IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023 and is informed by the Commission's public deliberations on October 15, 2021.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for November 19, 2021.

Prior to its next public meeting, the Commission will post a draft final Report for deliberation and a vote on its submission to the President.

CHAPTER 1: THE HISTORY OF REFORMS AND REFORM DEBATES

Any account of what has precipitated today's debate about the role and operation of the Supreme Court would be incomplete without an understanding of the long history of political debate and institutional reform surrounding the Court. This history, which dates back to the Founding and encompasses formative periods of the nation's history, highlights how lawmakers and the public frequently have been keenly attentive to and engaged in debate about the role the Court plays within the constitutional system. Reform debates have reflected the institutional needs of an expanding nation, and they have involved partisan conflict and philosophical struggle over substantive constitutional values and the power of government to serve the needs of the people. We offer this history not to explain away or attempt to resolve today's debate according to a particular historical standard, but rather to underscore the fact that debates about court reform are part and parcel of U.S. constitutional history and the development of the American political order.

I. The Origins of Federal Judicial Power

In the spring of 1788, Alexander Hamilton published an essay titled *The Federalist No. 78* under the pseudonym "Publius." The piece was one of a "Collection of Essays, written in favour of the New Constitution" and addressed to "the People of the State of New York." In it, Hamilton offered "an examination of the judiciary department of the proposed government." Describing the role of the Supreme Court in the constitutional structure, he wrote:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[1]

The Constitution's separation-of-powers principle, Hamilton argued, gave courts the power of "judgment" so that they could act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[2]

Federalist 78 was one of many political commentaries that were printed in newspapers and sold as pamphlets while the ratification debates were taking place. Tracts defending and

criticizing the Constitution circulated through the markets, coffeehouses, shops, and parlors of American towns. Not everyone who read *Federalist 78* agreed with it. Some readers preferred the writings of "Brutus," who "found the Constitution flawed in its 'fundamental principles' and advocated its rejection," while others agreed with the "Federal Farmer," in whose view the Constitution "included 'many good things' as well as 'many important defects,' and that 'with several alterations' it could create a 'tolerably good' federal system."[3] By the time the Constitution began operating in 1789, Americans were already engaged in a broad and lively public debate about the role that courts should play in the new republic.[4]

The Constitution creates the fundamental law of the nation, understood to embody the will of the people. But as a written document, it depends on actual governmental institutions for its articulation and enforcement. Beginning in the founding era and continuing to the present day, the role of the Court in carrying out this fundamental law has been contested. Over the intervening centuries, the place of the Court in the American system has changed.

Four themes are especially vital to understanding modern debates concerning the current role of, and potential reforms to, the Supreme Court:

- the persistence of debates over restructuring or reforming the Court, even as the nature and content of these debates have varied over time;
- the tension in the Court's role, insofar as it is both one of three co-equal branches of the federal government and also the arbiter that sees itself as responsible for resolving disputes among the branches and otherwise determining the meaning of the Constitution;
- the connection between the Court's organization and deeper structural concerns (e.g., the connection between the Justices' circuit-riding duties, the size of the Court, and regional representation); and
- the relationship between the Court and politics.

Here, we trace the history of debates over potential reforms to the Supreme Court from the early national period through the twentieth century. The discussion proceeds chronologically in order to explicate the ways in which the themes just mentioned shaped, and were shaped by, changing conceptions of the Court's role in the American constitutional system.

II. The Origins of the Supreme Court: The Constitution and the Judiciary Act of 1789

The Court's origins are inextricably bound up with existential questions concerning the structure of the judicial power of the United States. On March 4, 1789, the new government created by the Constitution began operating. Many elements of the system remained uncertain and disputed despite the preceding twenty-two months of discussion and drafting, first in the Constitutional Convention and then in the state ratifying conventions.[5] The Constitution's beginning raised a host of new questions, the stakes of which were understood to be tremendously high.[6]

Chief among the issues still to be settled were the scope of the federal judicial power and the practical details of how that power would function. Article III of the Constitution established

the Supreme Court. But the drafters of the Constitution had been unable to agree on key points—most importantly, whether to create inferior federal courts, what types of cases the federal courts would be able to hear, and what sort of relationship the Supreme Court would have with the state courts.[7] The Constitution was also silent on the number of Justices who would sit on the Court. The drafters therefore left to Congress the task of addressing many of these questions as it saw fit, subject to the boundaries set forth in Article III.[8] The drafters' decision to postpone the question of the inferior federal courts has been termed by modern commentators the "Madisonian Compromise."[9]

When the First Congress convened in New York's Federal Hall in April 1789, its members immediately began debating a bill to establish the federal courts. "The importance of the judiciary bill was obvious to contemporary observers both inside and outside Congress," according to several historians.[10]

In March 1789, weeks before a Senate committee had even been formed to draft a bill, an anxious James Sullivan—soon to become the attorney general of Massachusetts—wrote to his friend Representative Elbridge Gerry pleading for more news about the formation of the judiciary. "[T]he freedom of the people depends so much upon the proper arrangement of this part of the government," he explained. James Monroe, not yet in Congress, told Virginia representative James Madison that the judiciary bill "will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the gov[ernment] itself, and sh[o]w in the opinion of those who organize it, how far it can discharge its own functions." Senator Richard Bassett, a member of the committee drafting the bill, ventured to say that "our happiness as a people very much depends on this System."[11]

A Senate committee comprising ten members (one from each state that had both ratified the Constitution and sent senators by that point) produced a first version of the Act. The committee then sent its draft to leading lawyers, jurists, and officials around the nation, requesting their comments. What resulted was a compromise bill that attempted to balance competing interests, most notably the Federalists' focus on establishing a strong federal judiciary with the Anti-Federalists' desire to preserve state autonomy.[12] Following several rounds of revisions and amendments, the bill won approval from the Senate and the House. On September 24, the Judiciary Act of 1789 was signed into law by President George Washington.[13]

The Judiciary Act was far more than a restatement of Article III of the Constitution.[14] As the intense debates surrounding the bill suggest, the provisions of the Act were hard fought, and the final version represented a set of choices about how the judicial power of the nation would be shaped.[15] Even its supporters expressed reservations about the bill. James Madison wrote that the act was "pregnant with difficulties." [16] On the floor of Congress a few weeks later, however, he praised the bill as "as good as we can at present make it," while noting that it "may not exactly suit any one member of the House, in all its parts."[17]

The Act provided for a six-justice Supreme Court: one Chief Justice and five associate Justices. It established the Court's jurisdiction, both original and appellate. It also placed the Court at the top of the hierarchy of courts in the nation, state as well as federal. Section 25 of the Act granted the Court the power to review certain decisions of the highest courts of the states.

This provision was viewed by some as particularly delicate, insofar as it placed the Supreme Court in the position of overseeing—and potentially overruling—the decisions of state-court judges.

Proponents of the Act, including Connecticut U.S. Senator Oliver Ellsworth, its primary drafter (and a future Chief Justice of the United States), maintained that a robust system of inferior federal courts with jurisdiction to hear cases arising under federal law would be a more effective method of vindicating constitutionally secured rights and guarantees than relying on state courts alone.[18] The Act thus established a system of inferior federal courts, which it broke down into two categories: district courts and circuit courts. The thirteen district courts, each with a single district judge, were apportioned along state lines, including one each for Maine and Kentucky, which had not yet become independent states. The jurisdiction of the district courts extended primarily to admiralty cases and cases involving minor federal crimes. The three circuits—eastern, middle, and southern—were each staffed by the district judge and two Justices of the Supreme Court, whom the act charged with "riding circuit" to hold sessions in each district of the circuit twice each year.[19] Both the district courts and the circuit courts were primarily trial courts, with jurisdiction depending on the nature of the suit, the citizenship of the parties, and the amount in controversy. The circuit courts also possessed limited appellate jurisdiction.

The Act's assignment of circuit-riding duties to the Justices of the Supreme Court proved one of the most significant and controversial features of the U.S. judicial system for its first century of existence. The circuit-riding system tied the Court to the circuits, in both numerical and geographic terms. The original number of seats on the Court was set at six, allowing an even division among the three circuits. Although it required substantial and difficult travel, drawing complaints from the Justices,[20] the practice of circuit riding compelled the Justices to leave the capital and travel to the nation's periphery, where they mixed with a broad array of lawyers and litigants. When hearing cases on circuit, the Justices acted as trial-court judges, requiring them to deal with issues of fact, instruct juries, and issue rulings on procedure and evidence.

Four months after Congress passed the Judiciary Act, the Supreme Court began operations. On February 2, 1790, Chief Justice John Jay convened the initial session at New York's Royal Exchange, at which only three associate Justices were present.

The Court started its work amid intense arguments about the Judiciary Act. Within a year of the Court's first session, reform of the federal judiciary returned to the center of public debate because of dissatisfaction with the allocations of authority between the district and circuit courts, and between the federal and the state courts.[21] In 1790, President Washington's attorney general, Edmund Randolph, submitted a report to Congress that recommended restructuring the federal courts. Randolph's report was soon followed by a set of proposed amendments to Article III drawn up by New York congressman Egbert Benson. Among the proposed reforms in Randolph's and Benson's plans were ending circuit riding, creating circuit judgeships, and vesting the inferior federal courts with jurisdiction to hear all cases arising under federal law.[22] Neither plan gained sufficient support to bring about change. Yet reform of the federal courts was a constant topic of political debate in the early years of the Republic.

III. The Court and Politics in the Early National Period

Throughout the 1790s, Congress continued to debate reform of the federal judiciary, with much criticism focusing on the Justices' circuit-riding duties. In his annual message to Congress in 1799, President John Adams urged members to begin "a revision and amendment of the judiciary system," which he argued was "indispensably necessary" to "give due effect to the civil administration of Government and to insure a just execution of the laws."[23]

In February 1800, a House committee met with Justices William Paterson and Bushrod Washington to solicit their recommendations for reform. The following month, Congressman Robert Goodloe Harper of South Carolina introduced a draft bill recommending substantial reforms to the federal judiciary. The bill expanded the jurisdiction of the inferior federal courts to include all cases arising under federal law, increased the number of districts and circuits, and created sixteen new circuit judgeships, thereby ending the Justices' circuit-riding duties.[24] The Act reduced the number of Supreme Court Justices from six to five upon the next vacancy, likely to limit the ability of a future President who was not Adams to shape the Court.[25] It also added a new, sixth circuit, comprising Tennessee, Kentucky, and the Indiana and Ohio territories. Following debate and minor modifications, the bill passed the House on January 20 and the Senate on February 7, 1801, and was signed into law by Adams on February 13, 1801. Officially titled "An Act to Provide for the More Convenient Organization of the Courts of the United States," the Act became known as the Judiciary Act of 1801.[26]

The Judiciary Act of 1801 is sometimes assumed to have been entirely motivated by Thomas Jefferson's victory in the presidential election of 1800. Four days after the 1801 Act was passed, on February 17, 1801, the House settled the disputed contest by electing Jefferson on the thirty-sixth ballot. Jefferson's Republican Party swept into power in Congress as well. But reforms to the federal judiciary, including ending circuit riding and expanding the courts' jurisdiction, had been debated since the 1790s, and the movement that led to the 1801 Act predated the election by several months.[27]

Nevertheless, the election of 1800 clearly heightened political polarization, and with it the politicization of the judiciary. When Jefferson and the Republicans took control of the presidency and Congress in March 1801, they quickly moved to undo the Federalists' judicial reforms. On March 8, 1802, the Judiciary Act of 1801 was repealed. The new Act, known as the Judiciary Act of 1802, revoked the grant of general federal question jurisdiction, abolished the new circuit judgeships, and reinstated the Supreme Court Justices' circuit-riding duties.[28] The 1802 Act also retained the enlarged number of circuits (six) but reversed the planned reduction of the number of seats on the Court, bringing it back to six. For the third time in a dozen years, the Founders adjusted the number of Justices on the Supreme Court. Consequently, after 1802, the number of circuits matched the number of Justices, and the Justices continued to ride circuit.

The 1802 repeal of the 1801 Judiciary Act further inflamed debate surrounding the federal courts. All sides accused the others of using the judiciary for political gain. Jefferson charged the Federalists with having "retired into the Judiciary as a strong hold" in order to entrench themselves in the face of electoral losses.[29] Alexander Hamilton, influential among Federalists even though out of office, warned that "if the bill for the repeal passed, and the

independence of the Judiciary was destroyed," the nation would before long "be divided into separate confederacies, turning our arms against each other."[30]

The substance as well as the structure of federal judicial power was deeply contested during the early national period. One of Adams's most lasting achievements as President was his appointment of John Marshall as Chief Justice in January 1801. During Marshall's thirty-four-year tenure as Chief Justice, the Court became stronger as an institution, claimed the power to interpret the Constitution, and asserted with increasing force a particular vision of the United States as a union rather than a confederation. Under Chief Justice Marshall's leadership, the Court positioned itself as an arbiter of the constitutional order as well as a branch of the federal government.

In the early months of 1803, the Marshall Court issued two important rulings on key constitutional issues. In both cases, *Marbury v. Madison* and *Stuart v. Laird*, the Court demonstrated a notable ability to claim power while also appearing to limit that power. Both cases were also deeply political, having arisen out of the election of 1800, and both had been delayed when the Jeffersonian Congress postponed the Court's 1802 term.

In *Marbury v. Madison*, the Court held that it lacked the authority to order Secretary of State James Madison to issue a commission to William Marbury for a position as justice of the peace, even though Marbury clearly had a right to the commission, and the remedy he sought—a writ of mandamus—was the proper remedy.[31] The problem, Chief Justice Marshall held, was that the statutory provision on which Marbury relied to establish the Court's jurisdiction to grant the remedy was invalid because it exceeded Congress's authority. The Court therefore lacked the ability to grant Marbury his remedy, Chief Justice Marshall determined.

The reason for this seeming weakness, however, was that the Court possessed a far stronger weapon: the ability to declare acts of Congress unconstitutional. This was the power of judicial review. The authority that Congress sought to give the Court in Section 13 of the Judiciary Act of 1789 "appears not to be warranted by the constitution," Chief Justice Marshall stated.[32] Then followed what became one of the most quoted passages in American constitutional law:

> It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[33]

As many scholars have noted, judicial review was not new to American law in 1803.[34] Courts—including the Supreme Court, state courts, and, even earlier, colonial courts—had long claimed the authority to invalidate legislation. The Constitution did not refer explicitly to judicial review. But the combined force of Article III, the Supremacy Clause of Article VI, longstanding Anglo-American practice, and the nature of the written Constitution suggested to Chief Justice Marshall and others that judicial review was within the Court's power.[35] In *Marbury*, Chief

Justice Marshall established judicial review as a principle of American law, claiming for the Court—in the name of the Constitution and the people—the power "to say what the law is."[36] Yet Chief Justice Marshall's opinion in *Marbury* was ambivalent, insofar as it paired this claim of interpretive power with a disavowal of the power to order Madison to deliver Marbury's commission.

In addition, the power of judicial *review* that Chief Justice Marshall asserted did not necessarily amount to judicial *supremacy*. As one leading constitutional law casebook puts it, judicial review "means that a federal court can review statutes (or executive actions) for constitutionality and refuse to enforce them in court proceedings if it finds them unconstitutional." Judicial supremacy, in contrast, "means that the federal courts' interpretation of the Constitution is supreme over the other branches."[37] The boundaries between the two concepts, and the Court's claim on each, have been the subject of debate since the founding era.

One week after the Court handed down its ruling in *Marbury*, it decided another case that also carried important consequences for the role of the judiciary in the constitutional system. That case, *Stuart v. Laird*, required the Court to rule on the constitutionality of the Jeffersonian Congress's 1802 repeal of the Judiciary Act of 1801. The questions presented asked, first, whether Congress could validly abolish the circuit courts created under the 1801 Act without violating Article III of the Constitution, which stated that federal judges were to hold their offices "during good Behaviour," and second, whether the Justices could be required to sit as circuit judges.[38] The Court upheld the constitutionality of the 1802 repeal Act, found that the reorganization of the inferior federal courts was within Congress's power, and held that the validity of circuit riding had been settled by "practice and acquiescence."[39]

Some commentators have characterized *Stuart* as a more overtly political—and perhaps more consequential—decision than *Marbury*. *Stuart* forced the Court to confront existential questions about the balance between judicial independence and congressional control of the courts. One scholar has argued that "Marshall and his brethren apparently calculated that to invalidate this statute was to guarantee Jeffersonian political retaliation against the Court,"[40] while another called the *Stuart* decision "an exercise in self-preservation."[41] Chief Justice Marshall himself seems to have remained skeptical about the basis of the decision, referring in an 1823 letter, in ironic tones, to "the memorable distinction as to tenure of office, between removing the Judge from the office, and removing the office from the Judge."[42]

As the *Marbury* and *Stuart* decisions demonstrate, the Court was at the center of negotiations about both law and politics during the early nineteenth century. Through its substantive decisions, the Court established its power even as it showed itself attentive to political context. As the Court gained stature under Chief Justice Marshall's leadership, structural reforms to the judiciary continued to be a perpetual topic of discussion. In 1807, Congress both increased the size of the Court to seven Justices and added a seventh circuit comprising Ohio, Kentucky, and Tennessee.[43] The size of the Court and the number of circuits were still understood as necessarily linked. Other changes to the Court's jurisdiction were periodically proposed. These included stripping the Court of its power under Section 25 of the 1789 Judiciary Act to hear appeals from state courts, an effort that was linked to specific policy issues, including treaty enforcement, land sales, bank regulation, and internal improvements.[44]

IV. The Jacksonian Era: National Expansion, Court Expansion, and Partisan Strife

The antebellum decades saw continuing disputes over the federal judiciary's structure; the balance between political control of the Court and judicial independence; and the orientation of the Court toward pressing political issues, including commerce, migration, and slavery.

The election of Andrew Jackson as President in 1828, and the related rise of the Democratic Party to national political dominance, was viewed by many contemporaries as "a kind of revolution" akin to that which had swept Jefferson into office in 1800.[45] Jackson's two terms as President, from 1829 to 1837, brought a bold Executive who claimed broad powers, the rise of modern party politics, and the entrenchment of sectionalism. Jacksonian nationalism aimed, in the words of one historian, to "maintain white supremacy and expand the white empire, to evict the Indian tribes, [and] to support and extend slavery."[46]

These imperatives had important consequences for the federal judiciary in three distinct areas: the role of the Supreme Court and its relationship to contemporary politics; the structure of the federal courts, in particular the ongoing debate over the Justices' circuit riding; and the related issue of the size of the Court. Throughout this period, the Court was embroiled in important issues relating to the separation of powers (the Court's relationship to the President and Congress) and federalism (the relationship between the Court and the states, including both state courts and legislatures).

First, the Supreme Court continued to be viewed by contemporaries as an institution that was necessarily involved in politics. Prior to Chief Justice Marshall's death in 1835, the Court took stances in a few high-profile cases that appeared to be carefully calculated acts of resistance to Jeffersonian-Republican policies. In *McCulloch v. Maryland* (1819) and *Osborn v. Bank of the United States* (1824), the Court upheld the constitutionality of the Second Bank of the United States against attacks on it by several states and by then-candidate Jackson.[47] Chief Justice Marshall published a series of newspaper essays under a pseudonym in which he defended the *McCulloch* decision against arguments that the Bank represented an overreach by Congress and an invasion of state sovereignty.[48] During Jackson's presidency, the Marshall Court heard a pair of cases brought by the Cherokee Nation in which the tribe sought to vindicate its jurisdiction and ownership of lands against the state of Georgia. Jackson had campaigned for the presidency on a promise of "Indian removal," and, in 1830, a closely divided Congress had passed the Indian Removal Act.[49] In the 1831 case of *Cherokee Nation v. Georgia*, the Court held that it lacked jurisdiction to hear the tribe's case.[50] In 1832, however, the Court ruled in *Worcester v. Georgia* that Georgia did not have authority to extend its criminal laws over the Cherokee Nation.[51] The Court's ability to compel the state to carry out its decision was limited, however, by the procedures set forth in the Judiciary Act of 1789. Contemporaries also speculated that the Court was leery of provoking Georgia at the same moment that South Carolina was claiming the power to nullify federal law.[52]

Following Chief Justice Marshall's death in July 1835, President Jackson nominated as his successor Roger Brooke Taney, who had previously served as Jackson's Attorney General and Treasury Secretary (the latter via a recess appointment which was subsequently rejected by

the Whig-dominated Senate). Earlier in 1835, President Jackson had nominated Taney to an associate justiceship on the Court. At that time, the Senate had refused to confirm Taney based on his removal of deposits from the Bank of the United States at President Jackson's direction.[53] Taney had removed the deposits following Jackson's 1832 veto of the Bank's recharter, in which Jackson had rejected the Court's power to decide with finality the issue of the Bank's constitutionality.[54] By 1836, Democrats had regained sufficient control of the Senate to confirm him.[55]

Contemporaries noted the interaction of politics with the structure of the federal courts and the size of the Supreme Court. Territorial expansion and regional affiliations were important factors with respect to these issues. By 1837, the Union comprised twenty-six states, nine of which had been admitted since the addition of the most recent circuit in 1807. Since then, the number of circuits and Justices had remained at seven. But residents of the six most recently added states increasingly demanded that their states be incorporated into circuits, rather than having district courts exercise both district- and circuit-court jurisdiction (and without ever being visited by a circuit-riding Justice).[56] Jackson was the first western president, and the West was an important piece of the Democratic political coalition. An increasingly widespread belief held that the Court should represent the regions of the nation. Relatedly, some observers felt that, for all its problems, circuit riding was valuable because it ensured that the Justices were exposed to the issues and debates on the periphery, and that Americans on the nation's periphery felt connected to the center. Another view, however, held that the Court was already too large, and that the quest for regional balance was either not worth pursuing or doomed to failure.[57]

While these arguments over the structure of the federal judiciary were churning, the Court's membership was shifting, in part due to deaths and retirements among the Justices and in part due to politics. During his first term in office, President Jackson appointed two Justices to the Court. During his second term, he nominated five additional Justices, including Taney as Chief Justice, bringing to seven his total number of nominees to the Court, of whom six served as Justices. The last five of President Jackson's appointments came from slaveholding states.[58] President Jackson thus "made more Supreme Court appointments than any other president between Washington and Taft."[59]

President Jackson was able to appoint so many Justices to the Court because on March 3, 1837—his last day in office—Congress, which was controlled by Jackson's Democratic Party, passed a new Judiciary Act.[60] The Act of 1837 created two new circuits and added two new seats to the Court, bringing the total for both to nine for the first time in the nation's history. The Act also took effect immediately, allowing outgoing President Jackson to nominate two Justices: John Catron, whose circuit-riding duties would cover the newly created Eighth Circuit, and William Smith for the new Ninth Circuit. When President Jackson's successor Martin Van Buren (who had previously served as Jackson's Vice President and Secretary of State) took office on March 4, 1837, the Senate confirmed both Catron's and Smith's nominations. Smith, however, declined, and Van Buren nominated John McKinley through a recess appointment.[61]

After decades of wrangling over Court expansion, circuit riding, and western representation, Congress ultimately restructured the federal judiciary in 1837 because it was possible to do so in a way that consolidated the Democratic Party's control. "The two events

which finally induced both Houses to agree were the election of Van Buren, bringing with it the prospect of a four-year Democratic rule, and the Supreme Court appointments made by Jackson in 1835 and 1836," which eliminated "the fear that the addition of two new judges would change the complexion of the Court."[62] Describing Jackson's impact on the Court, one contemporary magazine characterized the "late *renovation* of the constitution of this august body, by the creation of seven of the nine members under the auspices of the present democratic ascendancy" as "the closing of an old, and the opening of a new, era in its history."[63] For the first time in the nation's history, the Court comprised nine justices. The expansion had come about through a combination of factors: pragmatic concerns about the federal courts' efficacy; sectional demands; and political imperatives.

V. The Upheavals of the Civil War and Reconstruction: Transforming the Constitution

The Civil War and Reconstruction launched a series of constitutional transformations that were accompanied by fundamental changes in the operation of the federal judiciary. At the heart of this "second founding" were the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[64] The Thirteenth Amendment abolished slavery.[65] The Fourteenth Amendment "constitutionalized the principles of birthright citizenship and equality before the law and sought to settle key issues arising from the war, such as the future political role of Confederate leaders and the fate of Confederate debt."[66] The Fifteenth Amendment granted Black men the right to vote.[67] Each of the Reconstruction amendments also vested Congress with the power to enforce these rights. In the realm of judicial power, the trend was toward stronger federal courts with more robust jurisdiction. Beginning in the 1870s, however, a series of narrow decisions from the Court severely limited Reconstruction's revolutionary potential.

Prior to the war, in 1857, the Supreme Court had drawn attack from growing numbers of Americans for its immediately infamous decision in *Dred Scott v. Sandford*, in which Chief Justice Taney wrote for the Court that "that class of persons" whose "ancestors were negroes of the African race, and imported into this country and sold and held as slaves" were "not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[68] To support his holding, Taney presented his own version of founding-era history:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[69]

Frederick Douglass, the great abolitionist political leader, excoriated the decision in a series of public addresses. "You may close your Supreme Court against the black man's cry for justice, but you cannot, thank God, close against him the ear of a sympathising world, nor shut up the Court of Heaven. All that is merciful and just, on earth and in Heaven, will execrate and

despise this edict of Taney," Douglass told a New York audience in May 1857. "Judge Taney can do many things, but he cannot change the essential nature of things—making evil good, and good evil."[70]

As part of his campaign for the U.S. Senate in 1858, Abraham Lincoln decried the *Dred Scott* decision, calling it "erroneous" as a matter of law and warning that it would lead to "the spread of the black man's bondage."[71] In his first inaugural address in March 1861, Lincoln continued his criticism of the Court, suggesting that such judicial overreach as the *Dred Scott* decision—which he did not mention by name—threatened democracy:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[72]

Following the secession of the eleven states that formed the Confederacy between December 1860 and May 1861, the Republican-controlled Congress set about reshaping the federal judiciary as "a partner against the South."[73] Many contemporaries also hoped that these efforts would redeem the Court from the stain of the *Dred Scott* decision.

The start of the Civil War witnessed a series of reforms to the circuit courts. In his first message to Congress in 1861, President Lincoln observed that "the country has outgrown our present judicial system" and called for the circuit system to be overhauled.[74] Eight states that had been admitted over the past two decades had never had circuit courts visited by a Supreme Court Justice. Yet Lincoln did not advocate expanding the size of the Court. Instead, he urged that Congress sever the connection between the Court and the circuits, setting the size of the Court at a "convenient number" and then establishing circuits of "convenient size," with circuit-judging duties to be handled by some combination of Justices and circuit judges.[75]

Congress enacted some of Lincoln's recommended reforms. In 1862 and 1863, enabled by the exodus of southern Democrats from the federal government, Congress reorganized the circuits in order to limit Southern influence. Instead of five circuits composed entirely of slaveholding states, there were now only three such circuits. The total number of circuits was now ten, and a tenth seat was added to the Court. As in the eighteenth century, when the Court had comprised six seats, reformers appeared unbothered by the prospect of an even number of Justices. The Justices responsible for the Eighth, Ninth, and Tenth Circuits now all hailed from northern states.[76]

In 1866, after the war had ended, Congress once more reorganized the circuits and the Court, again with the objective of limiting the influence of the former Confederate and other slaveholding states. The statute reduced the number of circuits to nine and mandated a gradual reduction of the number of seats on the Court from ten to seven, via attrition.[77] Congressional Republicans sought to reduce the size of the Court in order to prevent President Andrew Johnson, a foe of Reconstruction, from nominating Justices to fill any vacancies.[78]

The judicial power of the United States was even more profoundly transformed in this period by a series of statutes enlarging the federal courts' jurisdiction. As one historian writes, "[i]n no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876."[79] Although Congress did on a few notable occasions strip the Supreme Court of jurisdiction in specific sets of cases,[80] the broader movement was toward expanding the judicial power of the United States.[81] The most important reforms were in three areas: first, removal jurisdiction, which allowed certain cases that began in state court to be taken to federal court;[82] second, the habeas corpus power, permitting federal courts to issue writs on behalf of prisoners held by state authorities in violation of federal law;[83] and third, federal question or "arising under" jurisdiction.[84]

This growth in jurisdiction was accompanied by substantive legislation from Congress that created new federal rights and causes of action, many of which were aimed at protecting the rights of African-Americans.[85] As a result of these reforms, the inferior federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[86]

Despite Congress's expansion of federal jurisdiction during the post-Civil War era, the Court issued a series of decisions that significantly limited the reach of both civil rights legislation and the Reconstruction Amendments. In the *Slaughter-House Cases*, the Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment narrowly, holding that the Clause covered only certain rights of national citizenship that did not include the economic protections claimed by the plaintiffs, a group of white butchers in New Orleans.[87] Three years later, the Court reaffirmed this constrained view of the Fourteenth Amendment in *United States v. Cruikshank*, a case arising out of the infamous Colfax Massacre in Louisiana, in which a mob of white vigilantes killed between 60 and 150 African-Americans, as well as three white men.[88] In *Cruikshank*, the Court overturned the federal convictions of the vigilantes, holding that the Bill of Rights protected citizens only against deprivations of rights by the federal government, not by states or private parties.[89]

The next several years saw frequent litigation of the Reconstruction legislation and Amendments. In the words of one historian, "[t]he opening of each term of the Court, beginning in 1876, caused a buildup of anxiety regarding possible decisions in the civil rights cases."[90] The Civil Rights Act of 1875 was regarded by many contemporaries as the most far-reaching piece of Reconstruction legislation.[91] The Act's stated aim was "to protect all citizens in their civil and legal rights," and it guaranteed to all citizens, regardless of color, access to public accommodations, including public schools, churches, theatres, and transportation, as well as jury service.[92] In 1883, in the *Civil Rights Cases*, the Court invalidated key provisions of the Act, ruling that neither the Thirteenth nor the Fourteenth Amendment permitted the federal government to proscribe discriminatory behavior by private actors.[93] Many scholars regard the *Civil Rights Cases* as the culmination of a decade-long shift by the Court toward a narrow interpretation of the Reconstruction statutes and Amendments. As one historian observes, "[t]he rights of the individual took precedence over obvious social inequalities that federal officials sought to address."[94] With the erosion of northern support for robust Reconstruction policies,

"[t]hat same narrow, highly individualized interpretation of rights also allowed legal segregation to flourish."[95]

VI. The Progressive Era: Structural Reforms and Democracy-Based Critiques of the Courts

A. Reorganization of the Federal Courts

As a result of the structural reforms of the Reconstruction era, the dockets of the federal courts—and in particular the Supreme Court—became crowded "beyond all control."[96] A small reprieve came from Congress in an 1869 statute that created circuit judgeships, one for each of the nine circuits.[97] The circuit-riding obligations of the Justices were also reduced. But it was not enough to stem the tide of litigation in federal court. The number of cases pending in the federal district and circuit courts rose from 29,013 in 1873 to 54,194 in 1890—an increase of eighty-six percent.[98] Yet over the same period, the number of inferior federal court judges rose only slightly, from sixty-two in 1873 to sixty-nine in 1890.[99]

Moreover, the booming dockets in the district and circuit courts meant a concomitant surge in the Court's caseload. "[W]ith no other exclusively appellate court and an automatic right of appeal to the Court in many instances, the losing parties in such cases inevitably brought their claims to the justices."[100] The Court's docket in 1860 numbered 310 cases. In 1890, the number was 1,816 cases—623 of which had been filed in 1890 alone.[101]

Dissatisfaction with the federal courts' organization and functioning spawned numerous reform proposals. These included calls for an intermediate level of appeals courts, an innovation that had been discussed for decades but had never gained sufficient support to be attempted. Other proposals included expanding the Court to eighteen Justices, half of whom would operate as a "National Court of Appeals." Another proposal would have segmented the Court into three "divisional" panels, each responsible for common-law, equity, and admiralty and revenue cases, and with the entire Court hearing constitutional cases.[102]

Finally, in 1891, Congress passed the Circuit Court of Appeals Act, known as the Evarts Act in honor of its chief architect, Senate Judiciary Committee Chairman William Evarts of New York.[103] The Evarts Act "fundamentally reshaped the federal judicial system" and "substantially established the framework of the contemporary system."[104] For the first time since 1802, the Justices were no longer obliged to ride circuit. The Act also created intermediate courts of appeals, which "shifted the appellate caseload burden from the Supreme Court to new courts of appeals, and, in so doing, made the federal district courts the system's primary trial courts."[105] The reforms also drastically decreased the Court's caseload by limiting the right of automatic appeal, and by making the decisions of the courts of appeals final in several categories of cases, including diversity suits and criminal prosecutions. The courts of appeals could certify questions to the Supreme Court, or the Supreme Court could grant review by certiorari; for state-court cases, the review mechanism remained the writ of error.[106] Whereas the number of new cases filed before the Court in 1890 was 623, that number dropped to 379 in 1891 and then to 275 in 1892.[107] Three decades later, Harvard Law professor and future Supreme Court Justice Felix Frankfurter, along with his former student James M. Landis, offered the following

characterization of the Evarts Act: "The remedy was decisive. The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off."[108]

B. The Progressive Critique of the Court

The end of federally enforced Reconstruction by 1877 also redirected Republican energies from civil rights for African-Americans toward new forms of nationalism that prioritized economic development, property rights, and the interests of large-scale enterprise.[109] Critics of the Court, especially those associated with the progressive movement (and the related Progressive Party), charged the federal courts with favoring business interests, in part due to the expansion of the courts' diversity jurisdiction, the frequency of removal from state to federal court by corporate defendants, and the application of a substantive body of law known as "general federal common law."[110] These critics charged the Court with deploying its power of judicial review more often and in accordance with conservative policy preferences. Chief among these preferences was the curtailing of legislation and regulations, especially those that protected workers and consumers. Between 1864 and 1895, the Court invalidated an average of three state laws each year, a sharp contrast with the pre-Civil War rate of less than one law per year.[111]

By the 1890s, what one scholar has described as a "muted fury" toward the federal courts had developed among some reformers, many of whom mobilized as the Populist and later the Progressive parties.[112] Three decisions that the Court handed down in 1895 drew particular criticism: *United States. v. E.C. Knight Co.* (holding that the federal commerce power did not reach manufacturing);[113] *Pollock v. Farmers' Loan & Trust Co.* (invaliding the federal income tax);[114] and *In re Debs* (upholding a labor injunction against striking railroad workers).[115]

Progressive anger at the courts became a defining issue in the 1912 presidential election. After having left office and embarked on a worldwide tour, former president Theodore Roosevelt reentered the political fray with a blistering attack on the courts, focusing his ire on the Supreme Court's recent decision in *Lochner v. New York.*[116] Addressing a joint session of the Colorado legislature, as well as an audience of thousands who had gathered outside, Roosevelt decried the Court's decisions in *Lochner* and *E.C. Knight.*[117] In print, Roosevelt argued that the Justices had "strained to the utmost (and, indeed, in my judgement, violated) the Constitution in order to sustain a do-nothing philosophy which has everywhere completely broken down when applied to the actual conditions of modern life."[118]

Upon launching his presidential campaign in February 1912, Roosevelt proposed that state judicial decisions invalidating a statute as unconstitutional (either under the Federal Constitution or the state constitution) should be "recalled" by a vote of the citizens.[119] "[W]hen a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong," Roosevelt argued.[120] The former President's proposal focused on rulings by state courts, and he disavowed the notion that it would apply to federal courts. But one commentator notes that despite his public statements, Roosevelt "confided to [progressive journalist Herbert] Croly that he believed the people would ultimately obtain the power to interpret even the federal Constitution."[121]

Roosevelt's recall initiative became a dominant issue during the 1912 presidential election, a four-way contest that pitted Roosevelt, running as a Progressive, against Republican incumbent William Howard Taft, Democrat Woodrow Wilson, and Socialist Eugene V. Debs.[122] Ultimately, Roosevelt's attacks on the judiciary failed to win him the Republican nomination, repelling party conservatives and energizing Taft's reelection campaign, which focused on protecting judicial independence.[123] President Wilson, who prevailed in the contest, did not support recall of court decisions, and the frontal attack on the judiciary faded after Roosevelt's defeat.

During and after Roosevelt's unsuccessful presidential campaign in 1912, a group of U.S. Senators continued to press the progressive critique of the Court. Led by Robert La Follette of Wisconsin, William Borah of Idaho, George Norris of Nebraska, and Robert Owen of Oklahoma, these western and midwestern lawmakers argued that the federal courts, especially the Supreme Court, stood in the way of reforms that the Senators viewed as necessary remedies for social and economic ills caused by industrialization. Arguing that the courts were unduly solicitous of corporate interests and thus hostile to workplace regulation and the labor movement, progressives sought tools to limit judicial power. In the name of popular accountability, they proposed a number of mechanisms to constrain the judiciary, including recalls, supermajority voting requirements, and legislative overrides.[124]

In 1912, Senator Owen proposed that Congress be empowered to recall and remove federal judges from office by a majority vote of both houses. In 1918, he sought to write into a piece of legislation a provision shielding it from judicial review—as in a renewed federal ban on child labor, after the Court had invalidated a similar ban. Inveighing against "judicial usurpations" a few years later, Senator La Follette argued for a constitutional amendment that would permit Congress to override the Court by passing again laws that the Court had invalidated. Senator Borah, for his part, objected to decisions in which the Court decided by a 5–4 or 6–3 vote to strike down a statute. He therefore sponsored a bill in 1923 that would have required the assent of at least seven justices to hold a statute unconstitutional.[125] Though none of these proposals ultimately succeeded, their numerosity and the seriousness with which they were debated, both within Congress and among the broader public, demonstrates the force and appeal of the progressive critiques.

C. Nominations to the Court: Increasing Controversy

During the same period, the process by which justices were appointed to the Court became increasingly public and controversial. The first significantly contested nomination, and the first time that the Senate held a confirmation hearing for a nominee to the Court, was President Wilson's nomination of Louis D. Brandeis to the Court in 1916.[126] Brandeis, who was one of Wilson's informal legal advisers, was a leading progressive who had become known as "the people's attorney" for his successful and high-profile attacks on corporate interests and his dedication to bringing the social and economic impact of regulation to bear on legal arguments.[127]

Brandeis's nomination was strenuously opposed by many luminaries of the legal and business establishment: former President William Howard Taft; Harvard President A. Lawrence

Lowell; former Attorney General George Wickersham; and former Secretary of State and War (and current American Bar Association President) Elihu Root, among others. President Wilson defended his nominee, charging that the opposition stemmed from Brandeis's refusal "to be serviceable to them in the promotion of their own selfish interests."[128] Another factor in the attacks on Brandeis was bigotry: He was the first Jewish person to be nominated to the Court.[129] After four months of debate, including hearings that Brandeis did not attend, the Democratic-controlled Senate voted along party lines to confirm Brandeis in June 1916.

Fourteen years later, another nomination that was controversial for very different reasons failed to win Senate confirmation. In 1930, President Hoover nominated federal appeals-court judge John J. Parker to the Court. Given that Parker was a sitting federal judge, the nomination was initially expected by many observers to yield a smooth confirmation process.

Parker's nomination ultimately failed, however, because it was vocally and effectively opposed by civil rights groups, led by the NAACP, as well as labor organizations—groups that also shared the progressive sensibility. As a circuit judge, Parker had issued a strongly worded opinion upholding an injunction against the United Mine Workers, earning him the ire of organized labor. The NAACP and other organizations, meanwhile, condemned racially inflammatory remarks Parker had made a decade earlier while running for governor of North Carolina. "The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina," Parker had stated in 1920.[130] Two months after Hoover named Parker, the nomination was rejected by a vote of 39 to 41. It was the Senate's only rejection of a nominee to the Court in the seventy-four years between 1894 and 1968. For perspective, however, it is worth noting that for most of the nineteenth century, the Senate had rejected or otherwise blocked an average of nearly one out of every three nominees to the Court.[131]

VII. 1937, FDR, and the Court: Existential Challenges

Populist and Progressive critiques of the Court continued to circulate through the early decades of the twentieth century. By 1936, when the nation was in the grip of the Great Depression, these criticisms gained new salience. After President Franklin D. Roosevelt won reelection to a second term by an overwhelming margin, he turned his attention to the Court. In a series of decisions in 1935 and 1936, the Court had invalidated key New Deal legislation introduced by the Roosevelt Administration and supported by Democrats in Congress.[132] "A majority of the Court seemed to have turned decisively against the Administration's programs," notes one prominent casebook, adding that "constitutional challenges to a new spate of laws—the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act—loomed in the coming months."[133]

In February 1937, Roosevelt presented a package of reforms to Congress that he described as a remedy for overcrowded federal-court dockets. The proposal authorized the President to appoint one additional judge to the federal courts, including the Supreme Court, to supplement any federal judge who reached the age of seventy and did not retire. The size of the Court would be limited to fifteen justices. "The significant fact was that the plan would permit the president to appoint six new Supreme Court justices, and thus to insure approval of the New

Deal programs. It was, as it was called, a 'court-packing plan.'"[134] On March 9, 1937, Roosevelt took to the national airwaves to present the reforms to the American people in a "Fireside Chat."

Roosevelt's plan sparked a robust national discussion about the Court, its decisions, and its and the President's respective roles in the constitutional system. "Day after day for the next half-year, stories about the Supreme Court conflict rated banner headlines."[135]

> The question was debated at town meetings in New England, at crossroads country stores in North Carolina, at a large rally around the Tulsa courthouse, by the Chatterbox Club of Rochester, New York, the Thursday Study Club of La Crosse, Wisconsin, the Veteran Fire Fighters' Association of New Orleans, and the Baptist Young People's Union of Lime Rock, Rhode Island. In Beaumont, Texas, a movie audience broke out in applause for rival arguments on the plan when they were shown on the screen.[136]

While the public as well as members of Congress debated the merits and flaws of the Court-packing plan, the Court itself took action in a manner that surprised many observers. "Within weeks of the bill's introduction . . . the Supreme Court began prudently to change course by upholding New Deal measures that months earlier it seemed prepared to invalidate."[137] On March 29, 1937, the Supreme Court handed down its decision in *West Coast Hotel Co. v. Parrish*, upholding a state minimum-wage statute for women that was nearly identical to one that it had struck down a year earlier.[138] On April 12, the Court decided *NLRB v. Jones & Laughlin Steel Corp.*, in which it held the National Labor Relations Act to be a valid exercise of Congress's power to regulate interstate commerce, appearing to diverge from its position in a similar case from 1936.[139] And on May 24, in *Steward Machine Co. v. Davis*, the Court upheld the unemployment compensation provisions of the Social Security Act of 1935—again seemingly taking a broader view of congressional power than in previous cases.[140] All three were 5–4 decisions. This seeming about-face was dubbed the "switch in time that saved nine" by some observers[141] and "the constitutional revolution of 1937" by others.[142] Also in May 1937, Justice Willis Van Devanter—one of the so-called "Four Horsemen" who had steadfastly opposed most New Deal legislation—announced his retirement from the Court.[143]

By the summer of 1937, however, the Court-packing plan was foundering in Congress. It was ultimately defeated in July 1937. The controversy over the Court "helped weld together a bipartisan coalition of anti-New Deal Senators;" it also led to a "deeply divided" Democratic party.[144] Henry Wallace, a member of Roosevelt's cabinet during the Court-packing controversy, opined that "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight."[145] But the battle over the Court was not the only factor in this diminution of support for the President's plan. Other pressures included "dismay at the harsh recession of 1937–1938, anxiety over relief spending, and resentment at sit-down strikes."[146]

Many observers—at the time and since—charged Roosevelt with overreaching.[147] They argue that had the plan succeeded, its passage would have "set a precedent from which the institution of judicial review might never recover."[148] On this view, Roosevelt's effort to expand the Court failed on two fronts: It was voted down in Congress and it hobbled Roosevelt and the Democratic Party in their efforts to consolidate the progressive reforms that formed the core of the New Deal agenda.[149] "[A]lthough the battle was won, the war was lost."[150]

> Court packing divided Democrats and undermined middle-class and bipartisan support for the New Deal. It shattered FDR's aura of invincibility, helped "blunt the most important drive for social reform in American history," and "squandered" the president's 1936 triumph by welding together a coalition of conservative Southern Democrats and Republicans that blocked reform in Congress until 1964.[151]

Other commentators contend, however, that the Court-packing proposal in fact achieved some of its objectives. The Supreme Court's constitutional doctrine did undergo changes in 1937, and certain of those changes proved enduring. That spring, the Court began upholding major pieces of New Deal legislation, despite challenges that the statutes exceeded Congress's Article I powers—in particular, the commerce power and the taxing and spending power. Roosevelt did not succeed in packing the Court, but neither did he have to abandon his New Deal agenda. Nor did he have to launch an effort for a constitutional amendment to limit the Court's power, as some in his administration had urged.[152]

Scholars disagree regarding both the magnitude and the causes of these doctrinal shifts. The Justices might well have viewed the Court-packing plan as a threat and altered their views accordingly, engaging in "self-salvation by self-reversal."[153] On this view, "[w]hile the president lost the skirmish with the Court, he won the battle."[154] Gradual shifts in specific Justices' doctrinal approaches might explain the Court's shift in 1937.[155] The New Deal "did not reconstruct constitutional law out of thin air."[156] But "the doctrinal revolution would not have happened without sustained Presidential leadership."[157] Clearly, the struggle over the Court "exacted an enormous toll" on Roosevelt and impeded the legislative momentum for comprehensive economic and social reform. Yet, as one leading historian of the era notes, these costs "should not obscure the President's one huge success in the Court fight—the legitimation of a vast expansion of the power of government in American life."[158]

The public debate surrounding the Court-packing plan placed undeniable pressure on the Court in the late winter and spring of 1937. More than twenty-five bills regulating the Court were introduced in Congress between January 8 and May 20, 1937.[159] Justice Owen Roberts, the Justice whom many conventional accounts of the crisis identify as switching his views in 1937, recalled years later, in testimony before the Senate, "the tremendous strain and the threat to the existing Court, of which I was fully conscious."[160]

VIII. The Postwar Period: *Brown v. Board of Education* and the Warren Court

The middle decades of the twentieth century witnessed revived debates about the role of the Court in American public life, its ability to protect individual rights, and the relationship between the federal courts and state officials, particularly in the context of the civil rights movement.

In the wake of *Brown v. Board of Education*,[161] in which the Court unanimously held that racial segregation in public schools was unconstitutional, some southern officials challenged the authority of the Court's decisions on issues concerning African-Americans' civil rights under the

Fourteenth Amendment, and school desegregation in particular. Some southern state legislatures passed "interposition" resolutions asserting that a given issue—typically, public education—was within the exclusive control of the state.[162] In 1956, nineteen senators and seventy-seven congressmen, all from former Confederate states, signed onto a document titled "The Declaration of Constitutional Principles," but which became known as the "Southern Manifesto."[163] Such efforts at blocking the implementation of the Court's decisions explicitly borrowed from eighteenth- and nineteenth-century theories of state sovereignty associated with James Madison and John C. Calhoun, among others.[164]

The reaction against the *Brown* decision sparked a number of proposals for constitutional amendments. Among the amendments presented to Congress by various state legislatures were the following:

- An amendment making the Senate the final appellate court with power to review decisions of the Supreme Court in cases "where questions of the powers reserved to the States, or the people, are either directly or indirectly involved and decided, and a State is a party or anywise interested in such question."[165]
- An amendment setting term limits for federal judges and revising the method of selecting them.[166]
- A procedure according to which if one-fourth of the states disapproved of a decision by the Court that weakens states' rights, the decision would be rendered null unless three-fourths of the states approved it.[167]
- A proposed "Court of the Union" drawn from judges of state supreme courts, with the power to review decisions of the Supreme Court with respect to "the rights reserved to the States or to the people" by the Constitution.[168]
- An amendment reserving to the states "the right to sole, and exclusive jurisdiction of public-school systems in the separate States."[169]

None of these proposed amendments came to pass. But they demonstrate the broad range of Supreme Court reforms that have been proposed from across the political spectrum by critics of its decisions, its procedures, and, in some cases, its authority. In response to continued and frequently violent southern resistance to federal-court decisions that sought to dismantle racial segregation, the Court explicitly claimed the mantle of judicial supremacy. "The major act of the Supreme Court, in the ten years after *Brown*, was defending its newly self-appointed role as 'ultimate interpreter of the Constitution' in *Cooper v. Aaron*."[170] *Cooper* was a 1958 case in which the Court held that Arkansas officials were bound by federal-court orders mandating desegregation in public schools.[171] The joint opinion, authored by all nine justices, stated that the Supremacy Clause of the Constitution made the Court's decisions binding on every state, overriding any state laws to the contrary.[172] The Court's decision in *Brown* could "neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation," the Court wrote.[173]

Under Chief Justice Earl Warren's tenure from 1953 to 1969, the Court became a focus of public debate because "it displayed a willingness to confront a host of important issues head-on and become, in important ways, a significant agenda setter for domestic policy."[174] For some observers, the Warren Court stood for the protection of civil rights and civil liberties, including

the rights of criminal defendants as well as due process rights within the administrative state. Others took a more skeptical view, warning of the risks that judicial activism might pose when pitted against policies adopted by the people's elected representatives. An "Impeach Earl Warren" movement, led by several newly formed right-wing groups, placed advertisements and planted billboards throughout the U.S.[175]

The Court was met with unusually sustained and pointed criticism in response to a set of six cases that were argued together in November 1963 and decided in June 1964. Known collectively as "the Reapportionment Cases," the most prominent of which were *Reynolds v. Sims*[176] and *Lucas v. Forty-Fourth General Assembly of Colorado*,[177] the decisions effectively invalidated the apportionment of nearly every state legislature. Rather than allocating representatives by political subdivisions such as the county, the Constitution required a principle of "one person, one vote"—in other words, that any chamber of a state legislature must be based on equal population districts.

In response to these decisions, the House of Representatives passed a bill stripping the federal courts of jurisdiction over cases involving legislative apportionment. Members of Congress, led by Senator Everett Dirksen of Illinois, spearheaded a movement for a constitutional amendment overriding the Court's decisions. The effort ultimately fell short of the two-thirds of the states required under Article V of the Constitution to compel Congress to call a convention to propose amendments. "The newly reapportioned legislatures, after all, had no desire to return to the status quo ante the *Reapportionment Cases*."[178]

IX. Conclusion

As this historical overview demonstrates, debates about the proper role of the Supreme Court are as old as the Constitution. Though the focus of today's discussions is, appropriately, on current events and the immediate recent past, taking a longer view across 234 years of the Republic's existence allows for a deeper and more contextualized analysis of complex imperatives of text, structure, politics, and reform. The combination of these factors was present when the Constitution was drafted in 1787; when it was fundamentally reshaped through the Reconstruction amendments of 1865, 1868, and 1870; in the controversy between the President, Congress, and the judiciary over Court-packing in 1937; and in the civil rights struggles and victories of the 1950s and 1960s. The current debates require us to draw on the strengths and insights of these previous conflicts while also recognizing the distinctiveness of each moment across the history of the courts, the country, and the Constitution.

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[1] THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).
[2] *Id.* at 392, 394.
[3] PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 83 (2010).
[4] *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 154 (2018) (noting that although the *Federalist* essays "were not yet cloaked in national mystique, and were far from being deemed the authoritative constitutional commentary they would later become, as early as the spring of 1789 they enjoyed wide purchase"); see also MAIER, *supra* note 3, at 84 ("The series' reach and the number of people

who testified to its distinction expanded substantially after the spring of 1788, when the essays were collected and printed together in two volumes of some 600 pages (with Hamilton picking up over half the cost) . . . .")

[5] *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); MAIER, *supra* note 3; BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard Beeman, Stephen Botein & Edward C. Carter II, eds., 1987).

[6] *See* GIENAPP, *supra* note 4, at 4 (2018) ("The Constitution was born without many of its defining attributes; these had to be provided through acts of imagination.").

[7] *See generally* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911). *See also* Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 393 (2007) [hereinafter *The New Wheel in the Federal Machine*] ("The language of Article III, combined with the Madisonian compromise, had deliberately left a lacuna in the constitutional structure.").

[8] U.S. CONST. art. III, § 2, cl. 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

[9] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 (7th ed. 2015).

[10] Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY 13, 14 (Maeva Marcus, ed., 1992).

[11] *Id.* (alteration added) (footnotes omitted).

[12] *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 182–85 (2010) [hereinafter IDEOLOGICAL ORIGINS].

[13] An Act to Establish the Judicial Courts of the United States, Ch. 20, 1 Stat. 73 (1789).

[14] *See* Marcus & Wexler, *supra* note 10, at 27 (noting that "politics had a greater influence than the language of the Constitution on the decisions Congress made with regard to a new judicial system").

[15] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 201 (noting that "beginning in 1789, judicial power emerged as the focus of both practical and theoretical disputes about the nature of multilayered authority" in the American federal republic).

[16] Letter from James Madison to Samuel Johnston (July 31, 1789), *in* 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 491 (Maeva Marcus, ed., 1992) [hereinafter DHSC].

[17] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 186.

[18] Similar arguments for expansive federal jurisdiction continued to be made well into the nineteenth century, even as Congress declined to grant the full scope of decisional authority permitted by the Constitution. *See generally* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205 (2012).

[19] *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 5–8 (3d ed. 2005). In 1793, the Act was amended to require only one Justice, along with the district judge, to hold circuit court.

[20] In 1791, while riding circuit in Virginia, Justice James Iredell wrote to his wife Hannah of "a very rascally house where I had the misfortune to be obliged to put up on Saturday night" at which "a parcel of worthless young Fellows" were "sitting up drinking gaming & cursing & swearing all night." Letter from James Iredell to Hannah Iredell (Sept. 19, 1791), *in* 2 DHSC, *supra* note 16, at 210.

[21] *See* Kathryn Turner [Preyer], *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (1965).

[22] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 194–97.

[23] John Adams, Third Annual Message, Dec. 3, 1799, https://millercenter.org/the-presidency/presidential-speeches/december-3-1799-third-annual-message.

[24] Harper Judiciary Bill of 1800, *reprinted in* 4 DHSC, *supra* note 16, at 310, 317.

[25] On March 28, 1800, arguing against congressional Republicans' motion to postpone the bill's consideration, one Federalist congressman contended "that the close of the present Executive's authority was at hand, and from his experience, he was more capable to choose suitable persons to fill the offices than another." Turner, *supra* note 21, at 13.

[26] An Act to Provide for the More Convenient Organization of the Courts of the United States, Ch. 4, 2 Stat. 89 (1801).

[27] *See* IDEOLOGICAL ORIGINS, *supra* note 12, at 202-03 ("[T]he source of the conflict was political gain and power as well as ongoing and fundamental disagreement about just what the 'federal' in 'federal republic' was to mean, and what role the judiciary would play in that federal republic."); LINDA K. KERBER, FEDERALISTS IN DISSENT: IMAGERY AND IDEOLOGY IN JEFFERSONIAN AMERICA 136 (1970) ("Contrary to its subsequent reputation, the Judiciary Act of 1801 had been the subject of a full and responsible debate during the preceding session of Congress, and its terms represented an attempt to correct the inadequacies of the first Judiciary Act of twelve years before.").
[28] An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and For Other Purposes, Ch. 8, 2 Stat. 132 (1802).
[29] Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 36 THE PAPERS OF THOMAS JEFFERSON 165–66 (Barbara B. Oberg ed., 2009).
[30] Alexander Hamilton, *Remarks on the Repeal of the Judiciary Act*, NEW-YORK GAZETTE & GEN. ADVERTISER (Feb. 13, 1802), *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 523 (Harold C. Syrett ed., 1976).
[31] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[32] *Id.* at 176.
[33] *Id.* at 177–78.
[34] *See* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. OF POL'Y HIST. 6, 6 (2008); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004).
[35] The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.
[36] *Marbury*, 5 U.S. (1 Cranch) at 177.
[37] PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 134–35 (Paul Brest et al. eds., 7th ed. 2018).
[38] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803). Justice William Paterson wrote the opinion for the Court; Chief Justice Marshall had recused himself from hearing the case when it came before the Court, perhaps because he had heard the case when it was before his circuit court. *See* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 76 (2012).
[39] *Stuart*, 5 U.S. (1 Cranch) at 309.
[40] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1124–25 (2001).
[41] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 78 n.102 (1985).
[42] Letter from Chief Justice Marshall to Henry Clay (Dec. 22, 1823), *reprinted in* Ruth Wedgwood, *Cousin Humphrey*, 14 CONST. COMMENT. 247, 267-69 (1997).
[43] Act of Feb. 24, 1807, ch. 16, 2 Stat. 420.
[44] *See* William M. Wiecek, Murdock v. Memphis*: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, *in* ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 10, at 225–29.
[45] Carl B. Swisher, *The Taney Period, 1836-1864*, *in* 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 4 (2010).
[46] DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 280 (2007).
[47] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824).
[48] *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).
[49] Ch. 148, 4 Stat. 411 (1830).
[50] 30 U.S. (5 Pet.) 1 (1831).
[51] 31 U.S. (6 Pet.) 515 (1832).
[52] *See* RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS 116 (1987) (quoting the observations of William Wirt, attorney for the Cherokee Nation,

regarding "public considerations connected with the state of the country (particularly the open resistance of South Carolina), and the extremely ticklish predicament of Georgia").
[53] *See* HOWE, *supra* note 46, at 441.
[54] Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (James D. Richardson ed., 1898) ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.").
[55] *See* HOWE, *supra* note 46, at 441.
[56] *See* Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807-1837*, 12 MISS. VALLEY HIST. REV. 202 (1925).
[57] *Id.* at 210 ("Extension of the circuit courts was delayed until 1837 because it entailed a decision as to the permanent structure of the whole judiciary upon which all parts of the country could not agree.").
[58] *Id.* at 226; HOWE, *supra* note 46 at 441 ("All five of [President Jackson's] last round of appointees came from the slave states . . . .").
[59] HOWE, *supra* note 46, at 441.
[60] Act of Mar. 3, 1837, ch. 34, 5 Stat. 176. The Act is also known as the Eighth and Ninth Circuits Act.
[61] *See* Swisher, *supra* note 45, at 62–65.
[62] Nettels, *supra* note 56, at 225.
[63] *The Supreme Court of the United States*, 1 U.S. MAG. & DEMOCRATIC REV. 143, 143 (1838).
[64] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).
[65] U.S. CONST. amend. XIII.
[66] U.S. CONST. amend. XIV; FONER, *supra* note 64, at xix.
[67] U.S. CONST. amend. XV.
[68] 60 U.S. (19 How.) 393, 403, 404 (1856); *see also* Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 322 (1978) ("Only one thing was absolutely certain. Dred Scott had lost his eleven-year legal battle for freedom in the last court of appeal. Seven of the nine justices agreed that at law he was still a slave.").
[69] *Dred Scott*, 60 U.S. (19 How.) at 407. On Taney's misuse of Founding-era history, see MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 131 (2018) (noting, in a monograph documenting the ways in which free Black Baltimoreans seized rights in the courtroom and in everyday life, that "Chief Justice Taney concluded that only those who had been citizens of the individual states at the time of the Constitution's adoption could be citizens of the United States. To reach this decision, he set forth his own view of history").
[70] Frederick Douglass, The Dred Scott Decision: Speech, Delivered, in Part, at the Anniversary of the American Abolition Society, Held in New York, May 14th, 1857, *in* TWO SPEECHES BY FREDERICK DOUGLASS 25, 31–32 (1857), https://www.loc.gov/resource/mfd.21039/?sp=25.
[71] Speech at Springfield, Ill. (June 26, 1857), *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 398, 401, 404 (Roy P. Basler ed., 1953).
[72] First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).
[73] CROWE, *supra* note 38, at 133.
[74] *See* WHEELER & HARRISON, *supra* note 19, at 12.
[75] *Id.*
[76] Act of July 15, 1862, ch. 178, 12 Stat. 576 (Eighth and Ninth Circuits); Act of Mar. 3, 1863, ch. 100, 12 Stat. 794 (Tenth Circuit). The Justices were David Davis of Illinois (Eighth Circuit), Samuel Miller of Iowa (Ninth), and Stephen Field of California (Tenth).
[77] Act of July 23, 1866, ch. 210, 14 Stat. 209.
[78] *See* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 27 n.44.
[79] William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969).
[80] *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (upholding jurisdiction-stripping legislation). *But see* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (invalidating jurisdiction-stripping legislation).

[81] *See* CROWE, *supra* note 38, at 132 ("Contrary to the view that the election of Abraham Lincoln and the ascendance of the Radical Republicans effectively resulted in a circumscribed and cowering Supreme Court, the events of the Civil War and Reconstruction empowered rather than dismantled the federal courts." (citations omitted)).
[82] *See* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
[83] *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.
[84] *See* Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.
[85] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
[86] Steffel v. Thompson, 415 U.S. 452, 464 (1974) (emphasis omitted) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928)).
[87] 83 U.S. (16 Wall.) 36 (1873).
[88] 92 U.S. 542 (1876). *See generally* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008).
[89] 92 U.S. 542.
[90] John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225, 234 (1974).
[91] *See* WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 273–74 (1982).
[92] Ch. 114, 18 Stat. 335.
[93] 109 U.S. 3 (1883).
[94] LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 164 (2015).
[95] *Id.*
[96] FRANKFURTER & LANDIS, *supra* note 86, at 86.
[97] Act of April 10, 1869, ch. 22, 16 Stat. 44.
[98] FRANKFURTER & LANDIS, *supra* note 86, at 60.
[99] WHEELER & HARRISON, *supra* note 19, at 16.
[100] CROWE, *supra* note 38, at 174.
[101] FRANKFURTER & LANDIS, *supra* note 86 at 60, 102.
[102] *See id.* at 82–83; WHEELER & HARRISON, *supra* note 19, at 16.
[103] Act of March 3, 1891, ch. 517, 26 Stat. 826.
[104] FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 29.
[105] WHEELER & HARRISON, *supra* note 19, at 18.
[106] *See id.*; FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 9, at 30 & n.67.
[107] FRANKFURTER & LANDIS, *supra* note 86, at 102.
[108] *Id.* at 101.
[109] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 517, 522 (1988); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512 (2002).
[110] *See generally* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992).
[111] Gillman, *supra* note 109, at 512.
[112] *See generally* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994).
[113] 156 U.S. 1 (1895). The case was also known as the "Sugar Trust Case."
[114] 157 U.S. 429 (1895).
[115] 158 U.S. 564 (1895).
[116] 198 U.S. 45 (1905) (invalidating a New York statute regulating bakers' working hours on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment).
[117] *See Roosevelt in 1912 The Cry in Denver*, N.Y. TIMES, Aug. 30, 1910, at 1.
[118] Theodore Roosevelt, *Judges and Progress*, OUTLOOK 40, 44 (Jan. 6, 1912).
[119] *See* ROSS, *supra* note 112, at 130–54.
[120] Theodore Roosevelt, A Charter of Democracy: Address Before the Ohio Constitutional Convention (Feb. 21, 1912).
[121] ROSS, *supra* note 112, at 144.

[122] JAMES CHASE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 105 (2004).
[123] SIDNEY M. MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 56 (2009).
[124] See also *infra* Chapter Four.
[125] Senate Historical Office, *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm.
[126] *A History of Supreme Court Confirmation Hearings*, NPR (July 12, 2009), https://www.npr.org/templates/story/story.php?storyId=106528133 (interview with Lucas Powe).
[127] Melvin I. Urofsky, *Brandeis, Louis Dembitz*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 98 (Kermit L. Hall, ed., 2d ed. 2005).
[128] Letter from President Woodrow Wilson to U.S. Senate (May 9, 1916), https://www.brandeis.edu/library/archives/exhibits/ldb-100/career/president.shtml.
[129] *See* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 180 (2009) ("Brandeis's take-no-prisoners approach to his public interest practice had something to do with [his opposition], too—as did raw anti-Semitism. He simply was not clubbable.").
[130] *Senate Rejects Judge John J. Parker for the Supreme Court*, U.S. SENATE: SENATE STORIES, https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm.
[131] *Id.*
[132] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (voiding the National Industrial Recovery Act of 1933); United States v. Butler, 297 U.S. 1 (1936) (voiding the Agricultural Adjustment Act of 1933).
[133] PROCESSES OF CONSTITUTIONAL DECISIONMAKING, *supra* note 37, at 602; *see also* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).
[134] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 113 (Sanford Levinson ed., 6th ed. 2005).
[135] WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 134 (1995).
[136] *Id.*
[137] ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 19 (1995).
[138] 300 U.S. 379 (1937).
[139] 301 U.S. 1 (1937).
[140] 301 U.S. 548 (1937).
[141] *See* LEUCHTENBURG, THE SUPREME COURT REBORN, *supra* note 135, at 177.
[142] *See* Kalman, *supra* note 133, at 1055.
[143] *Justice Van Devanter Retires*, LIBRARY OF CONGRESS (May 19, 1937), https://www.loc.gov/item/2016871705/.
[144] LEUCHTENBURG, *supra* note 135, at 157–58.
[145] WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 239 (1963) (quoting Henry Wallace).
[146] *Id.* at 156.
[147] *See* Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 293 (1988).
[148] MCCLOSKEY, *supra* note 134, at 113.
[149] LEUCHTENBURG, THE SUPREME COURT REBORN, *supra* note 135 at 156 (noting several respects in which "FDR lost the war").
[150] Kalman, *supra* note 133, at 1057.
[151] *Id.* at 1057 (quoting LEUCHTENBURG, *supra* note 135, at 157).
[152] *See* Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 316 (1937) (discussing, among others, proposals from the National Committee for Clarifying the Constitution by Amendment aimed at ensuring that "the right will be clear for the federal and the state governments to enact labor and social legislation in accordance with the needs of the complicated industrial and economic system today").
[153] JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 147 (1938).
[154] Kalman, *supra* note 133, at 1056.

[155] *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).
[156] BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 291 (1998).
[157] *Id.*
[158] LEUCHTENBURG, THE SUPREME COURT REBORN, *supra* note 135, at 161.
[159] *See* Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 58-59 (1992).
[160] Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (quoting *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. on Const. Amendments of the S. Comm. on the Judiciary*, 83d Cong. 9 (statement of J. Owen J. Roberts)).
[161] 347 U.S. 483 (1954).
[162] *See, e.g.*, Bush v. Orleans Parish Sch. Bd., 364 U.S. 500, 501 (1960) (rejecting the state of Louisiana's assertion that certain state statutes were valid because the state "has interposed itself in the field of public education over which it has exclusive control" (quotations omitted)).
[163] *See generally* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014) (noting that although the debates over the Southern Manifesto challenged the Court's authority, they also suggest widespread popular belief in judicial supremacy by 1956, two years before the Court's decision in *Cooper v. Aaron*, 358 U.S. 1 (1958), which scholars often identify as establishing judicial supremacy).
[164] *See* James Madison, Virginia Resolutions, Dec. 21, 1798, *in* 17 THE PAPERS OF JAMES MADISON 189 (David B. Mattern, J. C. A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (describing "the powers of the federal government" as "resulting from the compact, to which the states are parties" and stating that "in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the states who are parties there-to, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them").
[165] 103 CONG. REC. S12787 (daily ed. July 26, 1957) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).
[166] 103 CONG. REC. S10863 (daily ed. July 3, 1957) (Res. of the Leg. of Ala. to the S. Comm. on the Judiciary).
[167] 107 CONG. REC. S2154 (daily ed. Feb. 16, 1961) (Res. of the Leg. of Ark. to the S. Comm. on the Judiciary).
[168] 109 CONG. REC. S2071-72 (daily ed. Feb. 11, 1963) (Res. of the Leg. of Fla. to the S. Comm. on the Judiciary).
[169] 111 CONG. REC. S15769-70 (daily ed. July 7, 1965) (Res. of the Leg. of Miss. to the S. Comm. on the Judiciary).
[170] MCCLOSKEY, *supra* note 134, at 255.
[171] 358 U.S. 1 (1958)
[172] *Id.* at 18; *see* U.S. CONST. art. VI.
[173] 358 U.S. at 17.
[174] MCCLOSKEY, *supra* note 134, at 149.
[175] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 141 (2000).
[176] 377 U.S. 533 (1964).
[177] 377 U.S. 713 (1964).
[178] J.W. Peltason, *Reapportionment Cases*, *in* OXFORD COMPANION TO THE SUPREME COURT, *supra* note 127, at 826–27.