

Laura Kalman

Court Packing as History and Memory

Open any U.S. history textbook and you will find some version of the following story. During Franklin Roosevelt's first term, a liberal President and Congress confronted the "nine old men" of the Supreme Court, a majority of whom waged war against the New Deal's push to end the reign of conservative laissez-faire. The "reactionary" elderly justices in the majority struck down statute after statute, often by razor-thin margins. Then in November 1936, FDR won the greatest electoral college and popular victory ever. Flush with success, he introduced a bill the following February that would reorganize the judiciary and help out the "overworked" Court by adding a new justice for every member who remained on the Court for more than six months past his seventieth birthday, up to a total of fifteen justices. That rationalization hid Roosevelt's real motivation for the proposal. During his first term in office, he had not had a single vacancy on the Court, where six justices over seventy sat, five of whom he believed were staying on to the bench to thwart his program of economic recovery and social reform. His Court Bill ignited a firestorm that made the battle over the League of Nations look tame. Horrified Republicans and even some Democrats accused the President of "packing" the Court for ideological gain. When the Court stunned the Administration by handing down decisions favoring it in the spring, some maintained that Roosevelt should back off because the justices had bent to his will. But he did not, and 168 days after the battle had begun, he lost it. By voice vote, the Senate recommitted his bill by 70-20 in July 1937. The magnitude of his failure made his bill look exceptionally foolish, and the concept of "court packing" suffered by association.

Ever since Joseph Alsop and Turner Catledge's 1938 history, *The 168 Days*, calcified the way it was remembered, Roosevelt's Court fight has been portrayed as the idiotic brainchild of a

hubristic FDR destined from its inception for defeat. Just consider a few characterizations. The President suffered from “[t]he pride that goeth before a fall” after his reelection triumph and before he made his "tragic" error, which was then “compounded by a stubborn persistence in it;” “his hubris was particularly harmful to his proposal;” his bill was “dead on arrival.” Historian Michael Parrish sums it up: “Roosevelt’s plan, most scholars now agree, had little chance of adoption from the beginning, a fact not lost upon the chief justice and his colleagues.”¹

Scholars almost universally thus portray Roosevelt as a nodding *and* arrogant Homer; his failure a victory for common sense; his scheme as doomed. As a result, according to law professors Daniel Epps and Ganesh Sitaraman, “In the near century since, court-packing has been treated as a political third rail—making the Court’s current size look like an entrenched, quasiconstitutional norm.” When proposals for change began circulating in the twenty-first century, some echoed the shock and horror of Roosevelt’s foes, while others argued that if a politician of FDR’s wizardry with his Congressional majorities couldn’t pull off changing the Court’s size, no one could. The way “we” remembered events became a club to wield against change.²

¹ Joseph Alsop and Turner Catledge, *The 168 Days* (New York: Doubleday and Doran, 1938); Kenneth Davis, *FDR: Into the Storm, 1937-1940* 3, 38, 69 (New York: Random House, 1993) (“pride”); William Ross, *The Chief Justiceship of Charles Evans Hughes: 1930-1941* 105 (Columbia: University of South Carolina Press, 2007) (“hubris”); Marian McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* 561-62 (New York: Fordham University Press, 2002) (“dead”); Michael Parrish, *The Hughes Court: Justices, Rulings, and Legacy* 26 (Santa Barbara: ABC-CLIO, 2002).

² Daniel Epps and Ganesh Sitaraman, “How to Save the Supreme Court,” 129 *Yale L.J.* 148, 164 (2019) (“near”). See, e.g., John Podhoretz, “Democrats’ Court-Packing Talk is Just Crazy,” *N.Y. Post*, July 4, 2018, <https://nypost.com/2018/07/04/democrats-court-packing-talk-is-just-crazy/>; Noah Feldman, “FDR, Even at His Pinnacle of Power, Could Not ‘Pack the Court.’ So, Good Luck with That,” *Minneapolis Star Tribune*, Oct. 1, 2020, <https://www.startribune.com/fdr-even-at-his-pinnacle-of-power-could-not-pack-the-court/572605672/>.

But the *history* of the Court fight tells a different story. I challenge the conventional wisdom. Excessive arrogance did not explain Roosevelt's actions. Instead, he was displaying the same shrewdness that enabled him to win a massive 1936 reelection victory despite the best efforts of an antagonistic press and angry elites. Further, on almost every one of the 168 days he battled Congress and the Court, he could reasonably anticipate achieving some success in the form of additional justices and for the principle of Court enlargement--as all, including the justices, were

aware. Instead of recounting the story from the usual perspective of how it turned out, we can tell one of possible victory. What drove FDR to try to "pack" the Supreme Court and federal courts? What, if any, mistakes did he make? What chance did he have of achieving his goal? What was the impact of his actions? What, if any, "lessons" does history have for us?

By June 1936, New Dealers' estimation of the Court had hit rock bottom. "Taken as a whole, the picture of new deal litigation...was a sorry one," the Justice Department acknowledged. In its view, the Court, often by a bare majority, had imposed unreasonable strictures on Congress's power to delegate authority to the Executive Branch and to regulate interstate commerce. Though the Court had broadly interpreted the scope of the taxing and spending power, it had restricted its exercise. The justices had shattered the pillars of Roosevelt's New Deal. And on the last day of the term, in Tipaldo, five justices relied on Adkins v. Children's Hospital to strike down a cherished issue of Administration stalwarts, state women's minimum wage legislation. The Due Process Clause buttressed laissez-faire economics by making governmental regulation of the economy and social welfare nearly impossible.

Together with other decisions, FDR said, Tipaldo created a judicial “no-man’s-land” where neither state nor federal government could function.³

Tipaldo turned out to be the proverbial blessing in disguise. It showed many what FDR had been trying to tell them: the problem was the Court’s benighted misinterpreters of the Constitution, rather than the incapability of the Constitution to confront modern problems. Even conservatives who had championed the Court’s earlier decisions assailing the New Deal thought the majority had gone too far. One Republican in Congress mourned that Tipaldo would win the Democrats an additional one million votes in November.⁴

Certainly, Tipaldo guaranteed that the Supreme Court would pervade politics in the election of 1936. By the time Congress adjourned, over a dozen bills in the Senate, and more than five times as many in the House, had been introduced to reduce the power or limit the jurisdiction of federal courts. Amid all this noise, columnist Arthur Krock wrote, the Supreme Court had to realize that it was “on trial in a Presidential campaign for the first time in years.” Although the President remained silent about the Court during his campaign against the Republican candidate, Alf Landon, FDR’s surrogates vied to denounce it. “Liberty, art thou both

³ Report of the Activities of the Department of Justice, n.d., Box 248, Folder, Notes: “The Biography of a Department,” Homer Cummings Papers, University of Virginia (hereafter Biography of a Department); A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (invalidating the National Industrial Recovery Act because the statute unconstitutionally delegated legislative power to the President, and the poultry code at issue had only an indirect connection to interstate commerce); Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 300 (1935) (striking down the Railroad Retirement Act of 1934 as a violation of the Fifth Amendment’s due process clause and the Commerce Clause); U.S. v. Butler, 297 U.S. 1 (1936) (striking down the processing tax at the heart of the Agricultural Adjustment Act because agricultural production was an area for the states); Carter v. Carter Coal, 298 U.S. 238 (1936) (striking down the Guffey Coal Act’s wage, hours and price provisions on the grounds that mining was not interstate commerce); Morehead v. New York ex. rel. Tipaldo, 298 U.S. 587 (1936); Adkins v. Children’s Hospital of D.C., 261 U.S. 525 (1923); Press Conference, June 2, 1936, http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0036.pdf;

⁴ 80 *Cong. Rec.* 8747, June 2, 1936 (Remarks of Representative Fish).

deaf and dumb!,” Senate Majority Leader Joe Robinson shouted at enthusiastic Democratic National Convention delegates as he attacked Tipaldo. “Canst thou not behold the pallid faces, the emaciated forms, the sweating brows, the trembling hands of millions of women and children workers who by the decision are left at the mercy of those who have neither pity nor charity for the oppressed and the poor?”⁵

Meanwhile Landon and other “economic royalists” FDR zestfully condemned during the campaign had apparently forgotten their temporary irritation with Tipaldo and repeatedly called for resisting the Democrats’ “constant attacks upon the Supreme Court of the United States,” Americans’ “salvation” against the New Deal. Publisher Paul Block made news when he announced that that FDR had hinted to him that he planned to “pack” the Supreme Court by increasing the number of justices. At his final Madison Square Garden rally, while leading the audience in a chorus of “The answer is: no one can be sure” about FDR’s intentions, Landon charged that the President had “publicly belittled the Supreme Court” and branded the Constitution “an outworn document.” If he won reelection, would he try “to get around the Constitution by tampering with the Supreme Court?”⁶

⁵ Arthur Krock, “In Washington: Supreme Court Knows It Is on Trial in Election,” *N.Y. Times*, May 27, 1936; “Text of Robinson’s Speech Defending New Deal Departure from Platform,” *N.Y. Herald Trib.*, June 25, 1936; John O’Donnell, “17,000 Roar Approval at Slashing Attack,” *N.Y. Daily News*, June 25, 1936.

⁶ Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa., June 27, 1936, <https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa>; “Liberty League Renews Appeal to Aid Courts (AP),” *Wash. Post*, Apr. 20, 1936 (“constant”); “Save High Court from Restraint, Pleads Shouse” *Chi. Daily Trib.*, Feb. 7, 1936 (“salvation”); “Fears for High Court: Paul Block Says President Hinted at ‘Packing’ Supreme Court,” *N.Y. Times*, Oct. 29, 1936; “Text of Governor Landon’s Address at Madison Square Garden,” *N.Y. Herald Trib.*, Oct. 30, 1936. The Republican platform agreed only to promote “the adoption of state laws and interstate compacts to abolish sweatshops and child labor, and to protect women and children with respect to maximum hours, minimum wages and working conditions,” which “[w]e believe...can be done within the Constitution as it now stands.” Republican Party Platform of 1936, <https://www.presidency.ucsb.edu/documents/republican->

Roosevelt prudently kept quiet. He could afford to do so. Democratic National Committee Chairman and Postmaster General Jim Farley wired FDR on November 1 that Landon would win just seven electoral votes. The only ray of hope for Landon came in the final poll of the *Literary Digest*, which had him winning in the electoral college by a margin of more than 2 to 1 and soundly beating FDR in the popular vote.⁷

On November 3, it turned out that Farley had been right. FDR had defied the rich conservatives he vilified. He also defied conservative newspaper publishers, most of whom opposed him. Roosevelt had won every state except Maine and Vermont and nearly 61% of the popular vote. If Americans had voted against Herbert Hoover in 1932, they had given FDR a mandate in 1936, as in the 1934 midterm elections. Thanks to the President's coattails, the new Senate would include a paltry 16 Republicans; the House, just 89. The result suggested that the Democrats, the historic party of states' rights, had replaced the Republicans as the majority party and the champion of a strong national government.⁸

[party-platform-1936](#). So Landon, who was initially more moderate than his backers, simply wired the convention that he was "interpreting" the platform plank to justify his promotion of a constitutional amendment permitting states to regulate wages and hours if legislation did not achieve that objective. Arthur Krock, "Landon Sends Telegram: To Back Constitutional Amendment if States' Wage Laws Fail," *N.Y. Times*, June 12, 1936.

⁷ "President Mum on Intent for Constitution," *Christian Sci. Monitor*, Oct. 19, 1936; James Farley, *Jim Farley's Story: The Roosevelt Years* 65 (New York: McGraw-Hill, 1948); Chapin Hall, "Farley Beat All Polls in Predicting Result," *L.A. Times*, Nov. 5, 1936; "*Literary Digest* Explains: 'Our Figures Were Wrong—and We Don't Know Why,'" *Daily Boston Globe*, Nov. 13, 1936.

⁸ Editorial, "Take It Easy," *Editor and Publisher*, Nov. 14, 1936 ("It is undeniable that the majority of newspapers opposed Mr. Roosevelt's re-election."); William Leuchtenburg, "The Election of 1936," *The FDR Years: On Roosevelt and His Legacy* 101, 150 (New York: Columbia University Press, 1995).

Clearly, it was a referendum on Roosevelt and big government, but was it also a referendum on the Court? Yes, in the sense that powerful Democrats had shown frustration with the Court, to acclaim. No, in the sense that they had clouded their intentions for it.⁹

Now that the election was over, the Administration had to act. Of course, it would have been helpful if FDR had discussed the Court in the campaign, but he did not yet possess a plan of attack. Of course, the two-term tradition was strong, no one expected Roosevelt to be a four-time winner, and he would have less power as a lame duck. But he had received a stunning vote of confidence, and he had patronage to dispense. The Administration yearned for “power...in a very real sense and not merely for authorization to return to office in which all power to carry out a social program was nullified by judicial fiat,” the Department of Justice history explained. But “with every pronouncement from the Supreme Court the walls were closing in.”¹⁰

Enter a 27-year-old Justice Department lawyer with an idea. Attorney General Homer Cummings told young Warner Gardner that after his reelection, the President “was determined to move against the five or six Justices who were so stubbornly opposed to any Government regulation that nothing could be done to strengthen the still devastated economy of the nation.” Cummings directed Gardner to draft a report assessing every proposal for dealing with the Court “short of constitutional amendment” that had been suggested.¹¹

Why no constitutional amendment? The Eighteenth Amendment establishing Prohibition took just over a year to win ratification; the Twenty-First Amendment repealing it,

⁹ William Leuchtenburg, “When the People Spoke, What Did They Say? The Election of 1936 and the Ackerman Thesis,” 108 *Yale L.J.* 2077 (1998).

¹⁰ Biography of a Department.

¹¹ Warner Gardner, “Pebbles From the Paths Behind,” 9 *Green Bag* 271, 278 (Spring 2006).

just ten months. Wary New Dealers, however, reasonably pointed to the bipartisan promotion of Prohibition's repeal, the possibility that voters would not understand the issues involving the Court as viscerally as spirits, and the "long year-after-year ordeal" of the proposed amendment prohibiting child labor. Moreover, there was no agreement on how the amendment should curb the Court or what it should say. Further, conservative interests were readying to capture the conventions or state legislatures if the government sought an amendment. Admiral Richmond Hobson had established the Constitutional Democracy Association for just that purpose. As he liked to tell those whom from whom he solicited funds, it took only thirteen states to block an amendment. The remedy, as the Attorney General and President saw it, had to be statutory.¹²

Gardner went to the drawing board and produced a series of memos about possible solutions that seemed ripped from today's law reviews, which Solicitor General Stanley Reed kept "under lock." According to the young lawyer, the Constitution's framers had intended judicial review, though they might not have anticipated the extent to which it had grown. For that reason, it was "extremely unlikely that Congress could control either the procedure or the jurisdiction of the courts in a manner such as (a) to prevent them from passing upon the validity of an Act of Congress or (b) to require a specified majority of the Supreme Court if such legislation was unconstitutional." Requiring the federal courts to accept Congressional findings of fact was pointless, since "[n]o court has ever intimated that the legislative finding of fact should be conclusive." Adjustment of the retirement pensions of the justices "so that the longer

¹² Memorandum 3, Press Arguments on President's Judiciary Bill, February 11 to 14, Box 271, Folder 2, Thomas Corcoran Papers, Library of Congress; Richmond Hobson to Andrew Mellon, Sept. 30, 1935, Box 47, Folder 3, Richmond Hobson Papers, Library of Congress. For the suggestion that FDR and Cummings may have been in error and that the New Deal would have benefited by becoming entrenched in the Constitution, see David Kyvig, "The Road Not Taken: FDR, the Supreme Court," *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 *Pol. Sci. Qtrly.* 463, 481 (1989).

a Supreme Court justice remains on the bench after the age of, say, 70, the smaller his retirement pension will be” was valid, but “[p]erhaps the most cynical of the proposals.” Controlling judicial review by impeaching the justices was impractical too. But one feasible solution was adding more justices to the Court. After all, Congress had repeatedly changed its size before. Princeton political scientist Edward Corwin was also saying, with Gardner, that an act of Congress would suffice to authorize the President, “whenever a majority of the Justices or half of the Justices, are seventy or more years old, to nominate enough new Justices of less than that age to make a majority.” The suggestion sat well with Attorney General Cummings. Although “I realize that there is a good deal of prejudice against ‘packing the Court,’ ...I have been wondering to what extent we have been frightened by a phrase,” he said.¹³

As the Justice Department history recorded, Gardner’s work was “of major significance” and “offered the best the Solicitor General and his subordinates were able to do with the hundreds of variously phrased proposals for removing the judicial barricade.” Gardner had considered and “condemned” most of them on grounds of constitutionality or policy, except the appointment of additional justices. His conclusions bound neither Cummings nor President Roosevelt, but the Justice Department considered his legal reasoning “good law.”¹⁴

Here, in the development of the plan, was arguably the first mistake. Cummings and Roosevelt should have considered a constitutional amendment more carefully, and they should

¹³ Biography of a Department (“lock”); Warner Gardner, Memorandum for the Solicitor General, Dec. 10, 1936, Box 238, Folder: Memoranda re: FDR’s Judicial Reorganization Plan, Cummings Papers; Warner Gardner, Memorandum for the Solicitor General, “Congressional Control of Judicial Power To Invalidate Legislation, Supplement,” n.d., Box 238, Folder: Memorandum by W.W. Gardner for the Solicitor General on the Matter of Judicial Review and Options for the President re: The Current Court,” Cummings Papers; Edward Corwin to Homer Cummings, December 16, 1936, Box 88, Folder: Attorney General Personal File—Edward S. Corwin, Cummings Papers; Homer Cummings to Edward Corwin, Dec. 17, 1936, id.

¹⁴ Biography of a Department.

have paid greater attention to signals from the Court. Since November, a majority of the justices had begun to look upon New Deal legislation more kindly and to vote accordingly. “On every side we meet now his [Mr. Dooley’s] famous observation, omitting the dialect, that *the Supreme Court follows the election returns*,” the *New York Times* noted. At their first meeting after Roosevelt’s victory, Cummings informed the president that “the atmosphere of the Court had manifestly changed since the election.” But neither he nor FDR placed “much hope” in “the bare chance that we may begin to get some more enlightened opinions.”¹⁵

While that conclusion seems reasonable enough, Cummings and Roosevelt should have consulted more widely beyond Gardner and a few others. For example, not everyone agreed with Gardner that when Article III, Section 2 of the Constitution spoke of granting “the Supreme Court...appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make,” that precluded Congress from statutorily mandating that a supermajority must hold legislation unconstitutional. Gardner might also have paid more attention to pensions. Some justices reportedly wanted to retire but feared doing so lest Congress cut their pensions, as it had done when Justice Oliver Wendell Holmes stepped down in 1932. House Judiciary Committee Chairman Hatton Sumners would subsequently reintroduce a bill that Congress would enact in March 1937 giving justices who had served ten years or longer the same option to retire at 70 with full pay that district and court judges possessed. But Congress had turned thumbs down on a similar bill in 1935, and the Administration probably did not believe the legislation would make any difference, since Cummings and FDR were certain that “[t]hese confirmed, die-hard, bitter, old-guard reactionaries have determined to hang on in the

¹⁵ Cummings Diary, Nov. 15, 1936, Box 235, Cummings Papers; “Topics of the Times: Dooley Is Quoted,” Nov. 27, 1936 (emphasis added).

hope that they would live long enough to see the same kind of Judges in their places.” Still, developing a statutory plan for a better retirement program deserved greater consideration. Yet, the Attorney General believed, because of Gardner, that adding additional justices to offset and outnumber the conservative ones was the only plausible statutory remedy.¹⁶

Cummings and Roosevelt did not agree with Gardner, however, that the Executive Branch should insist that the Judiciary was dangerously overreaching. They sought to avoid a frontal assault. As the Justice Department history said, the President and Attorney General understood that the Court “occupied a position of sanctity in the minds of the people,” who would denounce “a fundamental attack” on the justices. “The abuses attributed to the Court were clear in the minds of administration leaders but it was no easy task to explain to the masses of the people the extent to which the Court had set itself up as a legislature in opposition to Congress” and had proven “unresponsive to the will of the people.” Chief Justice Hughes favored more judges to speed up the business of the federal courts, where there were some unconscionable delays, and the Conference of Senior Circuit Judges had been calling for more judges since 1932. The case for combining a proposal for additional justices with one for reorganizing the entire judiciary seemed strong.¹⁷

¹⁶ William Ross, “When Did the ‘Switch In Time’ Actually Occur? Re-discovering the Supreme Court’s ‘Forgotten’ Decisions of 1936-1937,” 37 *Az. St. L.J.* 1153 (2005); Gardner, Memorandum for the Solicitor General, December 10, 1936; *Reorganization of the Federal Judiciary: Hearings before the Committee on the Judiciary on S. 1392*, U.S. Senate, 75th Cong., 1st Sess., Part 1, Mar. 10, 1937, 14 (hereafter *Hearings*; Senator George Norris on supermajority); Judge Glock, “Unpacking the Supreme Court: Judicial Retirement, Judicial Independence, and the Road to the 1937 Court Battle,” 106 *J. Am. Hist.* 47, 54-60 (2019); Homer Cummings to Carl McFarland, Feb. 15, 1937, Box 127, Folder: Cummings-McFarland, Cummings Papers (“reactionaries”).

¹⁷ Warner Gardner, “Pebbles From the Paths Behind,” at 280; Biography of a Department; Chief Justice Hughes Gives Supreme Court Critics Sly Dig: Still Functioning, He Tells Law Institute; Assails Economy in Judgeships,” *N.Y. Herald Trib.*, May 8, 1936; Peter Hoffer, Williamjames

FDR sent Congress his reorganization of the judiciary message on February 5, 1937. At his and the Attorney General's direction, Gardner had drafted the bill to assist the "aged or infirm" justices and judges who did not retire or resign within six months of reaching the age of seventy by adding "new blood in the courts." The President's plan would permanently expand the Court to up to fifteen justices by providing supplements for the six justices on the Court currently over seventy years and six months who did not leave within thirty days after the law became effective, a group that included Roosevelt's four nemeses, Justices George Sutherland, Willis Van Devanter, Pierce Butler, and James McReynolds; Chief Justice Hughes, who sometimes voted against the Administration; and the iconic progressive, Justice Louis Brandeis, who was generally, though not always, supportive of it. FDR's message blamed elderly justices for institutional inaction. Why would the Court refuse to hear 717 of the 867 petitions for review submitted to it over the past term, he observed, unless it could not keep up with its caseload? Why would it have agreed to hear just 13% of the appeals filed by private litigants? He also sought authority to nominate up to forty-four new judges to the lower federal courts when those on the bench reached the milestone of seventy years and six months without resigning or retiring within thirty days of the bill's enactment. If the lower courts' work was expanded, the Court's burden would become even heavier, the President maintained. The justices needed assistance, and now it was on the way. Presenting himself as a gradualist, FDR pointedly argued that his solution would relieve the American people of the need to seek "any fundamental changes in the

Hull Hoffer, N.E.H. Hull, *The Federal Courts: An Essential History* 283-88 (New York: Oxford University Press, 2016).

power of the courts or the constitution of our government—changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.”¹⁸

And as FDR said, his remedy was obviously legitimate. The Constitution did not fix the number of Justices for the Court, and Congress had altered it before. It was up to the justices whether that would happen again. As Cummings was to stress, he and Roosevelt had written the bill so that the justices themselves to “determine whether they wanted the Court increased or not.” They were not being coy. Apparently, they hoped that all six might resign. The blow of losing Brandeis would be offset by the exit of the other five.¹⁹

Here was the second mistake in the plan, lack of transparency in messaging. The rationale for it was deceptively disingenuous. Within a week of the bill’s introduction, what the Administration called “the opposition press” had made the case that FDR’s argument about the Supreme Court was a canard, often by citing government officials and New Dealers, and had denounced the bill as a "sugar-coated" act of "political trickery." Its antagonists could and did easily demonstrate that the Court was not behind in its work and that it refused to hear more cases because they did not present meritorious issues. “I did not place enough emphasis upon the real mischief--the kind of decisions which, as a studied and continued policy, had been coming down from the Supreme Court,” FDR acknowledged later. He soon corrected that error: “You know who assumed the power to veto, and did veto” crucial New Deal programs, the President now stressed--the justices behaving as a super-legislature. But Cummings clung to the

¹⁸ Message to Congress on the Reorganization of the Judicial Branch of the Government,” Feb. 5, 1937, <https://www.presidency.ucsb.edu/documents/message-congress-the-reorganization-the-judicial-branch-the-government>. Like his colleagues, Brandeis had voted against the government in *Schechter*, but he was considered a member of the “liberal” wing that included Justices Benjamin Cardozo and Harlan Fiske Stone.

¹⁹ Cummings Diary, April 10, 1937, Box 235, Cummings Papers (“determine”); *Hearings*, Part 1, March 10, 1937, at 33; Glock, “Unpacking the Supreme Court,” at 62-65.

clogged courts rationale, making Administration justifications for what was immediately dubbed the “Court Packing Plan” cacophonous.²⁰

In a tactical error, FDR also shrouded his Court Bill in secrecy without consulting members of Congress, arguably his third mistake. Like most of his predecessors, he thought that that senators and representatives could not keep their mouths shut around reporters. Had the recent election win made him cocky, certain that Congress would knuckle under to any anything he proposed? Perhaps, but it had also shown him that the nation’s press and conservatives were gunning for him. His press secretary told a columnist Roosevelt feared “a leak that would tip off the opposition and enable them to start hostile build up before he got his plan out.”²¹

Though they did not have a head start, his foes lost no time in mobilizing. The first blow came in the House, where the President had hoped to launch consideration of his bill. House Judiciary Committee Chairman Sumners refused to let it out of committee until the Senate had voted. All eyes then focused on the Senate, where almost all Republicans opposed the bill. But GOP unity counted for little when the Democrats so overwhelmed Republicans that there were insufficient seats for them on their side of the aisle, and bipartisan norms were stronger than they are today. So, while Congressional Republicans originally sought to take the lead in the battle, they reconsidered when they realized that their overt opposition might prompt Democrats to rally

²⁰ Franklyn Waltman, “Politics and People: Roosevelt Fails to Conceal That Real Objective Is a Supreme Court Amenable to His Will,” *Wash. Post*, Feb. 6, 1937; Waltman, “President’s Statement Varies With Aides’ Declarations,” Feb. 7, 1937, id.; Senate Memorandum 5, Press Arguments on President’s Judiciary Bill, February 12 to 19, Speeches and Articles re Court Plan, Box 271, Folder 2, Corcoran Papers (“opposition,” “sugar,” “political”); *The Public Papers and Addresses of Franklin D. Roosevelt, 1937 Volume: The Constitution Prevails LXV* (New York: Macmillan, 1941) (“I”); Address at the Democratic Victory Dinner, <https://www.presidency.ucsb.edu/documents/address-the-democratic-victory-dinner-washington-dc>, March 4, 1937 (“You”); *Hearings*, Part 1, at 7-9 (Cummings’s testimony).

²¹ Raymond Clapper Diary, February 8, 1937, Box 8, Raymond Clapper Papers, Library of Congress.

round FDR. Instead, Republicans decided on a “strategy of silence,” devised by the Senate leadership with the help of Senator William Borah, one of their own with deep roots in the progressive movement. They would quietly aid those in the other party who opposed the bill and sit back while Democrats for and against it tore “each other to pieces.” Additionally, they would join forces with conservatives in both parties, ostensibly to promote a constitutional amendment if the American people really wanted to constrain the justices. The goal was fighting Presidential interference with the Court. “Speak of constitutional amendments in the vaguest terms,” Borah advised his colleagues, since most Republicans had no intention of voting for any of them.²²

While many conservative Democrats shared the Republicans’ antipathy toward the bill, their crusade picked up momentum once a key liberal/progressive (two words the press still used interchangeably) signed on to their struggle. Democratic Senator Burton Wheeler became the commander of the bill’s foes after everyone battling it in both parties agreed to allow him to call the shots. The Republicans would overlook that Wheeler genuinely believed a constitutional amendment enabling Congress to override Court decisions was the answer.²³

The desertion by Wheeler and some of the other Congressional progressives took Roosevelt by surprise, and perhaps he could have headed it off through consultation. For

²² Turner Catledge, “House Aid Pledged to the President on His Court Plan,” *N.Y. Times*, Feb. 24, 1937; Offers G.O.P. Problem: Space Limitations Force Members to Sit With Democrats,” *L.A. Times*, Dec. 26, 1936; Robert Albright, ““Silence Is Golden,’ McNary Told Republicans and Court Bill Battle Proved He Was Right,” *Wash. Post*, Aug. 8, 1937; James Patterson, *Congressional Conservatism and the New Deal* 108 (Lexington: University Press of Kentucky, 1967) (“strategy”); Harold Ickes Diary, March 15, 1937, Box 3, Harold Ickes Papers, Library of Congress (“pieces”); William Hutchinson, *News Articles on the Life and Works of Honorable William E. Borah Late A Senator from the State of Idaho, 76th Cong., 3d Session, Senate*, Document 150, 11 (Washington: Government Printing Office, 1940) (“vaguest”).

²³Burton Wheeler with Paul Healy, *Yankee from the West: The Candid, Turbulent Life Story of the Yankee-Born U.S. Senator from Montana* 320, 326 (New York: Octagon, 1977 [reprinted]); Robert Albright, “Wheeler Plan,” *Wash. Post*, Feb. 18, 1937.

decades, progressives had denounced the Court as the bastion of economic privilege and advocated solutions to restrain it. More bills to curb its power had been introduced in Congress over the past three years “than in any other three-year or (thirty-five year) period in history.” Now that one with a real chance of success had materialized, they balked. “The real danger to the bill,” *The New Republic* editorialized, came not from conservatives whose hatred of the President had done “so much to elect him last November” and who now promoted a constitutional amendment as a placebo. The threat came “from progressive Senators and Representatives [in both parties] who sincerely want something done about the Court and the Constitution, but do not want it done this way” and who could not agree on how to do it.²⁴

The strange mix of bedfellows meant that the debate would not center around judicial supremacy and the antidemocratic nature of judicial review. Conservative Republicans and Democrats who viewed the Court as the bulwark of property were making common cause with progressives like Wheeler who had long railed against its economic dictatorship. Court Packing’s foes could not risk fracturing the alliance. Those who lined up behind FDR had to argue that they promoted the least invasive remedy for conservative justices’ constitutional misinterpretation and attacked their “abuse of power,” not judicial power itself, or the Constitution. The fight therefore “did little to clarify the underlying issues of Judicial Supremacy, for both sides evaded it,” one participant recalled.²⁵

²⁴ Barry Friedman, “The History of the Counter-Majoritarian Difficulty, Part Four: Law’s Politics,” 148 *U. Pa. L. Rev.* 971, 995 (quoting Michael Nelson, “The President and the Court: Reinterpreting the Court-Packing Episode of 1937,” 103 *Pol. Sci. Q.* 267, 273 [1988]); “Progressives and the Court,” *New Repub.*, Mar. 3, 1937. Some progressives, including Senator Robert La Follette Jr. (R-Wisc.) supported the Court Bill.

²⁵ Robert Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 189 (New York: Vintage, 1941).

The Administration's defensiveness enabled the opposition to frame the debate, the fourth mistake. Among other things, in addition to accusing FDR of duplicity, his foes charged him with dirty pool, or "lawless legality"; disregard for the aged; destroying checks and balances and constitutional government; establishing a dangerous precedent; imperiling states' rights; and endangering individual liberty. Antagonists also insisted that he interfered with judicial independence and the rule of law. While Roosevelt and Cummings had assumed that the six justices over the age of seventy would treat the bill as an invitation to retire to preserve a Court of nine, the Administration would have six vacancies to fill immediately if they did so or if its bill were enacted. Although presidents were expected to *try* to find sympathetic individuals for Supreme Court vacancies, no one since Washington had named so many justices at once. FDR really wanted rubber stamps, his antagonists contended. Further, they would be rubber stamps without constraints. Roosevelt's idea of a "living Constitution," which rightfully changed to keep pace with the times, meant that he fused his tilt at the justices with an attack on originalist constitutional interpretations predominant since the 1790s. Moreover, his foes maintained, he was trying to substitute dictatorship for democracy at a time when Americans saw threats to democracy everywhere.²⁶

As FDR had anticipated, newspaper editorials, publishers, and columnists in the mainstream and business press were overwhelmingly hostile. To an extent, that played into his hands. He expected and welcomed the opposition "of financial, industrial, and business leaders and reactionary publishers" who had fought him in 1936 and saw the Court as the protector of

²⁶ "Objection 1-30," n.d., Box 199, Folder: Memoranda re Criticisms re FDR's Judiciary Plan, Cummings Papers; Walter Lippmann, "Today and Tomorrow: The Flight From Democracy," *Daily Boston Globe*, Feb. 13, 1937 ("lawless"); 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 *Studies in Am. Political Development* 191 (1997).

property. The antagonism came “largely from the same group which opposed much of the social legislation of the present Administration,” Eleanor Roosevelt wrote in her column, “and the views of the people...were rather clearly expressed in November.”²⁷

The polls conveyed a different impression, though. Modern polling was in its infancy. Just as newspapers used the Court fight to promote reader interest, so Gallup, who surveyed public opinion on the issue more frequently than any other pollster, seized on it to boost polling’s legitimacy. He misleadingly conveyed the impression that the public was 53%-47% against the Court Bill at the beginning of the debate, and the numbers only got worse for the Administration afterwards. FDR mistrusted Gallup, who was suspected of allowing his Republican sympathies to bias his polls. So, as he had always done, Roosevelt counted on his mail, observations, and discussions with others to guide him in gauging public opinion. By February 17, he had received 1,170 letters in support of his Court bill and 796 in opposition. His mail remained a reassuring sign that his proposal possessed public support, which provided the President with good reason to believe that “the people” were with him.²⁸

Yet in contrast to the first term, when the public clamored for relief, recovery, and reform, he had to see it was failing “to rise up and demand” passage of the Court Bill. Whether that was because the public revered the Court or was told by the press and opposition politicians that it did was not entirely clear. Some of the loudest voices against the bill came from women’s

²⁷ Ernest Lindley, “Agenda for a Second Term,” 13 *Va. Q. Rev.* 1, 3 (Winter 1937) (“financial”); “Union League Raps Plan, So F.D.R. Feels Better,” *St. Louis Star and Times*, Feb. 12, 1937; Eleanor Roosevelt, “My Day,” *Knoxville News-Sentinel*, Feb. 10, 1937.

²⁸ George Gallup, “First Complete Poll Shows Voters 53% Against Court Change,” *Atl. Constitution*, Feb. 28, 1937; Richard Steele, “The Pulse of the People: Franklin D. Roosevelt and the Gauging of American Public Opinion,” 9 *J. Contemp. Hist.* 195, 208 (Oct. 1974); Box 1, OF 41 Tabulation Sheets, Judiciary Reorganization Act of 1937, Roosevelt Library; Leila Sussman, *Dear F.D.R.: A Study of Political Letter Writing* 77-78, 86, n. 74 (Totowa: Bedminster, 1963).

and religious groups. Though FDR's plan counted stronger backing in the bar and legal academe than the press often suggested, lots of lawyers and law professors hated it too.²⁹

In this poisonous atmosphere, interest groups became more important to the Administration than ever. By one estimate, perhaps 15% of members of Congress paid attention to their mail about the bill. Pressure groups carried more clout. The President apparently possessed a pair of aces.³⁰

That labor and farmers possessed two of Washington's weightiest lobbies illustrated the growing preeminence of pressure group politics. Labor leaders worried that the Supreme Court would invalidate the National Labor Relations Act, and farm leaders, who fairly "bubbled with enmity for the Supreme Court" when they gathered in Washington after FDR's reelection, feared for the future of federal subsidies. But in its fifth mistake, the Administration did not consult sufficiently with either group. Because it turned out that leaders of farmer groups were never really on board with the Court Bill, their skilled lobbyists did not swarm Capitol Hill. The sit-down strikes sweeping the country as workers sought union recognition hurt Roosevelt during the Court fight too. The labor press, long antagonistic to the Court, "[o]verwhelmingly" backed the bill, as did the CIO membership and leadership. But because workers were distracted by the strikes, disturbed by FDR's refusal to discuss them, or were delaying action while awaiting the

²⁹ Turner Catledge, "Combination of Forces Defeated the Court Bill," *N.Y. Times*, July 25, 1937 ("rise"); David Lawrence, "Court Change Is Opposed By Women," *Wash. Eve. Star*, July 5, 1937; William Ross, "The Role of Religion in the Defeat of the 1937 Court-Packing Plan," 23 *J. L. & Religion* 629 (2007-08); Kyle Graham, "A Moment in the *Times*: Law Professors and the Court-Packing Plan," 52 *J. Legal Educ.* 151 (2002); Ann Fagan Ginger, "Organizing Lawyers to, Inter Alia, Pack the Supreme Court," *The National Lawyers Guild: From Roosevelt to Reagan* eds. Ann Fagan Ginger and Eugene Tobin 9, 11 (Philadelphia: Temple University Press, 1988); George Gallup, "Split on Court Plan Analyzed by Poll," *Atl. Constitution*, Mar. 4, 1937.

³⁰ Maurice Merryfield, "Huge Volume of Mail Upon Court Controversy Floods Offices of Congressmen," *Lincoln Sunday J. and Star*, Mar. 21, 1937

Court's decision on the constitutionality of the National Labor Relations Act, labor lobbyists did not browbeat legislators. To make matters worse, the strikes increased resentment of the Administration among the press and Congress.³¹

Add up FDR's errors and you can make the case for an arrogant Homer nodding, particularly since we know that the Court Bill went down to defeat. Of course, Roosevelt made mistakes, but he also acted shrewdly. Perhaps, for example, a constitutional amendment could have been enacted more easily and quickly than he said, but no suitable language ever materialized, and he did not trust the majority of justices to interpret it as he wished. For another example, FDR's failure to prepare Congress or the public for his bill preserved the element of surprise. Moreover, he had at least as much reason to believe the letters supporting the bill reflected public opinion as polls he considered biased against his Administration. And what exactly did "defeat" mean—a loss for the bill Roosevelt proposed in February or for the principle of Court enlargement? Too often his Court Bill is *conflated* with all proposals for enlargement to create the sense that *any* attempt to “pack” the Court is foolish. Paradoxically, it is as difficult to believe that Roosevelt's political intelligence deserted him in his second term as it is easy to believe that without World War II, he would be remembered as a president who failed in his second term.

³¹ TRB, “Washington Notes,” *New Repub.*, Nov. 25, 1936 (“bubbled”); Chesly Manly, “Grange Fights Scheme to Pack Supreme Court: Farmers’ Opposition Sours Strategy,” *Chi. Daily Trib.*, Feb. 17, 1937; “President Asks Farm Aid on Court,” *Christian Sci. Monitor*, Feb. 20, 1937; James Duram, “The Labor Union Journals and the Constitutional Issues of the New Deal: The Case for Court Restriction,” *15 Lab. Hist.* 216, 230 (1974) (“overwhelmingly”); Melvin Dubofsky and Warren Van Tine, *John L. Lewis: A Biography* 239 (Urbana: University of Illinois Press, 1986).

We must remember that up until the very end, at least a partial victory was expected. FDR possessed an unmatched iron grip over the party apparatus, and the power of Presidential patronage was stronger than today. No one anticipated that Democrats who opposed him would necessarily vote their principles or the way they talked in the cloakroom. When FDR stunned Congress with his Court bill in February 1937, almost everyone believed that it would give him six new justices. Into March, the original bill still looked strong, and throughout that month, Congress would have happily given FDR at least two extra justices. In April, his chances of some success remained excellent. In May, offers of compromise from the opposition abounded. Those offers kept coming in. In June, when FDR finally signaled his willingness to negotiate, many believed that he would get five new justices, at the rate of one a year, instead of six all at once. And though many assumed that the unexpected death of Senate Majority Leader Joe Robinson on July 14 delivered the “final blow” to Roosevelt’s plans by killing the five-justice deal, they were mistaken. On July 15, Wheeler warned publisher Frank Gannett that if it came up for a vote within the next two days, their forces would lose. That day, Gannett’s National Committee to Uphold Constitutional Government sent a telegram to Mrs. Charles Evans Hughes in care of the Supreme Court, and, no doubt, to others as well, requesting money for renewal of its campaign. “Emergency appeal from Senators prompts this telegram,” it warned. “Immediate vote on Court Packing Bill would be dangerously close.” A successful filibuster seemed unlikely. Both sides continued to negotiate until July 21. As Attorney General Cummings recognized, “we could have settled the Court fight several times by compromise.”³²

³² Bernard Kilgore, “Death of Robinson Believed Final Blow to Court Program,” *Wall St. J.*, July 15, 1937; Samuel Williamson, *Frank Gannett: A Biography* 196 (New York: Duell, Sloan & Pearce, 1940) (Wheeler); Frank Gannett to Antoinette Carter Hughes, July 15, 1937, Reel 134, Charles Evans Hughes Papers, Library of Congress; Max Lowenthal Notes (on negotiation from July 16-22), Containers 56-57, Folder: Felix Frankfurter Subject File (Supreme Court), Felix

Yet, from FDR's vantage point, playing "constitutional hardball" by calling for a Court of as many as fifteen justices for so long would have appeared a good gamble. No one could be certain that Congress, with its enormous Democratic majorities, would bloody the president's nose. Court enlargement remained a live prospect even after the bill was recommitted, which is where histories of the fight typically end. According to Gallup, Roosevelt retained the support of "a whopping majority" of over 60%. Many in Congress remained worried that he would resuscitate court packing. His stunning popularity helps to explain their anxiety, as well as his refusal to compromise until late in the game.³³

In the end, FDR's tough stance helped get him what he wanted. Arguably, the consternation over Tipaldo, the size of his reelection victory, and his threat to enlarge the Court helped motivate the justices to produce more liberal interpretations of the due process clause, the Commerce Clause, and the taxing and spending power in the spring of 1937. In my view, the case for "external" influences on the justices is strong. The election results of 1936 suggested that the New Dealers' victory in 1934 was no anomaly and that Roosevelt was nearly invincible. Because the Court Bill, set against the background of his victory, carried the presidential imprimatur, it may have influenced Hughes and some of his colleagues, even though earlier Congressional discussion of limiting the Court's power apparently had not. To be sure, as law professors like Barry Cushman, Richard Friedman, and G. Edward White have shown, there were eminently plausible doctrinal reasons for the Court's journey. But as an expert sailor, FDR

Frankfurter Papers, Library of Congress; Cummings Diary, July 25, 1937, Volume: 1932-1938, 1944, Cummings Papers ("We"), Box 236, Cummings Diary, and see June 12, 1938, Box 235, id.

³³ Mark Tushnet, "Constitutional Hardball," 37 *J. Marshall L. Rev.* 523 (2004); "Roosevelt to Press Fight To Alter Court," *N.Y. Herald Trib.*, Aug. 26, 1937; George Gallup, "Roosevelt Holds 60% of Votes Despite Fight," *Wash. Post*, Sept. 5, 1937.

also realized that by moving the tiller, he would move the boat. And as he said, “[i]t would be a little naïve to refuse to recognize some connection between these 1937 decisions and the Supreme Court fight.” Any justice who read the papers and listened to Washington gossip in 1937 might have concluded that an excellent chance existed that the President would get at least *some* additional justices. Any enlargement would have rebuked the Court and, *with* preexisting doctrine, *may* have helped shape some judicial behavior.³⁴

³⁴ West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937) (upholding the Washington State minimum wage law for women); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935, which guaranteed collective bargaining rights to employees producing goods for interstate commerce, and one of a series of cases involving the act. The others were Labor Board v. Fruehauf Holding Trailer Co., 301 U.S. 49 [1937]; National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 [1937]; Associated Press v. National Labor Relations Board, 301 U.S. 103 [1937]; Washington, Virginia, & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142 [1937]); Steward Machine Co. v. Davis, 301 U.S. 548 (upholding Social Security’s unemployment insurance provisions); Helvering v. Davis, 301 U.S. 619 (1937) (upholding Social Security’s old age insurance provisions); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (upholding Alabama unemployment insurance legislation); Introduction, *The Public Papers and Addresses of Franklin D. Roosevelt with A Special Introduction and Explanatory Notes by President Roosevelt 1937 Volume: The Constitution Prevails* LXIX (New York: Macmillan, 1941 (“little”). See, e.g., Richard Friedman, “Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation,” 142 *U. Pa. L. Rev.* 1891 (1994); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2002).

Scholars disagree about the extent to which “external” political considerations, such as the criticism of Tipaldo, the election, and the Court Bill, and “internal” doctrinal factors shaped the Court’s behavior. I explore the debate between “internalists” and “externalists” over the spring 1937 cases in Kalman, “The Constitution, the Supreme Court, and the New Deal,” 110 *Am. Hist. Rev.* 1052 (2005) and in my book on the Court fight. There is no incontrovertible evidence, and it was most likely some mix of both. Take the spring minimum wage case, for example. Because the decision in West Coast Hotel v. Parrish overruling Adkins v. Children’s Hospital and rendering inconsequential Tipaldo was handed down in March, many at the time believed that the Court Bill was responsible for Parrish. See, e.g., “Supreme Court Upholds State Wage Law, 5 to 4, Completely Reversing Position Of Only A Year Ago,” *Atlanta Constitution*, Mar. 30, 1937. Yet it turned out the justices decided to hear Parrish before the election of 1936 occurred and reached their decision in December before Roosevelt introduced the Court Packing Plan. “The President’s proposal had not the slightest effect on our decision,” Hughes noted pointedly. Quoted in Merlo Pusey, *Charles Evans Hughes II: 757* (New York: Macmillan, 1951). But that does not mean that “external” factors were unimportant or that the election did not influence Parrish. The justices discussed whether to note probable jurisdiction in Parrish at their conference on October 10.

Though we can never know for certain what exactly moved them to behave as they did, the justices themselves showed how much FDR's bill and the attacks on the Court disquieted them. For a few examples, we know that Chief Justice Hughes told his colleagues the "public mind" was much disturbed over Tipaldo. Four justices, including Hughes, spoke out publicly against the Court Bill. FDR won the exit of one conservative justice, Willis Van Devanter, who intended his departure to destroy the bill's momentum. Justice Owen Roberts, who inspired the quip that "a switch in time saves nine" by seemingly shifting toward "the liberals" in the spring of 1937, cited "the tremendous strain and threat to the existing Court [posed by FDR's bill], of which I was fully conscious." The 1937 crisis showed us key justices concerned about the survival of the Court as a nonpartisan institution. Like the outcry over Tipaldo and the election results, the Court Packing Plan may well have helped change the institutionalists' calculations

Despite the fact that "none of the litigants [in Parrish] had requested that Adkins be overruled," Hughes, who preferred distinguishing precedents to overruling them and who had refused to side with the dissenters in Tipaldo who wanted to overrule Adkins, made it clear that he wanted the Court to take the case. The decision was apparently fairly simple for the Chief Justice. "Public mind much disturbed—Campaign," Justice Butler's notes record Hughes as saying. Barry Cushman, "Inside the Constitutional Revolution of 1937," 2016 *S. Ct. Rev.* 367, 377-78 (2017). Indeed, as we've seen, Tipaldo and the minimum wage figured in the election campaign. That does not necessarily mean that the outcry over Tipaldo affected the Chief Justice's evaluation of the merits, of course, but it did, at least, apparently make him more eager to hear the case. Then, at the December 19 conference after oral argument, Hughes argued forcefully in favor of overruling Adkins. *Id.* at 376. What about Justice Roberts? By his own account and Justice Frankfurter's, Roberts had wanted to overrule Adkins for some time and would have done so in Tipaldo had Hughes been willing to join the three dissenters in making up a majority. Felix Frankfurter, "Mr. Justice Roberts," 104 *U. Pa. L. Rev.* 311, 314-16 [1955], reprinting the memorandum written by Roberts in 1945 on his journey from Tipaldo to Parrish. (Not everyone has found the Roberts memorandum entirely convincing. Richard Friedman describes it as "[i]n some respects...maddeningly incomplete, inaccurate, and self-serving." Friedman, "A Reaffirmation: The Authenticity of the Roberts Memorandum or Felix the Non-Forger," 142 *U. Pa. L. Rev.* 1985, 1995 [1994]). In any event, as Hughes's authorized biographer disclosed, the news Roberts was willing to overrule Adkins in Parrish delighted Hughes. "When Roberts, in a private chat, had divulged his intention of voting to sustain the Washington law [in Parrish], the Chief had almost hugged him," Merlo Pusey reported. Pusey, *Charles Evans Hughes*, at II: 757.

about whether they needed to take advantage of the play, or flexibility, in existing doctrine to defuse the threat and preserve the Court’s nonpartisan authority in the long run.³⁵

If the war was for a changed interpretation of the Constitution, Roosevelt also triumphed. As Bruce Ackerman has shown, the Constitution was amended outside of Article V in the spring of 1937 by the same aged justices who had once blocked the New Deal. As a result, Congress and administrative agencies gained nearly unlimited regulatory power over the economy in the name of promoting the public welfare. The states did too, as long as they didn’t interfere with interstate commerce. If the Court hadn’t shifted its focus to protecting civil rights and civil liberties, there wouldn’t have been much for it to do. That shift brought us the rights revolution and made the federal courts, so recently the scourge of reformers, their guarantor.³⁶

That was in part because of how FDR populated the Court. If the war was for a changed Court, as well as changed constitutional interpretation, he also proved victorious. In the end, Father Time eliminate the elderly justices. Roosevelt successfully nominated eight new ones, and Congress easily confirmed them—usually by voice vote. With rare exceptions, “ideology” proved relatively unimportant to the confirmation process until the confirmation wars that

³⁵ Cushman, “Inside the Constitutional Revolution of 1937,” at 377; Pusey, *Charles Evans Hughes*, at II: 757 (delay); “Long Precedent Broken as Justice Assails Roosevelt Plan”; *Wash. Post*, Mar. 17, 1937; Richard Friedman, “Chief Justice Hughes’ Letter on Court-Packing,” 1997 *J. Sup. Ct. Hist.*, no. 1 76 (1997); Hutchinson, *News Articles on the Life and Works of Honorable William E. Borah*, at 12-13 (describing how Borah and Van Devanter planned Van Devanter’s resignation); George Sutherland to Richard Lyman, Jan. 21, 1938, Box 4, Folder 7, Sutherland Papers, Library of Congress (“I probably would have retired nearly a year ago if it had not been for the court fight.”); *Composition and Jurisdiction of the Supreme Court*, Subcommittee of the Committee on the Judiciary, S.J. Res. 44, 83d Cong. 1st Sess., Jan. 29, 1954, 9 (Roberts); John Barrett, “Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine,” 73 *Okla. L. Rev.* 229 (2021).

³⁶ Bruce Ackerman, *We the People 2: Transformations* 260 (Cambridge: Belknap, 1998).

occurred under Johnson and Nixon over Thurgood Marshall, Abe Fortas, Clement Haynsworth, Harrold Carswell, and William Rehnquist.³⁷

So far so good. But the 1937 fight also divided Democrats and reformers and undermined bipartisan support for the New Deal. FDR's Senate defeat shattered the idea of his invulnerability. The Court Bill wrought havoc for his Administration. Of course, without it, something else might have split the Democrats—then an uneasy and unwieldy coalition of urban and rural, liberal and conservative, northern and southern contingents. Most likely, it would have been the Fair Labor Standards Bill that many southerners feared would deprive them of their cheap labor advantage. Without a doubt, though, the Court fight helped to create a bipartisan coalition of conservative Democrats and Republicans who blocked domestic reform until 1964. And as the Court pressed forward with the liberal agenda that the fight's aftermath ensured only it could realize, claims that the justices behaved antidemocratically grew. By the 1960s, the charge that the Court was “counter-majoritarian” and “undemocratic” had spread from the halls of academe to those of Congress.³⁸

Could or should Roosevelt have foreseen these developments? Certainly, his proposed remedy has had a noxious odor since 1937. Court Packing, Kim Scheppele observes, is the favored tool of “legalistic autocrats”—like Chavez in Venezuela, Erdogan in Turkey, Orban in Hungary, or Duda in Poland. Who wants to be called a Court Packer?³⁹

³⁷ Laura Kalman, *The Long Reach of the Sixties: LBJ, Nixon, and The Making of the Contemporary Supreme Court* (New York: Oxford University Press, 2017).

³⁸ William E. Leuchtenburg, “FDR's ‘Court Packing’ Plan,” *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 132, 157-58 (New York: Oxford University Press, 1995); Barry Friedman, “The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,” 112 *Yale L.J.* 153 (2002).

³⁹ Kim Scheppele, “Autocratic Legalism,” 85 *U. Chi. L. Rev.* 545 (2018).

What does that tell us about the prospects for success of enlarging the Court today? Not much. Some of our political landscape resembles that of the 1930s. Certainly, Chief Justice Roberts seems influenced by the skillful way Chief Justice Hughes guided “a very unpopular Supreme Court through that high-noon showdown against America’s most popular president since George Washington” in 1937. In other respects, FDR would have found the Framers’ era more familiar. Where he thought TV a novelty, we live in the age of the 24-hour news cycle. The bipartisan coalition he confronted in the Senate exists no longer. A bastardized legal realism, along with the sense that justices and law are not just political but partisan, pervade popular culture. Etc.⁴⁰

So is the only “lesson” from the past that there are no lessons from the past? Unlike lawyers who mine the past for precedent, historians delight in demonstrating how seeking guidance from the past can mislead policymakers. Often, the context has changed so much that the past lacks predictive value. Too often all history “teaches” us is that history turns on a dime.⁴¹

Yet history provides a way to make sense of the world. Political leaders and the public create a useable past, often airbrushed of unpleasant or inconvenient truths. We draw on the past to inspire, mobilize political support, and, sometimes, yield concrete lessons. “History teaches

⁴⁰ Adam Liptak, “John Roberts Was Already Chief Justice. But Now It’s His Court,” *N.Y. Times*, June 30, 2020 (quoting Roberts).

⁴¹ Ernest May, *Lessons of the Past: The Use and Misuse of History in American Foreign Policy* (New York: Oxford University Press, 1975); Laura Kalman, *The Strange Career of Legal Liberalism* 167-246 (New Haven: Yale University Press, 1996).

us” it’s a bad idea to invade Russia in wintertime, after all. And as Mark Twain may or may not have said, though history doesn’t repeat itself, it can rhyme.⁴²

Consequently, any President faced with a recalcitrant Court might well instruct his staff members and a bipartisan commission to study the history of FDR’s effort to “pack” it. They might tell him that the 1937 crisis showed that key justices might be more concerned about the survival of the Court as a nonpartisan institution than in unyieldingly defending particular doctrinal positions. The possibility of expansion altered the political conditions under which the Court created legal doctrine. The 1937 precedent could suggest that a statute or constitutional amendment proposing a change in the Court by expanding it, altering lifetime tenure, or constraining judicial power by other means, might give the justices reason to consider whether their present course is endangering their institution and its vital role in a liberal democracy.

They might inform the President that Georgia and Arizona successfully added two justices to their Supreme Courts in 2016. But they might remind him, as Ryan Doerfler and Samuel Moyn have recently done, that “[a]mong reform proposals, court packing is uniquely polarizing because it is so nakedly partisan.” They might argue that “1937” showed, as Richard Pildes and Noah Feldman maintained, that “judicial review can remain remarkably independent” because “even the most popular politicians play with fire if they seek too directly to take on the power of the Court.” They might also observe that like FDR’s attempt in the 1930s, any effort at court packing would be viewed in the context of the growth of authoritarianism around the

⁴² Otis Graham, *Losing Time: The Industrial Policy Debate* 247-48 (Cambridge: Harvard University Press, 1992); “History Doesn’t Repeat Itself, But It Rhymes,” February 18, 2005, <http://www.volokh.com/posts/1108756279.shtml>

world--the attack on independent judiciaries underway in Hungary, Poland, and Turkey, for starters.⁴³

If he still was inclined to proceed with enlargement, they might persuade the President to make sure the Court was not sending signals it was already shifting direction, to consult widely, take key Congressional leaders into his confidence, frankly explain himself to the public, prevent the opposition from framing the debate, and line up his interest groups. They might explore how FDR's antagonists made "court packing" into dirty words that implied gutting the rule of law and judicial integrity. They might argue that he should hang tough and appear unyielding until as late in the game as possible. Or they might maintain that if a fight followed and became bogged down, he must quickly signal willingness to negotiate. Request four or six justices and ready himself for two. They might suggest that the possibility of Court enlargement could have influenced some of the justices in 1937 and might do so again. Perhaps, as Charles Fried has proposed, the President should hold the possibility of expansion in reserve--wear court packing "ostentatiously on our hip," just as Harry Truman wore the bomb on his--instead of setting the legislative machinery to enlarge the Court in motion and wait to see whether the justices began seeing things more his way. And then after warning the President about the high stakes involved in seeking additional justices, they might--or might not--urge him to make the fight.⁴⁴

⁴³ Elizabeth Robinson, "Revival of Roosevelt: Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State Court-Packing Plans," 96 *N.C. L. Rev.* 1126, 1136-41 (2020); Ryan Doerfler and Samuel Moyn, "Democratizing the Supreme Court," 190 *Cal. L. Rev.* ____ (2021) (providing an invaluable discussion of alternate proposals); Richard Pildes, "The Court and Politics: What Is the Lesson of FDR's Confrontation With the Court?," Sept. 23, 2010, <https://conlaw.jotwell.com/the-court-and-politics-what-is-the-lesson-of-fdrs-confrontation-with-the-court/> ("remarkably," "fire"); Feldman, "FDR, Even at His Pinnacle of Power, Could Not 'Pack the Court.'" But see Stephen Feldman, *Pack the Court! A Defense of Supreme Court Expansion* (Philadelphia: Temple University Press, 2021).

⁴⁴ Memorandum by the Secretary of War (Stimson) to President Truman, Sept. 11, 1945, <https://history.state.gov/historicaldocuments/frus1945v02/d13>; Charles Fried, "I Was Reagan's

Solicitor General. Here's What Biden Should Do With the Court," *N.Y. Times*, Oct. 19, 2020, <https://www.nytimes.com/2020/10/19/opinion/biden-supreme-court.html>.