. To carry through the decision of the Court to its logical and inescapable end will so endanger the people of this Nation that I am compelled to look beyond the letter of the law to the spirit of the original contracts.[280]

To fulfill that end, Roosevelt intended to "immediately take such steps as may be necessary, by proclamation and by message, to the Congress of the United States."[281] Krock compared the possible

---

> pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated.

Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

[276] *See* LEUCHTENBURG, *supra* note 8, at 87 (noting that Roosevelt's contingency speech declared that such an adverse decision would result in default by state and local governments and catapult the nation into its worst economic plight).

[277] Arthur Krock, *Roosevelt Speech Was Ready on Gold*, N.Y. TIMES, Feb. 21, 1935, at 1.

[278] *Id.* at 1.

[279] *See id.* (noting that the speech included forewarnings of bankruptcy for railroads and corporations, and wholesale mortgage foreclosures).

[280] President Franklin D. Roosevelt, Proposed Statement on the Gold Clause, at 8 (Feb. 18, 1935) (transcript on file with the *University of Pennsylvania Law Review*).

[281] *Id.* at 9. At the top of the statement, in FDR's handwriting, is a note: "File—Private: This is the rough draft of radio address I *would* have made if the Supreme Court

speech to Andrew Jackson's alleged reaction to *Worcester v. Georgia*,[282] but the fact is that if the speech had been given as reported, the conflict likely would have been far more dramatic.

FDR's aggressive defense of the Court-packing plan drew heavily from Reconstruction era precedents.[283] When Roosevelt was attacked for being disingenuous,[284] he took to the airwaves with addresses that were more candid about his purposes. Roosevelt said he wanted "as all Americans want—an independent judiciary as proposed by the framers of the Constitution." But this did "not mean a judiciary so independent that it can deny the existence of facts universally recognized."[285] Roosevelt went on to reassure his listeners: "[t]here is nothing novel or radical about this idea."[286] He alluded to a prior proposal that had passed the House of Representatives in 1869, denied that by packing the Court he meant to put "spineless" individuals on it, and denied that it would be "a dangerous precedent for the Congress to change the number of Justices."[287] "The Congress has always had, and will have, that power," he said, citing the number of times in the past, including Reconstruction, that the number of Justices had been changed.[288]

Moreover, Attorney General Robert Jackson's testimony in favor of the plan before the Senate Judiciary Committee also drew strongly from past Court-packing precedents.[289] Jackson is recognized as one of the plan's most effective advocates. Unlike Cummings, who stuck

---

decision in the Gold Cases had gone against the Gov." *Id.* at 1.

[282] *See* Krock, *supra* note 277, at 4.

[283] *See* CURTIS, *supra* note 192, at 35-37 (drawing the connection).

[284] *See* LASSER, *supra* note 87, at 155 (noting that Roosevelt's disingenuous presentation of the plan received a great deal of immediate criticism from the print media); CUSHMAN, RETHINKING, *supra* note 8, at 11 (recording the opposition of the American Bar Association and various other professional associations); HOFSTADTER, *supra* note 129, at 311 (asserting that the Court plan, and Roosevelt's artful justifications for the proposal, alienated many liberals otherwise supportive of the New Deal agenda). In a chapter entitled, "A Case Built on Sand," Merlo Pusey attacked Roosevelt's "false premises" for the Court-packing plan. PUSEY, *supra* note 115, at 10-21 (1937) (noting that Roosevelt's fears of the "lowered mental or physical vigor" of older judges was usually accompanied by talk of "new blood" who would reconsider his economic and social legislation).

[285] Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *in* 1937 PUBLIC PAPERS, *supra* note 62, at 126.

[286] *Id.* at 128.

[287] *Id.* at 129.

[288] *Id.* at 128-29.

[289] Senator Sherman Minton did the same. *See* 2 ACKERMAN, *supra* note 14, at 325 (noting that Minton testified "on Reconstruction precedents involving Court contraction and expansion").

to the disingenuous argument before the Senate, Jackson took a straightforward and hard-line approach, and in doing so kept himself out of much of the trouble other witnesses faced.[290] Jackson pointed to all the constitutional controls Congress theoretically had over the Court, in order to deny it complete supremacy. Congress might exercise its power "to see that the personnel of the judicial system is adequate, both with respect to number and to neutrality of attitude." As he elaborated at great length, "[s]ix times we have effected changes in the size of the Court, with resulting changes in the Court's attitude."[291]

But times had changed since Reconstruction: by the 1930s, the notion of judicial supremacy was fairly well established, and even revered.[292] Two astute legal commentators, Charles Fairman and Max Lerner, both recognized the fixed place judicial review had taken in American government. Lerner took "judicial supremacy" as a given, stating that "the rule of judges through their veto power over legislation is the unique American contribution to the science of government has become a truism of political thought."[293] Discussing the retirement of federal judges in 1938, Fairman said:

> Certain initial assumptions will narrow the range of discussion. We may take it that the system of judicial review is to be preserved. Whatever speculative interest may be found in imagining the situation had a dif-

---

290

> "A majority of the justices have made it apparent that the great objectives of this Administration and this Congress offend their deep convictions. . . . Prediction of 'impending moral chaos' [and] grief over the fear that 'the Constitution is gone' . . . indicate an implacable, although unquestionably sincere, opposition to the use of national power to accomplish the policies so overwhelmingly endorsed by the voters."

Quiet Crisis, *supra* note 119, at 16.

291 *Hearings*, *supra* note 223, at 2340.

292 Thurman Arnold, writing before the Court fight, would conclude, "Thus, in spite of their cumbersome way of approaching problems, courts appear to have found a way of acting which has brought them overwhelming prestige and respect." ARNOLD, SYMBOLS, *supra* note 7, at 203. In its immediate aftermath he would say: "It was this faith in a higher law which made the Supreme Court the greatest unifying symbol in American government. . . . On this Court the whole idea of a government of laws and not of the competing opinions of men appeared to depend." ARNOLD, FOLKLORE, *supra* note 116, at 63-64; *see also* CURTIS, *supra* note 192, at 12 ("A hole was left where the Court might drive in the peg of judicial supremacy, if it could. And that is what John Marshall did. He drove it in, so firmly that no one yet has been able to pull it out."); PATTERSON, *supra* note 39, at 87 ("To [those suspicious of tampering with the Court,] court and Constitution were almost synonymous.").

293 Lerner, *supra* note 63, at 688 n.2; *see also* Edward S. Corwin, *President and Court: A Crucial Issue*, N.Y. TIMES, Feb. 14, 1937, § 13 (Magazine), at 30 ("[T]he general trend of professional opinion has come to endow the court's interpretations of the Constitution with the authority of the latter . . . .").

> ferent doctrine prevailed, judicial supremacy has become firmly embedded in the *mores.*[294]

No less certain were the Court's fiercest critics. For example, Ralph Fuchs stated that "a habit of deference to judicial opinion in these matters has fastened itself upon the entire body-politic."[295] Similarly, in a book critical of the New Deal decisions, Robert Carr calls judicial review "the very keystone of our constitutional arch."[296]

Even those who disliked the idea of judicial supremacy seemed ready to acknowledge its fixed status. Isidor Feinstein, in a scathing attack on the Court, called judicial supremacy "the most important problem of our time," but acknowledged that the tide had turned toward supremacy in 1883.[297] Leonard Boudin, a critic since the Populist/Progressive era, published a famous two-volume critique of the Court, entitled *Government by Judiciary,* laden with countermajoritarian criticism challenging the idea of judicial supremacy.[298] Nonetheless, Boudin also recognized that supremacy had become embedded since

---

[294] Fairman, *supra* note 194, at 399.

[295] Fuchs, *supra* note 63, at 3.

[296] CARR, *supra* note 140, at 14; *see also* LEWIS, *supra* note 179, at 29 ("It is the expression of respect for judicial tribunals that is one of our most valuable characteristics."). Lewis explains further that "[t]he principle that the Supreme Court is the authoritative interpreter of our written Constitution is an outstanding characteristic of our system of government. Although not found in any provision of our written Constitution, the people have made it part of the unwritten Constitution of the United States." *Id.* at 38. The *New York Times* agreed:

> Many extreme things have been said about the NRA decision by the Supreme Court, but no one has proposed to disregard or defy it. Until it is modified or reversed, it is the law of the land and must be observed. This is conceded even by those whom it most deeply offended. The judges may have been wrong, but at least they were acting within their rights and doing their designated duty.

Authority, N.Y. TIMES, June 4, 1935, at 22; *One Point Not Doubtful,* N.Y. TIMES, Feb. 13, 1935, at 18 ("While the decision of the Supreme Court in the gold-clause cases is still shrouded in uncertainty, there is no difference of opinion on one point. It is that whatever the judges decide the country will accept. Many may be aggrieved, but no one will counsel resistance.").

[297] FEINSTEIN, *supra* note 97, at 53-55.

[298] *See* 1 BOUDIN, *supra* note 109.

> What is more, I believe that the people of the United States are not ready to abdicate their right to self-government. And if they have actually done so—and this book proves that they have—it is because they did not know what they were doing, and still do not know what has actually happened to them. The Judicial Power is based not so much on an initial act of usurpation as on continued ignorance as to the actual workings of our governmental system, which leaves the illusion of self-government while destroying its substance.

Id. at x.

Jefferson's time.[299]

In his subsequent analysis, Robert Jackson recognized that the fierceness of the battle followed directly from public commitment to the supremacy of Supreme Court rulings.[300] It thus is easy to understand why Jackson's countermajoritarian criticism of the Supreme Court came only *after* failure of the Court-packing plan. Prior to defeat of the plan, both Roosevelt and Jackson saw the Court as subject to a certain amount of political control. Once it became clear that the ability to exercise control no longer existed, the countermajoritarian difficulty became a problem, and thus a common theme of Jackson's.[301]

2. Public Support for an Independent Judiciary

Roosevelt also failed to see how troubled the public would be by the plan's implicit consolidation of authority in the Executive Branch.[302] These concerns played out in the debate over the plan,[303] reinforcing public approval of the idea of judicial supremacy.[304]

---

[299] *See id.* at v.

[300] *See* JACKSON, *supra* note 118, at 70 ("[A]t the threshold of the New Deal the Court had established itself as a Supreme Censor of legislation.").

[301] It is unclear whether it occurred to Jackson that the people themselves had rejected such control, making countermajoritarian claims more difficult to assert.

[302] Criticism of the consolidation of power in the executive came immediately after announcement of Roosevelt's Court-packing plan. Editorial comments gathered from around the United States that week include: "[Roosevelt] would strike at the roots of [the] equality of the three branches of government upon which the nation is founded, and centralize in himself the control of judicial, as well as executive functions."; "This is too much power for any man to hold in a country that still calls itself a democracy."; and "He might more plainly put it by frankly saying: 'Let me appoint six judges to the Supreme Court and they will see to it that the Constitution does not stand in the way of what I want to do.'" *Opinions of the Nation's Press on Court Plan*, N.Y. TIMES, Feb. 6, 1937, at 10. The former president of the American Bar Association, Silas H. Strawn, attacked the plan "as a short cut to a dictatorship." *Strawn Scores Proposal*, N.Y. TIMES, Feb. 6, 1937, at 10. State governments lashed out as well. Texas State Senator T.J. Holbrook declared that the plan would "establish a dictatorship equal to that of Hitler or Mussolini." *Texas Legislature Fights Court Plan*, N.Y. TIMES, Feb. 10, 1937, at 1.

[303] *See Quiet Crisis*, *supra* note 119, at 15. The article quotes *The New Yorker* columnist E.B. White as saying,

> [W]e decline to follow a leader, however high-minded, who proposes to take charge of affairs because he thinks he knows all the answers. Mr. Roosevelt is not ambitious personally, but he has turned into an Eagle Scout whose passion for doing the country a good turn every day has at last got out of hand.

Id.

[304] *See* LEUCHTENBURG, *supra* note 8, at 138 ("Above all, they protested that Roosevelt was not showing proper regard for the judiciary. . . . A prominent Catholic layman compared the Court's authority to that of the Pope and added: 'To all intents and

Three interconnected, yet distinct, arguments were at the fore of challenges to the Court-packing plan: (1) the Supreme Court's ability to defend civil rights and civil liberties would be jeopardized by making it too accountable to political appointments;[305] (2) the plan would undermine judicial independence;[306] and (3) the plan would give the President, and particularly President Roosevelt, dictatorial powers.

Worry about rising totalitarianism elsewhere in the world further fueled these concerns. Both sides to the debate over the Supreme Court and the New Deal played the fascism card, with Roosevelt forces arguing that fascism was overtaking government in some places precisely because government was proving unable to deal with economic crises.[307] Lest that happen here (the thinly veiled threat went) it was necessary to move the Court out of the way of progress.[308] Others,

---

purposes our Supreme Court is infallible. It can not err.'" (citations omitted)).

> A court which is not independent in one sphere will not be independent in any sphere. You cannot have a court that will blindly say, "O.K., Chief," to the economic purposes of the President—any President—and not have at least a tendency to do the same thing with regard to personal civil liberties.

Ira Jewell Williams & Ira Jewell Williams Jr., *What Are a Man's Rights?*, SATURDAY EVENING POST, May 29, 1937, at 17.

[305] Robert Post describes convincingly the way in which the Supreme Court's own decisions paved the way for its role in protecting individuals. *See* Post, *supra* note 132, at 1529-45. Post explains that, ironically perhaps, the substantive due process decisions of the *Lochner* era that were so reviled nonetheless reflected the same concern for individual liberty that ultimately flowered in decisions like *Meyer v. Nebraska*, 262 U.S. 390 (1923), and provided ground for later individual liberty decisions. *See id.* at 1530-40 (citing Taft court decisions that safeguarded individual liberty from "unjustifiable interference").

[306] *See* Williams & Williams, *supra* note 304, at 16 ("Our Constitution guarantees these rights. The Supreme Court guards the Constitution. Such a guardian must be independent of all things save one—namely, his oath of office. To pack the court would endanger this independence and, ultimately, the personal human liberties that we most deeply cleave to.").

[307] *See supra* notes 142-47 and accompanying text (describing the crisis of faith in democratic governance).

[308] For example, Senator Logan proclaimed:

> There is a great cry going up against dictators and dictatorships. We who support this legislation are fighting for the maintenance of the freedom of the people of the Nation and against dictatorship. The Supreme Court now admittedly is a dictator, so far as economical and political principles are concerned, as they relate to the most vital questions in the Nation.

81 CONG. REC. S.7380 (1937); *see also Held Gain for Democracy*, *supra* note 219, at 10 ("Never before has it been so necessary to take changed economic and social conditions into account. They threaten the very continuance of democracy as a form of government, and means must be found to make democracy effective in dealing with them." (statement of Sen. Green)); *New Dealer Warns the Supreme Court*, N.Y. TIMES, Jan. 30, 1937, at 6 (reporting speech of Robert H. Jackson, Assistant Attorney General of the United States, where he warned the New York State Bar Association that democ-

however, supported the Court as a protection against fascism. In particular, there were frequent expressions of concern about the accumulation of power in the national government, especially in Roosevelt's hands. In this environment, the Court's checking function was an important one.[309] To identify just one interesting example, the front page of the *New York Times* on November 28, 1936, reported on the AFL convention.[310] Among other action, the convention rejected constitutional amendments to increase government power and curb the Court.[311] Adjacent to the story is another labeled "Reich Decree Bans All Art Criticism" and "State To Be Sole Judge."[312]

---

racy was being "'frustrated' by the monopoly of the Supreme Court by lawyers"). Jackson closed his speech with: "[W]hen free government becomes too perplexing and futile, the people turn to dictatorship. Out of the break-down of an attempt at free government which failed to function arose Hitler, Lenin and Stalin, Napoleon and Cromwell." *Id.* As a 1937 *New York Times* article noted, cooperation between Congress and the judiciary was necessary

> because in a very literal sense democracy is now on trial. In all parts of the world many men have lost patience with the ways of popular government. They say it cannot function effectively in a crisis. They ridicule its some times blundering efforts to translate the will of the electorate into a policy of national action. They scorn the elaborate system of checks and balances by which it attempts to conserve personal liberty and individual initiative. There is a challenge in such skepticism which only a great democracy can meet, and a challenge which a great democracy can meet only by giving "the confident answer of performance" to those whose instinctive faith makes them wish to believe that the complex problems of the twentieth century can be solved within the framework of free government under a written Constitution.

The Ways of Democracy, *supra* note 175, at 18.

[309] *See* Louis Stark, *A.F. of L. Demands 30-Hour Week Law; Green Re-Elected*, N.Y. TIMES, Nov. 28, 1936, at 1 (describing the proposals for a constitutional amendment at an AFL meeting). One delegate, for example, was quoted as saying:

> "American constitutional government is the hope of the world." ... "If it is abandoned where will we go? Who hears of the Supreme Court of Russia, where Stalin sulks and issues his mandates? Who hears of the Supreme Court of Italy, where Mussolini smites himself upon the breast and imposes his mandate upon the people? Who hears of the Supreme Court of Germany?"

Id. An earlier *New York Times* article had summarized the argument of William Ransom, President of the American Bar Association, as:

> [I]f the present movement to abridge the jurisdiction of the courts succeeds, Congress could then pass laws "that no red-headed man could have a job, that no Catholic could go to Mass, that no Jew could adhere to his religion or marry, that no employer of labor could vote in a Federal election, that no worker could belong to a trade union or that every worker must belong to a trade union or that no woman could be employed except as a housewife."

Bar Head Warns of a 'Dictatorship,' N.Y. TIMES, May 1, 1936, at 15.

[310] *See* Stark, *supra* note 309, at 1 (reporting on the AFL convention).

[311] *See id.* (declining to adopt resolutions calling for constitutional amendments to permit labor and social welfare legislation and to curb the Supreme Court).

[312] N.Y. TIMES, Nov. 28, 1936, at 1.

In light of concerns about totalitarian government,[313] the Supreme Court's role as defender of constitutional rights and liberty moved to the fore.[314] Conservatives, of course, long had treasured that role with regard to property rights. At the time of the plan, however, a new role for the courts was emerging.[315] Concerns about police practices in criminal investigations were attracting the interest of some.[316] Issues

---

[313] *See, e.g.*, PURCELL, *supra* note 121, at 137 ("By 1937, talk of the 'totalitarian menace' and the equation of communism, fascism, and Nazism were common.").

[314] The Court had been making some progress on this front, including the well-publicized Scottsboro decision, *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that due process was denied to defendants because they did not have the effective assistance of counsel). *See* Friedman, *supra* note 20, at 1907-09, 1913-14 (describing some early civil liberties decisions of the Hughes Court); *see also Scottsboro Case Called Landmark*, N.Y. TIMES, Nov. 9, 1932, at 40 (noting that the secretary of the National Committee for the Defense of Political Prisoners said: "'[W]e believe [the Scottsboro case will] become a great historic landmark.'"). Courts were seen as the only guardian against abuse of citizens' rights. One person commented that "it was well understood [by the Framers] that the integrity of the Constitution and the liberty of the individual depended upon maintaining the independence of the courts whose duty it would be to hold void laws or executive acts in violation of the Constitution." Thomas Raeburn White, Letter to the Editor, *Danger Seen in Court Plan*, N.Y. TIMES, Feb. 26, 1937, at 20. Fred Clark, the National Commander of the Crusaders, stated that the "Supreme Court is the only guarantee the people have of sustained liberty." *Bar Urged To Give Opinion on Court*, N.Y. TIMES, Feb. 19, 1937, at 2. *See* Williams & Williams, *supra* note 304, at 40 ("Personal civil liberty is a precious and a continuing achievement.... [E]ternal vigilance is still its price. Again I say that an independent Supreme Court is our best and our last defense against the destruction of these fundamental liberties.").

[315] An example is an article in the *Saturday Evening Post*, *see* Williams & Williams, *supra* note 304. The authors argue that "[t]o pack the court would endanger this independence [of the Court] and, ultimately, the personal human liberties that we most deeply cleave to." *Id.* at 16. In the course of making this argument, the authors stress that in discussing "rights," "[y]ou will find here no defense of property rights as such, nor will there be any attack on the New Deal so-called, or on its professed objectives." *Id.* Rather, the authors expressed the belief that "[t]he fundamental personal rights are the only ones that in the long run have any real importance." *Id.*; *see also The Constitutional Crisis*, 25 COMMONWEAL 481 (1937). This article states that

> [w]hat the great majority of Americans, we believe, do firmly hold to be true, and justifiably so, is that the Supreme Court has been the instrument through which the civil liberties and rights of the people have been preserved and defended and perpetuated, and for that reason the Supreme Court is justly respected, and venerated, and now will be stoutly, even passionately, defended.

Id. at 482.

[316] *See* FRANKFURTER, *supra* note 133, at 59 (comparing unfavorably police methods in the United States to those in England). One columnist urged Congress to adopt the principle, *obsta principiis* ("withstand beginnings"). *See* Burke, *supra* note 178, at 7-8 (urging Congress to adopt this principle as the basis for its opposition to the President's Court-packing proposal). The principle was adopted by the Court in a decision, *Boyd v. United States*, 116 U.S. 616 (1886), which upheld a citizen's right against unlawful search and seizure of private papers under the Fourth Amendment.

of race and minority rights were of concern to others.[317] The First Amendment in particular was receiving the attention of the Court and the public.[318] Opinion was split on the subject of whether the Court was protecting rights adequately, with some quite critical.[319] Others, including the *New York Times*, were more willing to praise the Court.[320]

---

[317] *See Bar Urged to Give Opinion on Court*, *supra* note 314 ("We [the Voluntary Committee of Lawyers] believe that [the proposal] is unmistakably an attempt to pack the court... [and] that it would destroy the sole defense of minorities against the unrestricted tyranny of majorities."). Senator William H. King remarked that,

> [t]he Supreme Court of the United States has proved to be a bulwark for the safety and protection of the States and the people. It has truthfully been said that it is our "Ark of the Covenant," and to weaken or impair the power and the authority of the Supreme Court or to tamper with our judicial system cannot help but arouse grave apprehensions in the minds of all thoughtful Americans.

Court Change Foes Hold Senate Lead, N.Y. TIMES, Feb. 11, 1937, at 15.

[318] For example, Williams and Williams argued:

> What cannot be left to take care of itself is civil liberty not having to do with property. Does no one care any longer for freedom of speech, of assembly or of worship? In all the millions of words written about the President's proposal, how many have concerned themselves with the disperil to civil liberties that the proposal involves?
>
> I say: A plague on both your houses. You, Mr. Roosevelt, are wrong in seeking to weaken the Supreme Court as a court, and even more wrong in not seeing, or not caring, that you will have successors; that some of them may assail these fundamental freedoms of ours; and that then we shall be in bitter need of a strong court which can say "No"....

Williams & Williams, *supra* note 304, at 38, 40.

[319] For example, Isidor Feinstein charged that:

> [T]he Supreme Court has been as *unwilling* to apply the clear letter of the Constitution and its spirit in defense of civil liberties as it has been willing to twist, stretch, pervert, or ignore the letter and spirit of the Constitution to uphold property rights, no matter how spurious in their origin or harmful in their exercise.

FEINSTEIN, *supra* note 97, at 100; *see also* LOUIS P. GOLDBERG & ELEANORE LEVENSON, LAWLESS JUDGES 231 (1935) ("Not only have judges failed to apply the constitutional provisions for the protection of civil rights of individuals and minority groups but they have construed such provisions so as to deprive large masses of workers and nonconforming minorities of their constitutional privileges.").

[320] *See The Real "Super-Government,"* N.Y. TIMES, Feb. 12, 1936, at 20 (asserting that the complaints against the Supreme Court are really against the Constitution and the Bill of Rights, and that judges are merely applying the restrictions imposed on legislatures by the Bill of Rights and the Constitution); *What the Court "Obstructs,"* N.Y. TIMES, Feb. 21, 1936, at 16 ("[I]n the aspect usually overlooked by those excited radicals who see it only as a set of 'nine old obstructionists[,]'... [T]he court stands as the protector of free speech, a fair trial, and other individual liberties. It 'obstructs' indeed, but what it obstructs is injustice, brutality and tyranny.").

Felix Frankfurter's nomination was praised for his concern for civil liberties with much the same language used several weeks later to laud the retiring Justice Brandeis. *Compare Justice Frankfurter*, *supra* note 186, at 18 ("No real doubt was expressed that the

But this emergent role for the Court gave pause about stripping it of the power to stand up against majoritarian government. Indeed, the ability of the Supreme Court to protect civil liberties had even influenced Roosevelt's decision against a supermajority voting requirement for the Court.[321] The essential role of the Supreme Court in protecting individual liberty was mentioned frequently in the Court fight.[322] Religious groups were early opponents of the plan.[323] The Senate Ju-

---

living Constitution, and the liberties of the citizen under the Constitution, will be safe in [Justice Frankfurter's] hands."), *with A Great Judge Retires*, N.Y. TIMES, Feb. 14, 1939, at 18 (praising the career of Justice Brandeis by saying "[n]o man has shown a keener appreciation of the personal liberties and the civil rights which are the rich heritage of the American people, or done more to help preserve those liberties and rights").

Some writers responded to the "horse and buggy" criticism of the Supreme Court by pointing out that many traditional civil rights came from that era:

> Freedom of speech, freedom of the press, of assembly, of domicile, of conscience, together with free elections and due process of the law, are some of the rights embodied in a Constitution which goes back to the horse-and-buggy age.... [A]re the human rights embodied in this obsolete charter also to be regarded as obsolete?

Other Obsolete Traditions, N.Y. TIMES, Jan. 26, 1936, § 4, at 8; *see also Vehicle Carries Rights*, N.Y. TIMES, Jan. 26, 1936, § 4, at 8 ("[A] man's right to a fair trial for his life in Alabama is a horse-and-buggy right. A man's right to get up on a soap-box in Florida or in Union Square is a horse-and-buggy right. That is to say, they are rights which grew up with our horse and buggy civilization.").

[321] *See* LEUCHTENBURG, *supra* note 8, at 111-12 ("An act requiring more than a majority of Justices to invalidate a law, a solution a number of legislators favored, did not bear scrutiny.... [S]uch a law would limit the Court's role as a protector of civil liberties."); *see also* 2 ACKERMAN, *supra* note 14, at 338 (explaining how amendment solutions to the Court problem also had run into trouble because the "Old Court had used these provisions [the due process clauses] primarily to protect private property and freedom of contract, but it had also safeguarded other rights—most notably, freedom of expression and religion. How were the New Dealers to separate the wheat from the chaff?").

[322] *See, e.g.*, LEUCHTENBURG, *supra* note 8, at 139 (quoting the historian James Truslow Adams as stating that the judiciary is "the sole bulwark of our personal liberties"); John A. Ryan, *The Supreme Court Debate: Court Reform and Minorities*, 25 COMMONWEAL 683, 683 (Apr. 16, 1937) ("All... minority groups and some majority groups would be in danger of injury if the independence of the courts were destroyed.").

[323] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 73 ("The churches, and especially the Roman Catholic Church, always nervous over religious liberties and grateful to the Court for strong decisions protecting them, showed signs of acute uneasiness."); Leo P. McNally, *The Supreme Court Debate*, 26 COMMONWEAL 133, 133 (1937) ("[S]uch [Supreme Court] appointees may not consciously destroy the rights of religious minorities, but will do so only on the theory of protecting the rights of the majority for the general welfare of the country."). M.B. Carrott, *The Supreme Court and Minority Rights in the Nineteen-Twenties*, 41 NW. OHIO Q. 144 (1969), describes the Court's decisions "to support the personal liberties of ethnic, religious, and racial groups, a policy which was borne out in a series of cases between 1923 and 1927 involving parochial schools, foreign-language instruction, and the right of Negroes to vote." *Id.* at

diciary Committee report lambasting the plan played heavily on the concerns for civil liberties.[324]

Tied to the concern for civil liberties was the insistence on "judicial independence."[325] One editorial declared the battle between the independence of the Supreme Court and the progressiveness of judicial decisions as a "constitutional crisis."[326] "[T]here are millions of farmers who reckon the Constitution and the independence of the Supreme Court as of higher value than any temporary legislative nostrum."[327] The Court-packing plan would "mark the beginning of the end of the independence of the Supreme Court, and with it the beginning of the end of constitutional democracy in this nation."[328] This

144. Carrott argues that some of the Justices supported these decisions in part to gain the support of these groups in restoring order in society. *See id.* at 149 ("[I]t was natural that some members of the Court would mention religion as a hopeful stabilizing factor."). But Carrott also argues that Chief Justice Taft was hopeful the groups would support the Court in the face of increasing attacks on it. *See id.* at 150, 151 (stating that Taft "desired to carry the support of increasingly powerful ethnic, religious and racial groups" against those attacking the authority of the Court).

[324] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 230-32 (noting the committee's concern with "safeguarding the rights of the citizen"); *id.* at 230 ("For the protection of the people, for the preservation of the rights of the individual, for the maintenance of the liberties of minorities, ... the three branches of government were so constituted that ... no one branch could overawe or subjugate the others." (quoting Senate report)); *see also* PATTERSON, *supra* note 39, at 89 ("[S]ome congressmen objected to the proposal because they believed that it threatened civil liberties.").

[325] *See* PATTERSON, *supra* note 39, at 87 ("Perhaps a more widespread popular view reflected a reverence for the Supreme Court as an institution."); *id.* ("'Only a Supreme Court, independent and unawed, ... stands guard to protect the rights and liberties of the people.'"(quoting Sen. Burke)).

[326] *The Constitutional Crisis*, *supra* note 315, at 482.

[327] *It Must Not Pass*, BUS. WK., Feb. 20, 1937, at 64; *see also Speak Frankly, Mr. President!*, BUS. WK., Mar. 6, 1937, at 68 ("Come, golden voice, tell this to the people, inform them frankly that all you want from the Supreme Court is complete subservience to the White House!"); Williams & Williams, *supra* note 304, at 40 ("But at the very least let us make sure that the Supreme Court remains independent of everyone, and especially of the President and of all Presidents to come the chief pillar of the temple of our civil liberties, forever.").

[328] Burke, *supra* note 178, at 8. Burke also claimed:

> The principle that the powers of the national government should be separated from one another and that the national judiciary should be completely independent of the executive or the legislative department of the nation, was born of the conviction, resulting from the experience of the ages, that the vindication of the provision of the Constitution which the people and the states believed necessary for the preservation of their liberty and well-being, could not be safely committed to a national judiciary subservient to either of the other branches of the government.

Id. at 5; *see also* Williams & Williams, *supra* note 304, at 40 ("It is clear to me that the President's proposal to pack the court and to cripple the court's independence will pass unless some other way can be found to grant the desire of politicians for more

theme reappeared in the Senate Judiciary Committee Majority Report against the plan,[329] and one of the key speeches in the debate against the compromise bill was to the same effect.[330]

Accompanying these concerns were the persistent claims about "dictatorial" powers—an accusation that would continue to haunt Roosevelt through the deliberation on his executive reorganization program. As Alan Brinkley observes, despite popular approval of Roosevelt and the New Deal, there remained a latent distrust of state power.[331] Courts were seen as the final bulwark against dictatorial uses of such power,[332] and Roosevelt's plan threatened to increase his own power at the expense of those very courts.

The result was a veritable flood of articles and speeches about dictatorship, some subtle and others quite explicit in attacking Roosevelt's motives. This same concern would also spell a temporary end to his plans to reorganize the Executive Branch.[333] "Without ever directly

---

power and the wish of the people that they should have it.").

[329] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 232 ("'This bill is an invasion of the judicial power such as has never been attempted in this country.'" (quoting the Senate Judiciary Majority Report)).

[330] *See id.* at 262. Alsop and Catledge describe the scene of Senator Bailey's emotional speech:

> He . . . shouted his warnings of what would come if the independence of the judiciary were impaired, and hammered his desk at each of the points intended to show that an impairment of the judiciary's independence was the inevitable result of the court bill. . . . [T]he senators listened with complete attention. . . . That rare thing, a successful and convincing argument, was being made on the Senate floor . . . .

Id.

[331] *See* BRINKLEY, *supra* note 149, at 17 (discussing how new Democratic initiatives launched in 1937 encountered unexpected opposition despite the party's popularity).

[332] *See id.* at 20 ("If a President tries to take away our freedom of speech . . . who is to save us except the Courts?" (quoting the historian James Truslow Adams)).

[333] As Barry Dean Karl later explained:

> The opposition [to executive reorganization] seemed not to see the potentiality of public furor until the President pointed it out to them when he attacked the Supreme Court. The two arguments seemed to have no necessary relation to one another, yet in tandem they revealed inherent fears which, like images in a hall of mirrors, reflected endlessly the historic shape of the fear itself.

BARRY DEAN KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL 256 (1963). Stories of the reorganization effort are chock full of references to concern about Roosevelt having dictatorial power. *See, e.g.*, *id.* at 248 ("The introduction of the bill in the Senate the following winter met with heated and organized furor, with cries of 'Dictator' and the fantastic charge that Roosevelt was seeking the power to abolish the Congress . . . ."); RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT vii (1966) ("Congressmen who opposed reorganization contended that it would create a presidential dictatorship, and scores of newspapers echoed this sentiment."). The clamor was so intense Roosevelt actually issued a statement denying dictatorial designs. *See id.* at 159 (describing a letter to an anonymous friend which stated, "I have no in-

saying that Roosevelt was another Hitler, the authors [of the Senate report on the plan] called attention to 'the condition of the world abroad'" and warned of "autocratic dominance."[334] More overtly, the *Los Angeles Times* headlined the plan, "ROOSEVELT OUT FOR UNLIMITED POWER,"[335] and the *Boston Herald* chose, "HOLDS GREATER POWER AIM";[336] others noted generally that "prophecies of ruin and warnings of dictatorship to come were editorial writers' small change that day."[337] It became something of a sport to invoke Roosevelt's name—explicitly or by innuendo—with those of Hitler, Mussolini, and Stalin.[338] Columnist Dorothy Thompson followed this theme:

> No people ever recognize their Dictator in advance. He never stands for election on the platform of dictatorship .... Since the great American tradition is freedom and democracy you can bet that our dictator, God help us! will be a great democrat, through whose leadership alone democracy can be realized. And nobody will ever say 'Heil' to him or '*Ave Caesar*' nor will they call him 'Fuhrer' or 'Duce.' But they will greet him with one great big, universal, democratic, sheeplike blat of 'O.K., Chief! Fix it like you wanna Chief! Oh Kaaay!'[339]

---

clination to be a dictator"). The letter only served to make matters worse for taking seriously such an absurd charge. *See id.* at 159 ("Strangely, the fact that Roosevelt thought it necessary to disavow dictatorial ambitions only lent credence to the accusation. 'Think of it,' sputtered one congressman, 'needing to assure the country about it—that he did not want to be a dictator. In Heaven's name, why did he mention it?'").

[334] LEUCHTENBURG, *supra* note 8, at 146 (quoting from an adverse report of the Senate Judiciary Committee).

[335] 2 ACKERMAN, *supra* note 14, at 299.

[336] *Opinions of the Press on Court Plan*, N.Y. TIMES, Feb. 6, 1937, at 10 (quoting press reaction from around country).

[337] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 71.

[338] This was true even before the plan was announced. *See* LEUCHTENBURG, *supra* note 8, at 90 (quoting Senator Vandeberg, who responded to Roosevelt's 'horse and buggy' remark: "I don't think the President has any thought of emulating Mussolini, Hitler or Stalin, but his utterance as I have heard it is exactly what these men would say"); PATTERSON, *supra* note 39, at 87 (describing a citizen who wrote that President and Congress "seem to have become intoxicated with the DEMOCRATIC FEVER which brought them into power and there is no influence which can stop their headlong rush into the CHASM where STALIN, MUSSOLINI, and HITLER have led their countries"); Lionel V. Patenaude, *Garner, Sumners, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 SW. HIST. Q. 36, 44 (1970) ("Connally, posing as a friend of the President, by innuendo linked Roosevelt's motives with those of a Hitler, a Stalin, a Mussolini not by direct words, but by innuendo." (quoting the *Austin American*, commenting on a speech by Senator Tom Connally)).

[339] *The Big Debate*, TIME, Mar. 1, 1937, at 10.

Even Roosevelt's own metaphor of government was turned against him:

> Trust me, he said, for I seek harmony, not domination, I am only one horse in a three-horse team, I am not the driver. Not the driver? He is the boss of Congress, the boss of the party that rules Congress. He drives the second horse and now seeks authority to drive the third horse, which prefers to go about its business, doing the routine job of plowing, instead of jumping over the fence into a lot outside the Constitution.[340]

Thus, from the debate over FDR's plan came a new vision of the role of courts. Tremendous power having been ceded to the national government, the plan was the point at which the country balked. The accretion of government power threatened judicial independence, which at that time referred to the emergent role of the Court as a defender of individual liberty.

II. THE LESSONS OF 1937

After 1937, everything was different. The man whose policies were frustrated by a Supreme Court to which he made no appointments during his first term, ultimately would appoint more Justices than any other president. By the time he passed away, Roosevelt had selected eight of the Court's nine members.[341] The new Justices had little prior judicial experience,[342] but significant exposure to politics and government.[343] And, as Supreme Court Justices go, they were young. Indeed, *Life Magazine*'s 1945 article on the Court, no doubt emphasizing the change from the early New Deal days, was titled, "The Nine Young Men."[344] Most important, for the first time in his-

---

[340] *Trust Me, He Said*, BUS. WK., Mar. 13, 1937, at 60.

[341] *See* Thomas Reed Powell, *Our High Court Analyzed*, N.Y. TIMES, June 18, 1944, (Magazine), at 17.

[342] Justice Rutledge had served for two years on the United States Court of Appeals for the District of Columbia Circuit. The only other Justice appointed by Roosevelt with judicial "experience" was Justice Black, who, "as his detractors were fond of pointing out" had served "18 months as a police judge in Birmingham." C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947, at 13 (1963).

[343] *See id.* at 12-13; *see also* John Chamberlain, *The Nine Young Men*, 19 LIFE 76, 78-79 (giving a brief biographical sketch of each Justice); Jonathan Daniels, *The Battle of the Bench*, COLLIER'S, Aug. 17, 1946, at 12 (observing that five of the Justices had been elected to public office); Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73-78 (discussing the backgrounds and judicial attitudes of the Roosevelt Justices). Three Justices also had academic experience: Douglas, Frankfurter and Rutlege. *See* PRITCHETT, *supra* note 342, at 13.

[344] Chamberlain, *supra* note 343, at 76; *see also* PRITCHETT, *supra* note 342, at 13

tory, "the Court found itself in the unprecedented situation of being the most liberal branch of the government."[345]

As the membership on the Court changed, so too did constitutional law. Ironically, scholars focus on 1937 to ascertain whether there was a "switch" engendered by "politics,"[346] when no one seems to disagree that in a broader perspective this is precisely what happened. All agree that by the 1940s constitutional law was dramatically different, and that decisions such as *United States v. Darby*[347] and *Wickard v. Filburn*[348] were revolutionary.[349] No one denies that the 1940s switch was the result of Roosevelt's transformation of the bench.[350] By the

---

("The previous Court with its nine old men had reached the average age of 72 by 1937. In 1943, when Roosevelt's last appointment had been made, the average age of the Court was 56 years."); Robert E. Cushman, *Constitutional Law in 1939-40*, 35 AM. POL. SCI. REV. 250 (1941) ("By his policy of appointing younger men, ... [i]t seems probable that we shall have a 'Roosevelt Court' for many years to come."); Schlesinger, *supra* note 343, at 73 ("These are young men by Supreme Court standards: The oldest cannot qualify for a pension till 1952.").

[345] PRITCHETT, *supra* note 342, at 14; *see also* Alexander H. Pekelis, *The Supreme Court Today*, NEW REPUBLIC, Apr. 17, 1944, at 522 ("The Federal Judiciary, led by its Supreme Court, may well prove to be ... the most liberal of the three branches of the national government."); Chamberlain, *supra* note 343, at 76 ("Even members of the Roosevelt Court admitted officially that the lower courts and the bar can no longer even guess with any degree of accuracy at what the law will be tomorrow.").

[346] *See infra* notes 361-62 and accompanying text for a discussion of this issue.

[347] 312 U.S. 100 (1941).

[348] 317 U.S. 111 (1942).

[349] *See* PAUL R. BENSON JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, at 89 (listing *Darby* as "one of the half-dozen most important cases in the whole 180-year history of American constitutional law."); CUSHMAN, RETHINKING, *supra* note 8, at 224 (contending that the "revolution" is to be found in the aftermath of Roosevelt's appointments, *not* in the Court's Commerce Clause decisions between 1937 and 1940); LEUCHTENBURG, *supra* note 8, at 221-22 (noting that the Court's ruling in *Wickard* "assigned to the dustbin of history not only the criterion of direct and indirect effects but almost any distinction between commerce and production as a relevant standard for determining constitutionality").

[350] *See* CUSHMAN, RETHINKING, *supra* note 8, at 224 (contending that the replacement of the Nine Old Men "brought forth a new paradigm for commerce clause jurisprudence."); LEUCHTENBURG, *supra* note 8, at 220 (reporting that by June 1941, the "Four Horsemen" had left the bench, along with Cardozo and Brandeis, allowing Roosevelt to appoint faithful lieutenants to the Court and elevate Justice Stone to Chief Justice). As Wendell Wilkie explained,

> "Mr. Roosevelt has won. The court is now his.... When a series of reinterpretations overturning well-argued precedents are made in a brief time by a newly appointed group of judges, all tending to indicate that same basic disagreement with the established conception of government, the thoughtful observer can only conclude that something revolutionary is going on. And that is what has happened here."

Id. at 155 (quoting Wendell L. Wilkie, *The Court Is Now His*, SATURDAY EVENING POST, Mar. 9, 1940, at 71, 74.).

mid-1940s, frequent commentary alluded to, or complained about, the inability to predict legal outcomes because of the large number of judicial overrulings.[351] The ABA Journal referred to the practice of law in this environment as "The New Guesspotism."[352] Justice Roberts complained that precedents were falling "into the same class as a restricted railroad ticket, good for this day and train only."[353] Thomas Reed Powell quipped that when the Supreme Court was sitting he had to look at his clock during class in order to know what to tell his students the law was.[354]

This shift in doctrine appears to raise difficult questions about the separation of law from politics. Thus, since 1937, scholars have debated what happened and why, combing the historical record in order to ascertain the motives of key players, such as Justice Owen Roberts, whose possible change of votes in key cases was "the switch in time that saved Nine."[355] The concern of this scholarship is the extent to which the transformation of 1937 was the result of political pressure.

The problem with this approach, however, is that it is *too* historically contingent. The stakes in this debate are high, sufficiently high that one must hope that the answers do not rest on the actions of individual Justices. Is law separate from politics? Was the constitutional change after 1937 legitimate? What is the proper role of the judiciary in American democracy? Do we really care to believe these questions are answered primarily by what Owen Roberts was thinking in 1937? Surely 1937 has something to teach us about these important questions, but one might hope the lessons can rest on a broader understanding than the motives of one man.

This section looks at the problem of the separation of law and politics through the lens of 1937 but—again—its focus is on public reaction to the Supreme Court, rather than the actions taken by Supreme Court Justices in response to political threats. The suggestion

---

[351] *See* Chamberlain, *supra* note 343, at 77 ("[L]awyers feel like advising their clients to push cases as men bet on horse races, just for the sake of the gamble."); Powell, *supra* note 341, at 44 ("Where shall confidence be placed? How far will transactions become a mere gamble as to their legal results? These are questions many lawyers are now asking.").

[352] Frank W. Grinnell, *The New Guesspotism*, 30 A.B.A. J. 507 (1944).

[353] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting); *see also* PRITCHETT, *supra* note 342, at 57 (1948) (noting that there were 32 overrulings during the period 1937-1946).

[354] *See* LEUCHTENBURG, *supra* note 8, at 234.

[355] *See, e.g.*, CUSHMAN, RETHINKING, *supra* note 8, at ch. 1; Friedman, *supra* note 20 (arguing that understanding the minds of Justices Hughes and Roberts is essential to understanding the decisions of 1936 and 1937).

here is that the independence of the judiciary rests on public willingness to respect that independence. The analysis that follows pursues this idea with regard to two specific questions: the range of independence possessed by the Court in 1937, and the empirical legitimacy of the doctrinal change that followed.

A. *The Events of 1937, and the Extent to Which Law and Politics Are Separate*

Public reaction to the Supreme Court is not *only* the product of agreement or disagreement with specific decisions. The public will support the idea of a independent judiciary, even while seriously opposing judicial holdings.

As the preceding history makes plain, the public was extremely angry about Supreme Court decisions and the Court's constant interference with the New Deal agenda. At the same time, many parts of that same public—including those who favored the New Deal measures struck down by the courts—opposed the Court-packing plan.[356] This phenomenon was confirmed by Gallup polls that showed both dissatisfaction with Court decisions and opposition to tinkering with the Court.[357] As Thurman Arnold explained, "much of the opposition to the proposal came not from those who were opposed but from those in favor of the main outlines of the Roosevelt policies,"[358] including the farm movement and organized labor.[359] In addition, many members of Congress were enthusiastic New Dealers who were eager to solve the Court problem, but insisted on doing so by constitutional amendment, rather than by Court packing.[360]

---

[356] This was not universally true, of course; the defeat of the Plan necessarily took a coalition of New Deal opponents (who may or may not have disagreed with Court-packing in principle, but would oppose it because the Court was checking a disfavored political course), and New Deal proponents.

[357] *See* Caldeira & Gibson, *supra* note 24, at 638 n.4 (noting that most of the public opposed the Court's anti-New Deal actions, but fewer than half polled approved judicial review limitations).

[358] ARNOLD, FOLKLORE, *supra* note 116, at 53; *see also* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 184 ("[I]n the country you have the millions of middle-class Americans, whose political thinking is precisely that of the moderate New Dealers, who voted for the President in droves at the November election, deserting him on the court issue . . . .").

[359] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 119 ("The behavior of the farm organizations was the first sign that there might be a popular dissent from the court plan."). The situation was a bit more ambivalent with labor. *See id.* at 173-74 ("[A]fter the first loud pronouncements, no more happened.").

[360] *See id.* at 184 (describing how members of Congress deserted the President after

The question that remains, then, is how much room a Court has to maneuver in the face of public opposition. Stated differently, what are the boundaries of judicial independence? With regard to 1937, scholars have approached this question by first assessing the degree of political pressure, and then trying to ascertain whether a switch in fact occurred, ostensibly in response to it.[361] The widespread perception in 1937, however, was that the Court did in fact switch. Thus, the issue is not whether the Court switched, but what might have happened had it not done so. Obviously conjecture is required here, but in that conjecture rests some insight into the separation of law and politics.

1. The Public Believed the Court "Switched"

Press coverage suggests the public clearly received the impression that the Court had changed direction in the critical decisions in *West Coast Hotel* and *Jones & Laughlin Steel*.[362] As William Leuchtenburg reports, "[m]any observers, especially supporters of the plan, did not question that the Court had altered its views, and that it had been baptized 'in the waters of public opinion.'"[363] Al-

---

the switch); POLENBERG, *supra* note 333, at 125-26 (describing the Democrats' abandonment of the President after the plan's announcement). The President immediately lost the support of Texas Democrats, never easy New Deal allies, but critical to him nonetheless. *See* Patenaude, *supra* note 338, at 36 (describing the Texas Democrats' opposition to the plan).

[361] Many scholars simply assume a switch occurred. *See* 2 ACKERMAN, *supra* note 14, at 290-91 (noting scholarly assumptions that a "switch" occurred). Legalists argue at least that no switch occurred in response to politics, and perhaps also that no switch at all occurred in 1937. *See* CUSHMAN, RETHINKING, *supra* note 8, at 31-32 ("The fact that the only case that required the Court to eat its words was a response neither to the Court-packing plan nor to the 1936 election ought to give us pause when considering whether these political events were the proximate causes of decisions requiring no such *volte face*."). Quite recent scholarship suggests the Court perhaps was switching back and forth. *See* Kramer, *supra* note 16, at 927 (arguing that the 1935 decisions were consistent with direction of precedent, but that the Court "panicked" in 1936); Pepper, *supra* note 14, at 73-75 (arguing that apparently liberal decisions of the 1935 Term either were seen as not so liberal or were an aberration).

[362] David Pepper cites numerous sources for the proposition that "court-watchers immediately hailed the 1937 decisions as decisive turns in the Court's jurisprudence." Pepper, *supra* note 14, at 136. Barry Cushman cites sources that suggest the 1937 decisions were not that dramatic. *See* CUSHMAN, RETHINKING, *supra* note 8, at 177-80. Cushman's sources are law review sources, however, and immediately before the bulk of them he cites sources going the other way. As David Pepper observes, "I contend that the overwhelming amount of evidence garnered from a survey of leading law journals at the time outweighs Cushman's data." Pepper, *supra* note 14, at 136-37, n.454. Certainly that is the case for the more popular media.

[363] LEUCHTENBURG, *supra* note 8, at 143. The most that can be said for the legalist view in this regard is that some of the press coverage spoke in terms of "broadening" rather than overturning precedent, but this subtlety was only attempted by part of the

sop and Catledge refer to the events of 1937 as "the Court's self-salvation by self-reversal."[364]

The apparent nature of the switch was clear to Felix Frankfurter, who later took a vested interest in establishing that it was not a response to public or political pressure.[365] This concern that the switch not appear to be one of political pressure was undoubtedly felt by all those who cared about the distinction between law and politics. Yet, Frankfurter was initially quite candid in observing the switch, calling Roberts's and Hughes's support for the *Jones & Laughlin Steel* decision "hardly reconcilable with some of the views they sponsored regarding the invalidity of the labor provisions under the Guffey Act. . . . [O]ne thing is patent to every informed reader of the Court's opinions. A disregard of settled doctrines of constitutional procedure dangerously borrows trouble."[366]

Even if the *West Coast Hotel* decision had little impact on public

---

press, and the broadening was seen to be substantial.

[364] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 147.

[365] *See* Ariens, *supra* note 14, at 621-23 ("Justice Felix Frankfurter tried to coordinate history to protect the integrity of the Court as he saw it. . . . Frankfurter's revisionist history permitted defenders of the Supreme Court to claim that Justice Roberts had not altered his stance in 1937 as a result of FDR's court-packing plan."); Friedman, *supra* note 247, at 1994 ("[I]n both securing the memorandum and publishing it, one of Frankfurter's motivations may have been the support that it gave to the Court's legitimacy."); Pepper, *supra* note 14, at 150-51 ("Pusey and Frankfurter, on whom modern legalists greatly rely, undertook their historical analysis with strong views about legitimate constitutional change: Politics should never inform constitutional deliberation, they believed. Their arguments aimed to forward these notions.").

[366] Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 637 (1938). Richard Friedman's detailed article on the switch offers justifications for seeing the votes in *Jones & Laughlin Steel* as other than pressured. He concludes the "evidence strongly supports Hughes's insistence that *Jones & Laughlin Steel* represented no change in his concept of the commerce power." Friedman, *supra* note 20, at 1967. However, Friedman concedes that "Hughes's treatment of the Commerce Clause in *Carter* does not sit easily alongside his monumental opinion in *Jones & Laughlin Steel*. The two may be logically reconcilable, but I believe that, to the extent they are not, *Carter* is the aberration." *Id.* at 1962. Be that as it may, it surely suggests Hughes "switched" to some degree between *Carter* and *Jones & Laughlin Steel* and unquestionably that it could be seen as such. As for Roberts, Friedman repeatedly acknowledges it is more difficult to explain his vote in *Jones & Laughlin Steel* than Hughes's vote. *See id.* at 1967-74. Friedman then offers an extremely complicated (and somewhat questionable) apologia for Roberts, *see id.* at 1970-72, one that is a little inexplicable given his recognition of Roberts's "judicial timidity," *see infra* note 370. Indeed, Roberts himself conceded the pressure, "the tremendous strain and the threat to the existing Court, of which I was fully conscious." Edward A. Purcell Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (citing *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 83rd Cong. 9 (1954) (statement of Justice Owen J. Roberts)).

thinking about the Court-packing plan (a conclusion born out by Gregory Caldeira's careful study of polling results),[367] that does not mean the decision failed to attract attention as representing a shift of direction. Anything else would have been incredible given the outrage expressed at the *Tipaldo* decision. Leuchtenburg's study of public opinion reveals "one correspondent ask[ed]: 'Didn't the Welshman on the Supreme Court do a pretty job of amending the Constitution yesterday?'" while a Democratic leader observed that Roberts had performed a "marvelous somersault in mid-air".[368] Similarly, Attorney General Homer Cummings remarked that because of "the change of a judicial mind . . . the Constitution on Monday, March 29, 1937, does not mean the same thing that it meant on Monday, June 1, 1936."[369]

Alsop and Catledge themselves report that in drafting *West Coast Hotel*, there was "Roberts' change of front to be explained," and that to do so Hughes relied on "the novel argument that judicial interpretation must take cognizance of the changes of the times."[370] The understanding that a shift had occurred was even greater after *Jones & Laughlin Steel*. Alsop and Catledge report the surprise that greeted the

---

[367] *See infra* notes 383-84 and accompanying text.

[368] LEUCHTENBURG, *supra* note 8, at 143 (quoting numerous public reactions).

[369] *Id.* at 176. Leuchtenburg's account is chock full of reactions to the "change," including one woman's description of Roberts's "politically expedient" change, and the *New Yorker*'s quip that "We are told that the Supreme Court's about-face was not due to outside clamor. It seems that the new building has a soundproof room, to which justices may retire to change their minds." *Id.* at 177.

[370] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 142. It is irrelevant that Roberts voted prior to the announcement of the Court-packing plan (and thus could not have switched in response to it), *see* LEUCHTENBURG, *supra* note 8, at 177, or that *West Coast Hotel* may not have been "novel." Alsop and Catledge were contemporary observers, and they perceived that a change had occurred. More importantly, most of the public would have had no idea whether the conference vote deciding *West Coast Hotel* had been taken before or after the plan was announced.

The best explanation for Roberts's vote may well have been the harsh reaction the Court's *Tipaldo* decision engendered. This is an extremely plausible explanation, especially given the general agreement that Roberts was not a particularly strong personality. *See* Friedman, *supra* note 20 at 1944-46. Richard Friedman politely refers to Roberts's "judicial timidity" and quotes Roberts as saying, "I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo." *Id.* at 1945 n.270. In light of Roberts's generally-accepted "timid" personality, Richard Friedman seems also to accept the *Tipaldo* explanation for the vote in *West Coast Hotel*. *See id.* at 1947 (arguing that in light of reactions to *Tipaldo*, "Roberts may well have come to regret his vote"); *id.* at 1952 ("[T]o the extent that a political explanation is needed to account for Roberts's move from *Tipaldo* to *Adkins*, it may be found in the reaction to *Tipaldo* itself. . . .").

Court's "self-reversal."[371] The authors refer to Roosevelt's "fit of temper" upon learning that he had a "liberal Court" with the *Jones & Laughlin Steel* decision and describe how Senate Majority Leader Joe Robinson advised Roosevelt that "[w]hat he ought to do is say he's won, which he has, agree to compromise to make the thing sure, and wind the whole business up."[372] News coverage of the decision was vast, with much of the commentary raising questions regarding the fate of the Court-packing plan in light of the President's reversal of fortune. The headline of *Newsweek* for the week of April 17th read: "Judgment Day: Supreme Court Gives Its Blessing to Labor Relations Act and Hands Roosevelt a Victorious Defeat."[373] *The Commonweal* announced, "The Court Rules on Itself."[374] Leuchtenburg reports that one former Hoover Administration official "thought the steel case would be decided unanimously the other way."[375] Thurman Arnold said, "Roosevelt has already accomplished his objectives and we are rewriting all our briefs in the Department of Justice in terms of the new definition of the commerce power."[376] One Senator felt that the rulings indicated "the certain defeat of the President's Supreme Court reorganization plan."[377] The Supreme Court "opinions robbed the President of his best arguments—the driver had lost his whip."[378] It presented a "death blow to [the] court plan."[379] President Roosevelt now had his liberal court and "[h]is first reaction was an instant anger."[380]

2. What Action Might Have Been Taken Against the Court Had It Not Shifted Direction?

Given that the public perceived a shift by the Court, the next question is what would have happened had the Court not changed direction (or been understood by the public as not shifting). The focus of this question relates to, but differs from, a prominent question ad-

---

[371] *Id.* at 151-54.

[372] ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 153.

[373] *Judgment Day: Supreme Court Gives Its Blessing to Labor Relations Act and Hands Roosevelt a Victorious Defeat*, NEWSWEEK, Apr. 17, 1937, at 7 [hereinafter *Judgment Day*].

[374] *The Court Rules on Itself*, 25 COMMONWEAL 707 (1937).

[375] LEUCHTENBURG, *supra* note 8, at 311 n.22.

[376] *Id.* at 143.

[377] *See Judgment Day*, *supra* note 373, at 7.

[378] *Id.* at 8.

[379] Alsop & Catledge, *Behind the Story*, *supra* note 149, at 98.

[380] Alsop & Catledge, *The Ghost*, *supra* note 260, at 20.

dressed in much New Deal scholarship. Most scholars examine whether Roosevelt's plan had any chance of success, in order to determine whether the Justices felt pressured to change direction. Here, the plan's chance of success is a barometer for whether the public might have supported action against the Court had it not changed direction.

Scholars differ greatly on the question of whether political pressure could account for the Court's switch. Barry Cushman is skeptical about the Court-packing plan's chance of success;[381] if he is correct this minimizes the possibility that "politics" could have influenced the court's doctrinal decisions.[382] William Leuchtenburg insists the chances were better than that, and that up to the very end the compromise measure might have succeeded.[383] Alsop and Catledge's contemporary account gives the impression that the plan itself could have succeeded before the switch, but that the compromise was a much more doubtful proposition.[384]

With historical scholars in conflict, one might suspect the truth lies somewhere in the middle, an intuition born out by an empirical study of the events of 1937. In an attempt to understand why the plan might have been defeated, an extremely useful study by Gregory Caldeira compared polling data taken throughout the Court battle with critical events in that battle. The study suggests that support for the plan reached a high after Roosevelt's radio addresses, and lost significant headway (some five percent in each instance) after the decision in *Jones & Laughlin Steel* and after Justice Van Devanter resigned. At its height, support for the plan was at about forty-six percent.[385] The

---

[381] *See* CUSHMAN, RETHINKING, *supra* note 8, at 12-13 (arguing that from the beginning the plan was countered by a large and organized opposition consisting of the press, numerous bar associations, including the ABA, myriad civic and political organizations, and a number of eminent liberal reformers, academics, and farmers).

[382] *See id.* at 25 (contending that the Court-packing prong of any political explanation for the Court's behavior is deficient insofar as the good reasons to doubt the plan would be enacted gave the Justices "ample reason to be confident that constitutional capitulation was not necessary to avert the Court-packing threat").

[383] *See* LEUCHTENBURG, *supra* note 8, at 148 (noting that under the compromise bill, "FDR lost very little," and that the "prospects for enacting this new bill appeared very promising").

[384] *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 226 (arguing that following the Social Security decisions and the retirement of Van Devanter, the "time when compromise would have been easy was definitely past").

[385] *See* Caldeira, *supra* note 24, at 1146 (discussing the constantly changing levels of support for the Court-packing plan from February to June of 1937); *see also The Fortune Quarterly Survey: IX*, FORTUNE, July 1937, at 96, 97 (showing that the President lost support, from people generally supportive of his policies, after he proposed the Court-

Caldeira paper supports the conclusion that the "switch" and the Van Devanter retirement doomed the plan.[386]

The political fortunes of the plan depended on a great deal more than polling results, however.[387] Party discipline and loyalty to Roosevelt's coattails remained significant factors to the end.[388] Even if less than a majority of the country supported the plan, it still might have made its way through Congress.[389]

For present purposes, it is significant that at some points in the debate the plan or a compromise had a reasonable chance of success. By late spring, and certainly after the decision in *Jones & Laughlin Steel* and Van Devanter's retirement, it would have been very difficult to get the plan through Congress.[390] Nonetheless, it would be wrong to con-

---

packing plan).

[386] In light of the competing accounts, and the Caldeira study, Cushman's conclusion that the Court was unaffected by Roosevelt's proposal is a bit difficult to accept. Cushman bears an overwhelming burden of proof here, and as strenuously as he makes his case, one is led to decide his conclusion is "not proven." Given the strength of the competing accounts, it is hard to believe the Court could have been so certain of the outcome as to ignore the political events. This alternate conclusion is bolstered by the Chief Justice's decision to write a letter to Congress challenging the factual basis for Roosevelt's plan. *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 126-27. One has to wonder why, if the plan's demise was as certain as Cushman relates, the Chief Justice ever would have gone to the extraordinary step of providing the bombshell letter that he did refuting Roosevelt's premises. *See id.* at 125-26 (discussing Hughes's resistance to the idea of participation).

[387] The *Literary Digest*'s poll famously undercounted FDR support in 1936 and predicted an Alf Landon victory. *See Landon, 1,293,669; Roosevelt, 972,897: Final Returns in the Digest's Poll of Ten Million Voters*, LITERARY DIG., Oct. 31, 1936, at 5-6. On the other hand, James Patterson identifies a study showing a high correlation between voter support and the stand of their home state's senators. *See* PATTERSON, *supra* note 39, at 99 n.76 (citing a study that showed the stand of Senators on the Court-packing plan closely tracked public opinion in Senators' states).

[388] *See* PATTERSON, *supra* note 39, at 122-24 (noting that for a time the compromise plan had a majority of votes in the Senate, but that when Majority Leader Joe Robinson suddenly died, party control faltered, and the plan died with him); *How Big a Revolt Against F.D.R.?*, BUS. WK., June 19, 1937, at 26 ("If [the Democratic congressmen] vote against the President, they are likely to be knocked off in the primaries by some New Deal candidate who charges that the sitting member fights against Our Leader—against social justice."); *see also* PATTERSON, *supra* note 39, at 110-17 (making clear how hard it was to break ranks with Roosevelt).

[389] *See* PATTERSON, *supra* note 39, at 92-94 (stating that in the first week following the announcement of the plan, a number of Democratic Senators announced themselves for the bill and *Time* magazine predicted passage of the bill despite great opposition from other congressional members).

[390] *See, e.g.*, ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 201 (noting that the steering committee against the bill concluded in early May that they had an absolute majority of Senate votes); CUSHMAN, RETHINKING, *supra* note 8, at 21 (stating that Van Devanter's retirement "sealed the fate of the Court-packing plan"). Most studies have focused on the Senate, but Roosevelt chose to fight the fight there because he calcu-

clude the plan ever was considered folly. Too many contemporary observers indicated the plan had some chance for passage.[391] Had Roosevelt not refused to compromise until it was too late, it seems likely there was a second chance for some action.[392]

---

lated that was where the best chance of success rested. Leuchtenburg noted that although the Democrats had a nearly four to one advantage in the House, the President was eager to avoid confrontation with House Judiciary Committee Chairman Hatton Sumners and so focused the Administration's efforts on the Senate where "the President had so overwhelming a majority in the upper house that several Democrats could find seats only across the aisle in the Republican section." LEUCHTENBURG, *supra* note 8, at 135.

[391] *See, e.g.*, 2 ACKERMAN, *supra* note 14, at 335 ("Most obviously, the President could have won the battle for court-packing."). Indeed, when the Court-packing plan was first presented, its passage seemed to some almost certain.

> Even opponents of the plan conceded, however, that the bill would be approved in the House, where the Democrats had a nearly 4-1 advantage, with many votes to spare.
>
> The situation in the Senate seemed almost as promising. The President had so overwhelming a majority in the upper house that several Democrats could find seats only across the aisle in the Republican section. He figured to lose a few conservative Democrats, but he might make them up .... Yet Roosevelt was unlikely to need these, for there were enough Democratic Senators who owed their election to him to provide a comfortable margin. If every one of the sixteen Republicans rejected the measure, the opponents would still need to persuade more than twice that many Democrats to desert the President just to draw even.

LEUCHTENBURG, *supra* note 8, at 135.

Even late in the game, the plan had a chance of passing. *See, e.g.*, FEINMAN, *supra* note 136, at 133 (noting that the plan was viable even as late as May of 1937 when Justice Van Devanter retired); LEUCHTENBURG, *supra* note 8, at 142 (quoting *Time* magazine at the end of March: "Last week the stanchest foes of the President's Plan were privately conceding that, if he chose to whip it through, the necessary votes were already in his pockets."). Even after the Judiciary Committee released a damaging report, and a Gallup survey found support for judicial reform at a new low, Roosevelt revived Court-packing on June 16 with a large picnic party on an island in Chesapeake Bay. At the three-day party for all 407 Democratic Congressmen, Roosevelt is said to have "clinched" votes by reversing a few minds. *Id.* at 147.

Further, the outcome may have differed depending on the public's support of Roosevelt in general.

> Leuchtenburg's study suggests how formidable the President would have been if his support had been soaring instead of sagging as an intransigent Court continued to provoke public opinion. If the Congressional leadership got so far despite the loss of popular support, how hard would it have been to win assent from 49 of 76 Democrats in the Senate and 218 of 331 Democrats in the House when the public was up in arms?

2 ACKERMAN, *supra* note 14, at 336.

[392] Alsop and Catledge are quite clear that as of April a compromise had a very good chance of success, had the President been willing to listen. *See* ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 197 (arguing that only a successful filibuster could have defeated a compromise in April). They conclude the President lost critical time in the two weeks after the Van Devanter retirement by not awarding the seat to

Moreover, factors other than the Court's decision might have influenced the public in the face of perceived continued judicial recalcitrance. Both Eben Moglen and Bruce Ackerman are right to observe the significance of the economic downturn of 1937.[393] It would have taken a stout Court indeed to have weathered the storm of public opinion in the face of further bad economic times.

Although it is impossible to answer this question with anything but conjecture, there seems a basis for concluding that had the Court not shifted in the eyes of the public, some retributive action would have been possible. Public sentiment against the Court was strong, and Roosevelt's case would have been bolstered by a bad economy and additional unpopular judicial decisions. The vote count throughout the battle over the plan was close.[394] It is true the President or Congress might have attempted a solution other than Court-packing, for example, taking the amendment route, but the obstacles to that route which existed in early 1937 largely remained in place after the plan was defeated.

3. The Separation of Law and Politics

Thus, the conclusion that can be drawn is that the Court is neither necessarily susceptible to immediate retributive politics, nor is it entirely immune. As much as we might like to think of the Court as completely separate from politics designed to influence judicial deci-

---

Robinson. *Id.* at 214, 268. Leuchtenburg feels there was a chance of passing a compromise as late as the end of June. *See* William E. Leuchtenburg, *FDR's Court Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 680-81 (1985). He supports this claim with several sources that expressed such an opinion at the time. *See id.* at 681 n.50 (citing letters which indicate that there was a chance of passing a compromise). Leuchtenburg concedes a filibuster was a problem, but says,

> many doubted that a filibuster would succeed. Roosevelt's opponents, who had been charging him with perverting the democratic process, would be in an embarrassing position if they sought to deny the people's representatives in Congress an opportunity to vote and thereby contrived the triumph of the will of a minority.

Id. at 681.

[393] *See* Eben Moglen, *Toward a New Deal Legal History*, 80 VA. L. REV. 263, 268 (1994) (noting that the recession of 1937 was politically damaging, but that it cannot be "enlisted as an influence on the Court's behavior during the crucial second half of the 1936 Term" because the recession "could hardly be used to explain events that occurred before the public was aware of the worsening economic situation").

[394] *See, e.g.*, ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 9, at 245-46 (describing how "at any moment" during the Court-packing battle a large number of key senators could either desert or support Roosevelt and change the outcome); Caldeira, *supra* note 24, at 1147 fig.3 (describing Gallup Poll results reporting a close division of opinion on the eve of the Court's "switch").

sions, there have been times in history—Reconstruction was one of them, and the New Deal was another—when politics appeared to influence the Court, and may well have done so. As Edward Purcell has said, speaking of Barry Cushman's legalist story of New Deal change, "he does not show that the Justices were impervious to the concentrating pressures they faced during the Depression and the New Deal."[395]

On the other hand, the traditional external story of political change during the New Deal probably overstates matters.[396] As this history has shown, there clearly are forces that operate below the surface of ordinary politics, even retributive politics, that are primary determinants of whether such politics will succeed in disciplining the Court. A recent study by Gregory Caldeira and James Gibson similarly concludes public opinion supports the Supreme Court, even in the face of dissatisfaction with individual decisions, and that "public values" regarding democracy and rights are far stronger determinants of the Court's public esteem.[397] The same sorts of forces that determined the extent of judicial independence in 1937 also are those that would be important at other points in history: notions of how democracy should operate, notions of the role courts play in that democracy, understandings about judicial supremacy, and understandings about the determinate meaning of the Constitution itself.

The best way to understand the Court's relationship to popular politics is "bounded independence." On the one hand, a Court that deviates far from popular understanding faces some threat of retribution. On the other hand, deep public support for constitutional democracy protects the Court, even when it renders unpopular decisions. Differing normative views as to the desirability of this "bounded independence" of the judiciary may exist, but as a descriptive conclusion it seems a difficult one to avoid. As Larry Lessig has said (albeit writing from a unique normative framework), "there is a limit on how

---

[395] Purcell, *supra* note 366, at 280. Caldeira concurs after his analysis of polling data:

> Perhaps one lesson we can extract from these results is that if the justices wish to gain public support in battles with the popularly elected branches, they must first assess whether the public stands with the president and Congress on the substantive issue; and, if so, the Supreme Court can preserve its institutional integrity by retreating on the issue.

Caldeira, *supra* note 24, at 1150.

[396] Thus, Caldeira is wrong to discount entirely public "reverence" for the Supreme Court. *See* Caldeira, *supra* note 24, at 1150.

[397] *See* Caldeira & Gibson, *supra* note 24, at 635-38 (arguing that a citizen may not agree with all of the decisions of the Supreme Court, but may nonetheless concede the legitimacy of the Court).

much a court can resist what is taken for granted by all."[398] The reason for that limit is that the political branches appear to retain some control over the Court. Although among academics the propriety of such control is debated hotly, when the chips are (or appear to be) down, politicians will urge exercising control. Whenever that occurs, the country is forced yet again to confront its commitment to an independent judiciary.

B. *The Legitimacy of Constitutional Change*

This idea of "bounded independence" provides some insight into one last question at the heart of much scholarship about the New Deal, the question of the legitimacy of constitutional change. Some scholars suggest that because the New Deal transformation occurred without constitutional amendment, the change of law that followed 1937 was of dubious legitimacy.[399] Most, however, recognize that the legal regime that has held sway for some sixty years cannot seriously be deemed lacking in legitimacy.[400] Nonetheless, they struggle to explain precisely how that change was legitimate, given the failure to utilize the Article V amendment process.[401]

---

[398] Lessig, *supra* note 23, at 441.

[399] *See id.* at 444-46 (discussing views of those who believe the change illegitimate).

[400] There are a variety of legitimating stories of New Deal change. The one that scholars call "traditional" or "conventional" is the story of the fall from grace. The Supreme Court deviated from original understandings between the end of the nineteenth century and the 1930s, and the New Deal transformation is legitimate in the sense that it was a return to original ideas. *See* 1 ACKERMAN, *supra* note 44, at 42-43 (explaining the golden age theory in which the switch in time serves as a symbol of Court rebirth); 2 ACKERMAN, *supra* note 14, at 259 (same); Lessig, *supra* note 23, at 446 (same). As Larry Lessig explains, this story is a "lawyer's trick" for "however much the plain language of these [Marshall Court] opinions might support the New Deal, there can be no doubt that Chief Justice Marshall and the Framers he spoke for would never have sanctioned the extent of Federal power that the New Deal allowed." *Id.* at 447.

The remaining approaches are efforts to find the New Deal transformation consistent with acceptable means of legal change. Larry Lessig argues that the New Deal Court properly translated original understandings. *See* Lessig, *supra* note 23, at 453. Larry Kramer argues the Court's doctrine properly reflected changing circumstances until the Court "panicked" in 1936, and then went back upon its way in 1937. *See* Kramer, *supra* note 16, at 927. Legalists such as Barry Cushman and Richard Friedman are less explicitly concerned with the legitimacy of the change, but implicit in their legalist story is legitimate constitutional doctrinal transition by the Supreme Court. *See* CUSHMAN, *supra* note 8, at 4-7; Friedman, *supra* note 20, at 1982-83. Bruce Ackerman constructs an elaborate schema for constitutional change. *See generally* 1 ACKERMAN, *supra* note 44; 2 ACKERMAN, *supra* note 14.

[401] *See supra* note 44 and accompanying text (describing the common, but shallow, modern explanation of the switch).

Whatever one may wish to conclude about the normative desirability of constitutional change outside of Article V, this historiography suggests that such legitimacy simply exists as an "empirical" matter.[402] As this history demonstrates, there was a remarkable congruence between what the public wanted out of the Court, and what the Court ultimately delivered. The public supported the New Deal, and believed the Constitution was elastic enough to tolerate new solutions to economic problems, even if those solutions meant sweeping away the firmaments of substantive due process and narrow commerce power. At the same time, the public was jealous of judicial independence. Why? Because it saw a role for courts in protecting individual liberty, in matters of race, of religion and speech, and of criminal justice. After 1937, the Court abdicated its role superintending economic legislation and turned to protecting individual liberty.

The notion of public opinion legitimating constitutional doctrinal change is likely to cause some normative discomfort. Any notion that law is legitimate when it meets with public approval, and illegitimate otherwise, seems to threaten the notion of the rule of law, and the separation of law and politics. *Especially* in a democracy, equating popular approval with "law" appears to threaten the very values the rule of law holds most dear: protection of individuals against the power of the state. Would *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu* be considered legitimate simply because the public approved? Are constitutional decisions regarding the rights of criminal defendants legitimated simply by public approval?

Reassurance rests in recalling that the relationship between law and politics still exists at a remove. The public's view of judicial independence is not—happily—entirely congruent with its views on the merits of individual decisions.[403] Indeed, the public may have views about the judicial role that run contrary to the actions of government officials. At least during the New Deal, it seems apparent the public

---

[402] *See* Orts, *supra* note 30, at 267 (suggesting this notion of empirical legitimacy, reflected in Max Weber's social theory).

[403] This conclusion seems similar to where Don Herzog ends up on the argument that the legitimacy of law rests on the separation of law and politics. He seems to conclude that, given the inherently contestable nature of political debate about legal resolutions, such a strict separation is impossible. *See* HERZOG, *supra* note 1, at 124. As his history of the trial of Charles I indicates (as do other examples in chapter four of his book), in cases of political trials the separation is going to be difficult to maintain. Nonetheless, Herzog establishes a number of conditions in the ordinary run of legal cases, such as judges being free from political influence and deciding cases without regard to the social and political station of parties. *See id.* at 129.

was not looking for a rubber-stamp Court.

Moreover, the Court itself is not exogenous to this process. Public opinion may determine the degree of the Court's independence, but the judiciary may also sway public opinion. As other scholarship has shown, the effects of this Court interaction are unpredictable and sometimes perverse.[404] The Court, however, plays a role in the formation of public ideas not only about individual decisions, but about broader questions of equality and democracy.

In fact, the real danger is that the Court itself could learn the wrong lesson from the New Deal. What this history of the New Deal seems to suggest is that the Court has more "political capital" than it might imagine, that it *is* free to deviate from popular will. That room to maneuver is not unbounded, surely, but—with one possible exception, in 1957—nothing the Court has done since 1937 has come close to engendering a retributive threat to its independence.

Ironically, 1937 may have provided *greater* separation of law from politics, not less. The events of 1937 ended any easy claim to the legitimacy of Court-packing as a retributive measure. The Senate report on Roosevelt's plan concluded: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[405] That was then; we have the insights of sixty years of history since. No serious argument has since been made in favor of Court-packing, although other remedies to control the Court have been urged. Court-packing may have died its death in 1937.

Often unnoticed in academic literature is a similar rejection of political controls in the late 1950s. During the 1957 Term, the Supreme Court decided ten cases in favor of Communists and Communist-sympathizers, and against the government's war on those with unpopular views.[406] Forces opposed to those decisions joined hands with

---

[404] *See* Friedman, *Dialogue and Judicial Review*, *supra* note 116, at 580-81 (positing that "all segments of society" participate in the judiciary's interpretation of the Constitution through the "elaborate dialogue of meaning"); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81 (1994) (describing how the primary impact of a Supreme Court decision may be a backlash in public opinion and action).

[405] SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 711, at 23 (1937).

[406] *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957) (reversing convictions of defendants charged with conspiring to advocate and teach the forcible overthrow of the U.S. government and to organize the Communist Party in violation of the Smith Act, and concluding that "organize" referred only to creation of new organizations and not already existing organization); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (revers-

segregationists still angry with the desegregation decisions to launch yet another political attack on the Court.[407] This attack, embodied in the Jenner-Butler bill, took the form of jurisdiction-curbing.[408] The measure sought to restrict the Court's jurisdiction on many fronts.[409] In a highly public and heavily-fought battle, the measure was defeated.[410]

---

ing the conviction of a witness in an investigation of subversive activities who refused to answer questions regarding the Progressive Party and the contents of a lecture); Jencks v. United States, 353 U.S. 657 (1957) (reversing the conviction of a labor union officer for filing a false non-Communist affidavit with the NLRB and holding that the labor union officer was entitled to examine FBI reports made by government witnesses).

[407] *See* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960, at 120 (1961) ("To a very considerable degree the legislative opposition to the Court's security decisions was recruited from among southern members of Congress whose main concern was retaliation for the Court's segregation ruling."); Alfred J. Schweppe, *Court Rewrites Constitution in Its Own Image*, U.S. NEWS & WORLD REP., Oct. 24, 1958, at 114 ("The preponderant backing of the attack on the decision in the Nelson case is made up of those who would undo the Supreme Court's decision in Brown . . . ."); J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 189 (1959) ("Southern Congressmen, having failed in their initial effort to mobilize anti-court sentiment . . . were quick to perceive that their basic purpose of discrediting the Supreme Court would be served whether the issue was undue concern for civil liberties or softness to communism or states' rights."). J. Lee Rankin explained that

> [The Court] is the target of a rare combination of dissident groups who have found common ground in their displeasure with decisions in their fields of special interest. Segregation is the particular rallying point at the moment but the complaints cover limitations on . . . power in congressional hearings, restrictions on dismissal of government employees in security programs, prohibition against punishment by States for sedition directed against the United States, denial of power to discharge an employee for claiming privilege against self-incrimination before congressional committees, and determination that a state cannot draw unfavorable inferences from a mistaken but honest refusal to answer relevant questions in a proceeding for admission to the bar.

J. Lee Rankin, *An Independent Supreme Court*, *in* 25 VITAL SPEECHES OF THE DAY 389 (1959) (footnotes omitted).

[408] *See* A Bill to Limit the Appellate Jurisdiction of the Supreme Court, S. 2646, 85th Cong. (1958). For one of the best sources on the history of this legislation, see generally PRITCHETT, *supra* note 407. *See also* White, *supra* note 407, at 193 (discussing the attack on the Court following its desegregation rulings, including the Jenner-Butler bill).

[409] Senator Jenner proposed a bill that, in its original form, would have deprived the Supreme Court of appellate jurisdiction over admissions to the practice of law in state courts; over any function or practice of a congressional committee, including any proceeding against a witness charged with contempt of Congress; over executive branch employee loyalty-security programs; over state attempts to control subversive activities within the state; and over regulations of school boards with respect to subversive activities of teachers. *See* PRITCHETT, *supra* note 407, at 31.

[410] *See* PRITCHETT, *supra* note 407, at 11, 119-21 (speculating as to several possibilities why the Supreme Court emerged largely unscathed).

Since the fight over Jenner-Butler, there has not been any serious attempt to control the Court politically, save in the one way approved during the New Deal: the regular process of attrition and presidential appointment coupled with Senate approval. It was here, during the nomination of Robert Bork, that the battle over the Court was fought in the political arena. And it is here that the battle has remained. For the time being, the public has rejected political control over the courts, save for the confirmation process.

IV. CONCLUSION: LAW'S POLITICS

What happened in 1937 and thereafter teaches us important lessons about the legitimacy of constitutional change, of judicial review, and of the separation of law and politics. What did not happen teaches us some lessons about judicial independence.

It is difficult after 1937 to insist that there is a strict separation of law and politics; it is not clear anyone really does. In the 1930s, the public was influenced greatly by the economic catastrophe facing the nation and by growing world totalitarianism. In the face of those concerns, fundamental shifts occurred in notions of democracy, the interpretation of the Constitution, and the role of courts in protecting civil liberty and guarding against government oppression. All of these factors are in some sense "political," and all affected public acceptance of the role of courts and influenced reactions to the Court-packing plan.

Most importantly, these forces led the public to important determinations regarding the role of courts and the legitimacy of constitutional change, determinations that have endured even as they have perplexed scholars in the legal academy. The public in 1937 was ready for a change in constitutional meaning. Although it might not have amended the Constitution formally—by way of the Article V procedure—there is very little sign of resistance to the same change by means of judicial interpretation. If anything, the public seems to have demanded this change and to have accepted it happily when it came. Academics, seeing no vehicle for such change in the Constitution, are troubled. The public, by contrast, was reconciled.

Indeed, for this very reason, recent Supreme Court decisions in the area of federalism and economic liberty may not be as surprising as some observers believe. Although it is *far* too early to tell, the decisions in cases such as *Lopez* and *Eastern Enterprises* may do nothing more than reflect social forces today that are comparable to those that existed during the New Deal. The public does seem dissatisfied both

with national interest-group politics and with the increase in the size of government accompanied by political stasis. The popularity of "devolution" reflects this trend. The public may be comfortable with the direction of constitutional doctrine, even as academics express unease.

As this story suggests public comfort or discomfort will, ultimately, have some impact on Supreme Court review and constitutional change. That was true in 1937 and it will prove true today. This history suggests law and politics are inextricably intertwined, but at a distance, not in a close fashion of political retribution for unpopular decisions.