NOTES

The Other "Switch in Time": How the Opposition Changed the Debate Over the Court-Packing Plan and Won

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ABSTRACT

The conversion of the court-packing plan from a controversy over judicial efficiency and the modernization of legal interpretation into one about the rule of law and the integrity of the judiciary undermined the lobbying influence of organized labor and bolstered that of lawyers. Specifically, the alignment of labor organizations with the plan and the arguments made in support of it crystallized the opposition's claim that the plan was a political power grab by President Roosevelt. Furthermore, the inability of labor organizations to generate and maintain support for the plan contributed to the opposition being able to change the parameters of the debate over it. Meanwhile, the opposition was able to generate and sustain support largely from bar associations and legal professionals. The opposition was more successful because it was able to claim credibility over the constitutional issues the court-packing plan implicated. The combination of all these factors contributed to the parameters of the debate changing to topics more favorable to the opposition. This change, in effect, undermined the labor unions' lobbying power and bolstered the lawyers' opposition.

Any future attempt to increase the size of the Supreme Court should be mindful of the reasons the 1937 plan failed. Following the confirmation of Justice Brett Kavanaugh, some have openly raised the possibility of Democrats attempting to pack the Supreme Court. If they do, I predict the grounds on which the Democrats justify the plan and the organizational alignment on both

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I dedicate this work to my great-grandmother, Lillian Hathaway, who passed away at the age of ninety-six on April 27, 2018. She endured the Great Depression, lived through the implementation of the New Deal, and inspired me to take a legal history seminar about the New Deal. I am thankful for all the wonderful times I was able to spend with her, especially listening to her first-hand accounts of some of the most momentous events in twentieth-century American history.

sides of the issue will again play an important role in determining whether the plan is politically viable.

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INTRODUCTION

Much has been said about why the Judicial Procedures Reform Bill of 1937, known to most by its moniker, "the court-packing plan," failed. Many historians ascribe to the "Switch in Time to Save Nine" theory, which argues the plan failed because it was unnecessary after Justice Owen Roberts "flipped" in 1937 and the Supreme Court began to uphold important economic legislation.[1] This shift in jurisprudential outcomes began in March, when the Court upheld a

1. *See, e.g.*, JASON SCOTT SMITH, A CONCISE HISTORY OF THE NEW DEAL 130 (2014); MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR 430 (2002).

state minimum wage law[2] and continued in April, when the Supreme Court upheld the Wagner Act, and in May, when the Social Security Act was upheld.[3] Thus, the need for placing pro-New Deal Justices on the High Court waned. And as the need for the plan decreased, the Democrats in Congress lost their appetite to take on its continued political volatility, resulting in the bill's failure.

Another theory focuses on President Roosevelt's unwillingness to accept compromise court-packing proposals.[4] Specifically, this theory focuses on an expectation that Senate Majority Leader Joseph Robinson would be nominated to the Supreme Court as being a driving force for President Roosevelt continuing to press ahead with the court-packing plan and reject compromises.[5]

This note does not provide an exhaustive list of these theories. Among the theories that causally link an action or an event to the failure of the court-packing plan, few, if any, have assessed the effect of converting the court-packing debate from one about judicial efficiency and the desirability of the Court's rulings in 1935–1936 into one about the rule of law and the integrity of the judiciary. This note concludes that the effect of this conversion of the debate over the court-packing plan contributed to the demise of the plan. While different political issues may propel a modern-day court-packing plan, proponents could face a similar obstacle.

This note is divided into three parts. Part I assesses the organizational alignment on either side of the debate over the plan. The alignment of labor organizations on the affirmative side gave merit to the opposition's claim that the plan was a political power grab to support pro-New Deal interests, which in turn facilitated the conversion of the debate from one about judicial efficiency to one about the rule of law and the integrity of the judiciary. This note does not assert that the court-packing plan would have been more likely to pass but for labor's involvement. To the contrary, labor organizations were both an important constituent group of President Roosevelt and integral supporters in the early days of the plan. But their support came at a price. Conversely, the alignment of special interests—such as bar associations, individual lawyers, and legal academics—with the opposition increased the opposition's credibility on matters of constitutional law, which allowed it to alter the parameters of the debate.

Part II of this note highlights the inability of proponents to generate or sustain support for the Roosevelt Administration's justifications for the court-packing plan. President Roosevelt sought to center the affirmative side's reasoning on judicial efficiency and modernizing legal interpretation. But the proponents failed to accomplish this task. Instead, they were undisciplined and polarized their position through a series of labor strikes in 1937. The opposition, by contrast, more effectively generated and maintained support because its large cadre of lawyers

2. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 142 (1995).
3. *Id.*
4. *See generally* Barry Cushman, *Court-Packing and Compro*mise, 29 CONST. COMMENT 1 (2013).
5. *See id.*

could claim superior knowledge about the court-packing plan's constitutional dimensions.

In addition, labor's support decreased precipitously after the Supreme Court upheld the Wagner Act in April 1937, delivering on much of what the labor movement was after in the first place. Thus, the relatively lackluster support for the plan labor provided early on lost steam after the Supreme Court eliminated the incentive to lobby vociferously in support of the plan. On the other side, the opposition sustained support for its position from the time the Wagner Act was upheld until the court-packing plan was ultimately defeated in July 1937. In sum, the poverty of support for the plan resulted from the lack of consistent popular constitutional arguments and from the abrupt lack of need to change the composition of the Supreme Court after the Court upheld the Wagner Act.

Finally, Part III considers the possibility of a modern-day court-packing plan, especially following the contentious confirmation of Justice Brett Kavanaugh. The same factors that doomed the 1937 plan—the grounds on which the plan is justified and the organizational alignment in support of and opposition to the plan—are also at play today. But Democrats must overcome significant political hurdles before court-packing can become a viable option. Assuming Democrats are able to overcome these obstacles, however, this note proceeds to review how these two justifications (organizational alignment and sustaining support for the plan or the opposition) might shape the outcome of a modern-day plan.

I. ORGANIZATIONAL ALIGNMENT: WHO WAS INVOLVED IN LOBBYING FOR AND AGAINST THE COURT-PACKING PLAN?

The proposal to pack the courts in 1937 sparked an intense national debate. Input came from all parts of the country and from various types of organizations. The flood of constituent interest in the court-packing proposal caught some members of Congress off-guard.[6] Senator Hugo Black received so many letters about court-packing from his constituents in Alabama that the collection of his papers at the Library of Congress divides these letters into several folders based on whether the letter voices support for or opposition to the plan and the Alabama county in which the author of the letter lived.[7] These letters illustrate the level of grassroots interest in the plan and that it was a controversial issue that would place the spotlight on members of Congress.

Although, ultimately, lawyers were able to unite and overpower the lobbying efforts of labor unions, that outcome was not apparent at the plan's inception. In 1930, approximately 3,401,000 workers belonged to a labor union.[8] By 1940, that

6. LEUCHTENBURG, *supra* note 2, at 134–35.

7. *See* Hugo Lafayette Black Papers (on file with the Library of Congress, boxes 134–35, 137–38).

8. GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23 (2004).

amount swelled to 8,717,000.[9] By contrast, there were only 139,059 lawyers in 1930 and 181,220 in 1940.[10] Labor groups also entered the debate much more united than lawyers, as demonstrated by their unwavering support for President Roosevelt's 1936 reelection.[11] The American Bar Association ("ABA"), by contrast, was divided over New Deal policy.[12]

Yet, the alignment of labor groups gave opponents of the plan the opportunity to convert the debate from one about judicial efficiency and the desirability of the Court's rulings in 1935–1936 into one about the rule of law. Although labor attempted to make populist constitutional arguments in favor of the plan, the alignment of lawyers with the opposition gave opponents greater credibility as constitutional interpreters.[13] In addition, the alignment of lawyers with the opposition allowed opponents to convert the debate into one about the rule of law and the integrity of the judiciary. This undermined the lobbying power of organized labor and bolstered that of lawyers.

A. Supporters

President Roosevelt scored an enormous victory in the presidential election of 1936, winning the electoral votes of all but two states.[14] In addition, Democrats increased their already large majorities in both congressional chambers, further increasing President Roosevelt's ability to move his New Deal agenda through Congress.[15] The problem, however, was that the Supreme Court continued to halt this agenda through court rulings, reaching an apex in 1936.[16] Landslide victories in the recent presidential election gave Roosevelt the mandate he needed to drive the New Deal forward. Indeed, Roosevelt threatened to pack the Court, at least in part, because he was concerned the Supreme Court would continue to strike down fundamental parts of the New Deal.[17]

Polling data prior to and shortly after the plan's proposal in February 1937 shows that supporters faced an uphill battle convincing Congress. An autumn 1935 Gallup Poll, which asked if the respondent favored curtailing the power of the Supreme Court to deem acts of Congress unconstitutional, yielded the following results: 31% responded "yes," 53% responded "no," and 16% had no

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9. *Id.*

10. AMERICAN BAR ASSOCIATION, ABA NATIONAL LAWYER POPULATION SURVEY (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf [https://perma.cc/X6SW-GTZ7].

11. *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 424 (2010).

12. *See* Norbert C. Brockman, *The History of the American Bar Association: A Bibliographic Essay*, 6 AM. J. LEGAL HIST. 269, 276–78 (1962).

13. *See* MCKENNA, *supra* note 1, at 311.

14. LEUCHTENBURG, *supra* note 2, at 108.

15. *See* PARTY DIVISIONS OF THE HOUSE OF REPRESENTATIVES, http://history.house.gov/Institution/Party-Divisions/74-Present/ [https://perma.cc/KGT6-9U5U] (last visited Apr. 4, 2018); Party Division, https://www.senate.gov/history/partydiv.htm [https://perma.cc/RJ9U-EDJN] (last visited Apr. 4, 2018).

16. *See* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's Court-Packing Plan*, 1966 SUP. CT. REV. 347, 381–82 (1966).

17. *See* LEUCHTENBURG, *supra* note 2, at 109.

opinion.[18] Following Roosevelt's victory, most of the weekly polls in the plan's early days showed an even split: 45% in favor, 45% against, and 10% undecided.[19] Despite the spike in support, there is some skepticism whether this poll represented public support for the plan itself or if the plan's increased popularity was riding Roosevelt's coattails after the resounding 1936 victory.[20] At least equally important were the results of an informal poll of Senators taken in February 1937, which showed that "thirty-two favored the proposal, twenty-eight were opposed, [and] thirty-five [were] uncommitted."[21] As the poll results show, the battleground for support was in the Senate, because "[n]inety percent of the public was on record, while only sixty-three senators took a definite stand."[22]

Despite the victory in 1936 and a slight advantage in the early polling, the Roosevelt Administration knew it needed strong support from its base to convince undecided Democrat Senators to support the plan and to have enough votes in both chambers of Congress for it to become law. Before announcing the plan, Roosevelt turned to labor, one of his strongest constituencies, for assistance, even before briefing some of his closest advisers on the plan.[23] Attorney General Homer Cummings recounts that President Roosevelt met with labor leaders John Lewis of the Congress of Industrial Organizations ("CIO") and Charlton Ogburn, legal counsel for the American Federation of Labor ("AFL").[24] Ogburn's accounts describe meetings about the plan with Roosevelt in late-December 1936 and January 1937.[25] President Roosevelt held these meetings with labor leaders before he briefed Felix Frankfurter, one of his primary legal advisors, on the contents of the plan.[26]

Roosevelt knew the importance of having labor organizations on his side because of the "religious zeal" with which they campaigned for him in 1936.[27] Labor unions viewed the 1936 presidential campaign as a "crusade, its aim nothing short of deliverance . . . from starvation wages, endless workdays, [and] inhuman conditions."[28] But Roosevelt needed to convince labor leaders that the court-packing plan was the source of deliverance for which their members had been looking: deliverance from a Supreme Court whose goals were not aligned with theirs.[29]

The involvement of labor in the early days of the plan is indisputable. Although Roosevelt had already received word from the AFL and CIO that they would endorse the plan prior to its announcement, the AFL formally endorsed it

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18. *Id.* at 94.
19. MCKENNA, *supra* note 1, at 339.
20. *Id.*
21. *Id.*
22. *Id.* at 339–40.
23. *Id.* at 273–74.
24. *Id.*
25. *Id.* at 274.
26. *Id.*
27. SHESOL, *supra* note 11, at 424.
28. *Id.*
29. *Id.* at 424–25.

on February 17, 1937.[30] The Labor Non-Partisan League, which had been established in 1936 to bring together various factions of the labor movement to support Roosevelt, "sent letters to every member of Congress expressing the group's expectation that every friend of labor would get behind the plan."[31] Still, galvanizing support for this message proved challenging. But at least some factions of labor were receptive. Among them were railroad brotherhoods, who knew firsthand the Supreme Court had stood in the way of labor's interests.

Although the job was dangerous, other working men and members of the middle class envied railroad workers for holding a job that was often highly skilled and perceived as a romantic profession involving travel to faraway places.[32] Yet, rail workers, especially younger ones, suffered during the Great Depression.[33] The combination of seniority rules in the rail industry and the sharp decrease in the demand for rail labor meant young workers were the first to be released when the Depression hit.[34] In 1934, President Roosevelt signed the Railroad Retirement Act, which "required [rail] carriers to contribute 4 percent of their payrolls to a common pension pool for more than two million railway workers, past and present, and assessed employees 2 percent of their wages."[35] The purpose of the legislation was to encourage older workers to retire and collect a pension to allow younger workers to remain employed in the rail industry.[36] However, the Supreme Court would have none of it.[37] A five-vote majority, consisting of the "Four Horsemen" and Justice Owen Roberts, struck down the law with an opinion that was criticized for its antiquated view of the nature of the employee-employer relationship.[38]

Unsurprisingly, railroad workers believed the court-packing plan was a means to relief from their undesirable condition during the Depression, because the Supreme Court had stood in the way of allowing for needed reform to their industry. J.H. Keeler, President of the New York, New Haven, & Hartford Railroad Veterans Association, had firsthand knowledge of this reality, and he supported the plan.[39] Keller also criticized the Republican "majority" on the Supreme Court for standing in the way of President Roosevelt, who he referred to as "the most humane President we [have] ever had."[40]

The Railroad Employés National Pension Association ("RENPA") expressed a similar belief that the court-packing plan provided critical aid in a letter to

30. SHESOL, *supra* note 11, at 329; *see also* MCKENNA, *supra* note 1, at 274.
31. SHESOL, *supra* note 11, at 329.
32. LEUCHTENBURG, *supra* note 2, at 27.
33. *Id.* at 29–31.
34. *Id.*
35. *Id.* at 32.
36. *See id.* at 32–33.
37. Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935).
38. LEUCHTENBURG, *supra* note 2, at 34–39.
39. Letter from John H. Keeler to Sen. Hugo Black (Mar. 25, 1937), *in* Hugo Lafayette Black Papers, *supra* note 7, box 138.
40. *Id.*

Senator Black in March 1937.[41] In a resolution supporting the plan, RENPA credited Roosevelt with "sav[ing] the nation from chaos and revolution . . . and . . . progress[ing] its affairs toward full recovery."[42] RENPA also agreed with Roosevelt's pitch to unions, that their relief could come only if the Supreme Court could be stopped from striking down his New Deal agenda. Opining on the state of affairs in the United States, RENPA notes that "[f]orty million people of these United States are in dire poverty—without means of existence except what may come to them through relief."[43] And RENPA paints the Supreme Court as a group of nine men standing in the way of providing much needed aid to those living in poverty, stating that "[the poor] are denied the right to enjoy life, liberty and happiness because of the viciousness of the justices of the Supreme Court in declaring acts of Congress unconstitutional, which acts tended to promote the economic and social betterment of the people."[44] To help the poor, the "viciousness of the justices of the Supreme Court" needed to be tamed, and, in the opinion of RENPA, the court-packing plan was a way to accomplish that task.[45] The letter's arguments exemplify the popular constitutionalism embraced by court-packing's proponents.

Private-sector labor groups like RENPA, who stood to benefit from the creation of the National Labor Relations Board ("NLRB") through the Wagner Act, were not the only labor organizations to endorse the court-packing plan. Charl Ormond Williams of the National Education Association ("NEA"), a public-sector union that did not stand to benefit from the creation of the NLRB, also endorsed the plan.[46] Although she spoke only for herself, Williams implicitly tied passage of the court-packing plan to a belief in a compulsory retirement age for teachers, and that such a principle prevents the use of "ancient formulas" to solve modern problems.[47]

Although labor groups and leaders played a crucial role in advocating the plan, they were not its only supporters. Although more of the law school faculty and administrators who testified before the Senate Judiciary Committee were opposed, the plan did receive significant support from some legal scholars.[48] Prominent academics like Dean James Landis of Harvard Law School, Dean Wiley Rutledge of the University of Iowa Law School, and Dean Charles Clark

41. *See* Letter from Railroad Employés National Pension Association to Sen. Hugo Black (Mar. 12, 1937), *in* Hugo Lafayette Black Papers, *supra* note 7, box 138.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*

46. *See* Letter from Charl Ormond Williams to Douglas Lurton (Feb. 19, 1937), *in* Charl Ormond Williams Papers (on file with Library of Congress, box 4).

47. *Id.*

48. Kyle Graham, *A Moment in The Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151, 159 (2002).

of Yale Law School supported the plan.[49] The Administration welcomed the support of those who were in academia, but if the scholar was not a lawyer, the Administration made note of it, presumably viewing it as a shortcoming.[50] The Administration understood that convincing legal scholars to testify in support of the plan before Congress would add credibility and would be a way to push back against the arguments from opponents that it was a political power grab dressed up as a bill to provide meaningful reforms to the judiciary. Thomas Corcoran and his assistant Milton Katz understood this and actively worked behind the scenes to convince legal scholars to testify in favor of the plan.[51] Although some in legal academia defended it, a majority of law professors called as witnesses to testify at congressional hearings and a majority of legal professionals bombarded the Roosevelt Administration in opposition.[52] And this bombardment of legal academics clearly influenced members of Congress because "[p]oliticians considered law professors to be among the plan's most compelling critics."[53]

Corcoran and Katz's recruitment efforts suggest proponents felt like they were short on credibility. Even with labor united, the Administration feared that it may not have the legal credentials on its side to maintain the debate as one about judicial efficiency and modernizing legal interpretation to address the present-day needs of citizens. For sure, the Administration needed labor on its side to have the manpower to lobby for the plan. Yet, lobbying did little to magnify the Administration's constitutionalist reasoning because the opposition simply had greater success claiming superior legal credentials. Moreover, the opposition better communicated this message to Congress through its own well-supported lobbying effort, led by groups like the ABA and with the help of legal academics who testified at congressional hearings.[54] Thus, the opposition was able to convert the debate into a topic less favorable to the Administration's position because lawyers, most of whom opposed the plan, were perceived as having greater credibility on matters of constitutional law and the judiciary.[55]

49. *See* Letter from George Creel to Ralph E. Jenney (Mar. 11, 1937), *in* Thomas G. Corcoran Papers (on file with Library of Congress, box 638); Telegram from Irving Brant to Thomas G. Corcoran (Mar. 12, 1937), *in* Thomas G. Corcoran Papers, *supra*, box 638.

50. Telegram from Irving Brant, *supra* note 49.

51. DAVID MCKEAN, TOMMY THE CORK 93–94 (2004).

52. *See* Graham, *supra* note 48, at 159; MCKENNA, *supra* note 1, at 311–14. However, although the ABA and a majority of the legal profession opposed the plan, and the majority of legal academics *who testified* at congressional hearings spoke in opposition, evidence suggests majority support for the plan among legal academics overall. *See* Graham, *supra* note 48, at 157–58. But this sentiment was not that of the vast majority of legal academics that testified before the Senate Judiciary Committee. *See id.* at 159. And, notably, the "[p]oliticians considered law professors to be among the plan's most compelling critics." *Id.*

53. Graham, *supra* note 48, at 159.

54. *See id.*; MCKENNA, *supra* note 1, at 311–14.

55. *See* MCKENNA, *supra* note 1, at 311.

B. Opponents

The opposition to the court-packing plan had a credibility advantage because its most prominent constituency groups were bar associations. Unlike labor groups, bar associations had the advantage of perceived legal expertise, which allowed them to more successfully claim credibility for their position on the plan. Thus, although the proponents made arguments centered on popular constitutionalism, lawyers' arguments on constitutional interpretation were naturally better received. This credibility advantage allowed the opposition to convert the debate from one about judicial efficiency and modernizing interpretation into one about the threat to the rule of law, an argument more favorable to the opponents' position.

Historian Henry Steele Commager observed that the legal profession was a "force for conservatism" and that its influence was "pervasive, and so powerful."[56] He notes that "[t]he law school, like the constitutional lawyer, is an American institution" and that "in no other country . . . have lawyers occupied a comparable position or a comparable role."[57] Thus, unsurprisingly, the legal profession argued in defense of an independent judiciary, and their vociferous opposition was salient in the minds of members of Congress and those of the voting public.[58]

On the national level, the legal professionals led the charge for the opposition. In a referendum, ABA members "voted seven-to-one against the [court-packing plan], and twenty-five thousand lawyers who were not members voted four-to-one against."[59] With the support of members and non-member lawyers alike, the ABA pounced, creating a committee to "coordinate opposition activities."[60] In addition, the ABA provided volunteer lawyers and established an office in Washington, D.C. to make sure Congress heard the bar's opposition.[61] With encouragement from Senator Edward Burke, the ABA turned this group into a "permanent research staff for Congress," consisting of "[s]enior partners and some of the brightest young men from the country's largest law firms."[62] These lawyers "supplied the opposition with valuable ammunition for use in the . . . Senate hearings."[63] The ABA also financed the use of radio advertisements to

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56. MCKENNA, *supra* note 1, at 311.

57. *Id.*

58. *See, e.g.*, Graham, *supra* note 48, at 159 (stating that "[p]oliticians considered law professors to be among the plan's most compelling critics"); MCKENNA, *supra* note 1, at 311 (noting the "pervasive and powerful" influence of the legal profession, and, at the time of the New Deal, that the bar was "a force for conservatism"). Importantly, the "[t]estimony by opposition witnesses in the hearings before the Senate Judiciary Committee helped solidify the negative response [to the court-packing plan]." *Id.* at 381.

59. MCKENNA, *supra* note 1, at 313–14.

60. *Id.* at 314.

61. *Id.*

62. *Id.*

63. *Id.*

broadcast their opposition and featured influential Democrat Senators on the Judiciary Committee who opposed the bill in its advertising campaign.[64]

Some legal academics also supported the national campaign against the court-packing plan. Of the approximately eighty witnesses who testified regarding the plan at the Senate Judiciary Committee hearing, approximately one-fifth of them were legal academics.[65] Of the legal academics who testified, all but two were opposed.[66] This opposition to the plan included prominent law school administration officials, including Dean Young B. Smith of Columbia University Law School and Dean Henry Bates of the University of Michigan Law School.[67]

At the state level, state and local bar associations generated grassroots opposition to the plan. The ABA sent notices to members of Congress, boasting that all state bar associations voted against it in referenda they held.[68] Indeed, within the state bar associations, the opposition to the plan was overwhelming.[69] With both the bar and some of the academy lined up against it, the opponents had on their side the two influential pillars of the uniquely American institution of law that Henry Commager described as a "pervasive" and "powerful" force.[70]

Lawyers used both their credibility and unity to reframe the debate around the rule of law. The opposition succeeded in making arguments that focused on two themes: (1) maintaining the separation of powers system by protecting the independence of the judiciary; and (2) the lack of historical precedent for President Roosevelt's maneuver.[71] And those themes both aimed to protect the structural integrity and independence of the judiciary.

Overall, public opinion suggests that Americans favored the existing constitutional order, which included an independent judiciary.[72] However, if forced to decide between protecting the Supreme Court's "structural integrity" and expanding the powers of the federal government to address economic hardship, the American people's choice is unclear.[73] But Americans were not forced to choose during the court-packing plan debate, because the Supreme Court issued multiple rulings between March and May 1937 that allowed for economic reform legislation.[74] After the Court upheld the Wagner Act, opposition to the court-packing

64. *Id.* at 313.

65. *See* Graham, *supra* note 48, at 159.

66. *Id.* Although the opposition from legal academics was the position made visible to Congress through the hearings, most legal academics, in fact, supported the plan. *See id.* at 157–58.

67. *Id.*

68. Letter from Frederick H. Stinchfield, President of the American Bar Association, to Sen. Hugo Black (Mar. 20, 1937), *in* Hugo Lafayette Black Papers, *supra* note 7, box 136 (summary of referendum vote by states of members of the American Bar Association).

69. *See id.*; MCKENNA, *supra* note 1, at 311.

70. MCKENNA, *supra* note 1, at 311–14.

71. *See, e.g.*, *id.* at 396–403.

72. *See* Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1150 (1987).

73. *See id.*

74. *See* LEUCHTENBURG, *supra* note 2, at 142.

plan increased sharply.[75] This swing in public opinion occurred, at least in part, because the public, satisfied with the Court's recent decisions on economic reform legislation, began to prioritize protecting the structural integrity of the judiciary.[76] Polling suggests the public viewed the court-packing plan as an attack on the judiciary's structural integrity and contrary to the constitutional order.[77]

The opponents could sustain support for their position because their "need" argument remained constant. That is, the "need" to defend the judiciary remained constant during the entire debate over the plan. Although the "need" argument remained constant for the opponents, it did not stay the same for the supporters. As the Supreme Court began to reverse course on economic reform legislation in March 1937, the perceived need for the court-packing plan decreased, which directly benefited the opposition.[78] Thus, having a constant "need" argument, combined with credible and well-funded support from the American Bar Association, allowed the opposition to sustain and later grow the support for its position during the debate over the plan.

Not only did the opposition make popular arguments, they also had the most credible people making them. Although the opposition, like the supporters, had individuals from an array of backgrounds providing testimony, the number of legal academics arguing in opposition to the plan in congressional hearings substantially outweighed the number of those arguing in favor.[79] This imbalance provided the opposition with not only greater credibility, but also witnesses who provided a "dispassionate logic" that was appreciated by members of the Judiciary Committee.[80] Academics such as Professor Erwin Griswold of Harvard Law School and Dean Young B. Smith of Columbia Law School provided sober advice to the Judiciary Committee, advising its members that Roosevelt's plan lacked historical precedent in the American constitutional system and that it would allow the Executive Branch to usurp the independence of the judiciary.[81]

Although plan proponents initially fielded a larger team of supporters and lobbyists, the opponents were better able to claim credibility as constitutional interpreters and were more unified. These advantages of the opponents promoted their success and allowed them to convert the debate from one about judicial efficiency and popular constitutionalism into one about the rule of law and the integrity of the judiciary.

75. Caldeira, *supra* note 72, at 1148.
76. *See id*. at 1150.
77. *See id*.
78. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
79. *See* Graham, *supra* note 48, at 159; MCKENNA, *supra* note 1, at 394.
80. MCKENNA, *supra* note 1, at 402.
81. *See id*. at 396–403.

II. DISORGANIZATION AND DISUNITY: THE DEMISE OF PRESIDENT ROOSEVELT'S COURT-PACKING PLAN

From the time President Roosevelt announced the court-packing plan, he hoped that members of Congress and the voting public would perceive the bill as an attempt to recreate the judiciary with a modern approach to the problems that faced Americans, especially during a crisis like the Great Depression. Looking back on the court-packing fight in 1941, Roosevelt insisted that "[t]ime and again during the fight, I made it clear that my chief concern was with the objective—namely, a modernized judiciary that would look at modern problems through modern glasses."[82]

However, the way in which Roosevelt made this modernization argument changed. Roosevelt began the debate by casting "modernization" as a matter of ameliorating "congested court dockets" and diluting the influence of old judges with an infusion of young blood to the federal judiciary.[83] Roosevelt soon realized this approach was ineffective and changed course.[84] He recast "modernization" as a matter of popular constitutionalism by framing the debate around one simple claim: that the judiciary twisted the Constitution to thwart New Deal policies that mattered to his constituency.[85] However, Roosevelt's adjustment came too late.[86] The Roosevelt Administration's vacillation over how to frame the debate conveyed a lack of direction that undermined the plan's lobbying campaign as well.

Roosevelt's lack of direction created a void that allowed the opposition to convert the debate over the court-packing plan from a controversy over judicial efficiency and the desirability of the Court's rulings in 1935–1936 into one about the rule of law and the integrity of the judiciary in two ways: First, the lack of direction contributed to labor exhibiting poor discipline during the debate. This lack of discipline is best demonstrated by the massive labor strikes that occurred in 1937. The strikes and the Administration's lack of response made the opposition's "rule of law" argument more appetizing. Second, the lack of direction complicated labor's ability to rally around the plan and sustain support for it. Taken together, the Roosevelt Administration's lack of direction, labor's lack of discipline, and the Supreme Court's decision to uphold the Wagner Act in April 1937 produced an opening that allowed the opposition to transform the debate over the court-packing plan from one about the modernization of legal interpretation into one about the rule of law and the judiciary's integrity. Overall, these factors culminated in a defeat of the plan.

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82. Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan*, 113 PUB. CHOICE 301, 314 (2002).

83. *See* SHESOL, *supra* note 11, at 367.

84. *See id.* at 368.

85. *See id.*

86. *See id.*

A. *The Administration's Lack of Direction and Labor's Lack of Discipline*

President Roosevelt adhered to his underlying belief that the court-packing bill should be about a modernized approach to the law.[87] To do so, Roosevelt determined the bill needed to include a provision that added a new Justice due to the old age of a present Justice.[88] Roosevelt rejected various compromise bills proposed by skeptical Senators.[89] The compromises, he believed, did not comport with his principles concerning the modernization of the judiciary.[90]

Despite communicating this supporting principle to his inner circle, Roosevelt was unable to articulate it to members of Congress and voters in the earliest days of the plan.[91] Early on, Roosevelt remained steadfast in articulating this message by depicting to his audience a Supreme Court with "congested court dockets and aged justices refusing to hear important cases."[92] But this argument did not make sense to many people. Roosevelt's opponents quickly pounced and pointed out that there had been many accomplished individuals who remained sharp into their old age.[93] Although Roosevelt did create a scare about the age of the Justices, this argument was not strong enough to overcome the onslaught of criticism.[94]

Roosevelt was also criticized for contradicting himself. In a four-year period, Roosevelt appointed nine men over sixty years of age to the federal bench, and he appointed sixty-eight-year-old Robert Williams to the Tenth Circuit Court of Appeals after announcing his court-packing plan.[95] Finally, Roosevelt's argument that the court dockets were "congested" never rallied his base, and this argument was all but torpedoed when Chief Justice Charles Evans Hughes' testimony, which rebutted Roosevelt's claim about the Supreme Court's efficiency, was read to the Senate Judiciary Committee.[96]

Roosevelt's closest advisors, including Robert Jackson, urged him to change course. From the day he announced the plan, these advisors urged Roosevelt to

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87. *See* Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089, 2091 (2013).

88. *See id.* at 2093.

89. *See generally* Cushman, *supra* note 4.

90. *See id.* at 8–9.

91. In fact, Thomas Corcoran, a prominent Roosevelt Administration official who was involved in lobbying for the court-packing plan, later described the plan as being "bungled from the start" and criticized the Administration for a lack of "adequate communication between the executive offices and congressional leaders." MCKENNA, *supra* note 1, at 391.

92. SHESOL, *supra* note 11, at 367.

93. LEUCHTENBURG, *supra* note 2, at 138.

94. *See, e.g.*, Letter from Jensen and Jensen, Lawyers, to Associate Justice George Sutherland (Feb. 28, 1937), *in* George Sutherland Papers (on file with Library of Congress, box 4). In this letter to Justice Sutherland, the authors, who are lawyers, implore Justice Sutherland and "the other justices who are 70 years of age and over" not to retire. *Id.*

95. MCKENNA, *supra* note 1, at 389–90.

96. LEUCHTENBURG, *supra* note 2, at 140–41.

simplify his argument and to base it on the "fighting issues."[97] Jackson, in particular, urged Roosevelt to make the case that the goal of the plan was to "make the court a contemporary and nonpartisan institution" and to save the American people from conservative Justices who had "gone out of their way" to "twist[] the meaning of the Constitution."[98] Thus, Jackson and other advisors wanted Roosevelt to make the case that the court-packing plan would allow him to modernize legal interpretation which, in their view, would recreate the Court as a "contemporary and nonpartisan institution."[99] Three weeks into the fight, Roosevelt agreed to change course, but the time he wasted on his original justification damaged the plan's likelihood of success.[100]

Without direction or intervention from the Administration, labor strikes exploded across the country, and these strikes were affiliated with the court-packing plan. When the strikes broke out, the Administration did nothing to stop them, stating it was a local law enforcement issue.[101] The labor strikes negatively affected the plan because it crystalized the opposition's fears of rule by a tyrannical majority and a concentration of economic power. Roosevelt may have been able to end or lessen the effect of these strikes if he had intervened, but he opted against intercession.[102]

According to the Bureau of Labor Statistics, the total number of strikes increased by 118% from 1936 to 1937.[103] The strikes reached their height in March 1937, totaling 614.[104] The number of strikes remained around that amount per month through June, before decreasing to 472 in July.[105] In total, the year 1937 featured 4,740 strikes involving 1,860,621 workers.[106] These strikes, which at times turned violent, were in response to undesirable labor conditions and workers' collective bargaining rights.[107]

Although the strikes may have stemmed from workers' demands for better conditions and collective bargaining rights, the strikes were very closely associated with the court-packing plan and general anger towards the Court for being unfriendly to labor. Morris Ernst, a founder of the American Civil Liberties Union, observed, "[w]e are either going to get out of this mess by a change in the Court or with machine guns on street corners."[108]

97. SHESOL, *supra* note 11, at 368.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 424.
102. *See id.*
103. BUREAU LAB. STAT., ANALYSIS OF STRIKES IN 1937, at 1 (1938), https://www.bls.gov/wsp/1937_strikes.pdf [https://perma.cc/ARH8-47BA].
104. *Id.* at 3.
105. *Id.*
106. *Id.* at 1.
107. SHESOL, *supra* note 11, at 387.
108. *Id.* at 387–88.

Some placed blame on Roosevelt for inciting the strikes, but the Roosevelt Administration fought back against that contention.[109] Robert Jackson blamed the conservative majority on the Supreme Court for the labor unrest.[110] Senator Hugo Black joined the chorus of those blaming the Supreme Court, declaring that the Justices had created an insurmountable burden to address the labor issues that caused the strikes.[111] Workers joined Roosevelt's political supporters, one declaring that the Justices' actions on the New Deal legislation was a sit-down strike of their own.[112]

Although the strikes may have built momentum among Roosevelt's base of support, their gains were short-lived. In the long run, the strikes built little support for the plan and did more damage—especially among conservative Democrats.[113] Opponents of the plan were able to capitalize on the feeling of emergency that the strikes created.[114] Those who attacked it generated fears of lawlessness and of the loss of the sanctity of property rights.[115] Portraying labor as lawless made it easier for opponents to turn the debate over the court-packing plan into one about the rule of law.

As public opinion of the strikers dropped, the opponents used the strikes to depict the supporters of the court-packing plan as militants seeking chaos.[116] On March 23, 1937, the Senate called William McDowell, a Michigan attorney, to recount the United Auto Workers strike in Detroit, Michigan.[117] McDowell recounted one worker speaking at the rally who directed blame for the strike at the Supreme Court.[118] McDowell described the situation as "dangerous," and he placed blame for the strikes on the Roosevelt Administration.[119] And he was not alone. On April 7, 1937, the Senate shifted focus away from the court-packing plan by passing an overwhelming resolution condemning the strikes, and some Senators joined McDowell in blaming Roosevelt's inaction as the cause of the strikes.[120]

Regardless of whether Roosevelt was responsible, the strikes hurt the popularity of the court-packing plan. The strikes crystallized the fears espoused by the opposition, which led to a decline in support from conservative Democrats. In 1937, conservatives numbered "somewhere between thirty-five and forty" in the

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109. *See id*. at 419, 425.
110. *Id*. at 425.
111. *Id*. at 388.
112. *Id*. at 419.
113. *Id*. at 424–25; MCKENNA, *supra* note 1, at 383–84.
114. *See* SHESOL, *supra* note 11, at 418.
115. Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. 49, 89–90 (2000).
116. *See* SHESOL, *supra* note 11, at 419.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id*. at 423–24.

Senate,[121] meaning Roosevelt could only afford to lose a small number of liberals for the plan to pass in the Senate. Thus, Roosevelt's failure to market a coherent defense of the plan and his inability to work with labor leaders to curb the strikes made it easier for the opposition to shift the debate to the rule of law.

The effect of labor's lack of discipline is reflected in the testimony of Dorothy Thompson, who was one of the most notable New York columnists at the time.[122] She eloquently warned the Judiciary Committee that the plan was nothing more than an attempt to create "a court whose eyes are fixed, not upon the Constitution, and upon the whole body of existing law, but upon the White House and the ruling majority in Congress . . . [and make] the Supreme Court an instrument of that majority."[123] Furthermore, Thompson cautioned that concentration of economic power inevitably led to a totalitarian state.[124] Her remarks won the praise of the press, and some members of the Committee viewed them favorably.[125] Thompson's remarks illustrate the perception that the opposition had of the labor leaders and groups who were supporting the plan. The words and conduct of labor during the debate over the plan crystallized these perceptions, making the plan less viable.

B. Waning Support from Labor Organizations After the Wagner Act is Upheld

Ultimately, labor organizations were unable to generate and sustain enough support to center the debate on modernizing legal interpretation. Although labor's support existed at the outset of the court-packing plan, it proved underwhelming and decreased significantly after the Supreme Court upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp*.[126] Joseph Alsop and Turner Catledge, who published their findings about the debate over the court-packing plan one year after it occurred, noted that "[t]he labor situation provided by far the most important sub-plot of the drama of the court fight."[127] That "sub-plot" involves the inability of warring labor factions to unite in support of the plan. It also refers

121. MCKENNA, *supra* note 1, at 547. In the 1938 midterm elections, thirty-four Senate seats were up for grabs. Twenty-one of these seats were held by Roosevelt-endorsed Democrats. *Id.* Conservatives wanted to win these seats "to be assured of a dependable bulwark against the New Deal onslaught." *Id.* Of the remaining thirteen seats, three were held by Republicans and ten were held by Democrats targeted by Roosevelt for being "unreliable[]." *Id.* Roosevelt was determined to punish these ten Democrats for their opposition to his court-packing bill and his 1938 tax proposal. *See id.* at 548. Prior to the 1938 election, "[c]onservatives in both parties had long dreamed of forging a successful bipartisan coalition to harness the New Deal . . . ." *Id.* at 546. With regard to the court-packing plan, however, "Roosevelt . . . found himself aligned against not only Republicans and conservative Democrats, but liberals and Progressives on whose support he thought he could count." *Id.* at 301.

122. *Id.* at 394.

123. *Id.*

124. *Id.* at 394–95.

125. *Id.* at 395.

126. 301 U.S. 1 (1937).

127. Joseph Alsop & Turner Catledge, The 168 Days: The Story Behind the Story of the Supreme Court Fight 4 (1938) (unpublished manuscript), *in* Joseph Alsop and Stewart Alsop Papers (on file with Library of Congress, box 53).

to the decrease in support for the plan from labor after the Supreme Court upheld the Wagner Act. Labor's inability to remain united throughout the debate over the plan made it easier for the opposition to change its terms. Without the unwavering support of labor, plan proponents lacked assistance from one of their largest constituency groups. This made it easier for the opposition to convert the discussion over the plan into one more favorable to its position. And this decreased the likelihood of Congress enacting it.

Although the AFL and CIO initially joined forces to support the court-packing plan prior to its announcement, fissures developed quickly in this alliance. While the AFL and CIO had come together through the Labor Non-Partisan League to support Roosevelt in the 1936 presidential election, they were unable to cooperate to do the same for the court-packing plan.[128] With the sit-down strikes intensifying shortly after the court-packing plan was proposed, both sides became agitated with the Administration's response, and neither side trusted Roosevelt.[129] Because he remained silent during the sit-down strikes, the more conservative AFL accused Roosevelt of showing too much favor towards the more militant CIO.[130] Conversely, members of the CIO argued that Roosevelt not openly supporting the strikes was indicative of him not doing enough for them.[131] Yet, Roosevelt believed he was being neutral and was hoping his impartiality would be enough to maintain a tense alliance between the two labor factions.[132] But this is not how the AFL and CIO perceived Roosevelt's behavior.[133]

Because the labor unions perceived Roosevelt's behavior as partial, they did not provide the pressure on Democrat Senators necessary for the plan to become law.[134] Although individual AFL chapters passed resolutions in support of the bill, their support was detached and did not come close to the voraciousness with which they helped carry Roosevelt to victory in 1936.[135] Similarly, the CIO largely stayed on the sidelines, which may have been a more significant loss to the Administration.[136] Even if Roosevelt had shown favor to the AFL, the organization was likely not going to embrace the plan because of the organization's conservative leanings.[137] The CIO, however, was more radical. If Roosevelt had not isolated its leader, John Lewis, with his inaction concerning the sit-down strikes, the CIO might have used its more militant base to rally around the court-packing plan and provide a reliable base of support for it.[138] Instead, Roosevelt

128. SHESOL, *supra* note 11, at 329, 424–26.
129. *Id.* at 424–25.
130. *See id.* at 425.
131. *Id.*
132. MCKENNA, *supra* note 1, at 383.
133. *See* SHESOL, *supra* note 11, at 424–25.
134. MCKENNA, *supra* note 1, at 383.
135. *See* Alsop & Catledge, *supra* note 127, at 7.
136. *Id.*
137. *Id.*
138. *See id.*

was unable to rally the full support of either organization, and labor remained split and sidetracked for much of the debate over the court-packing plan.[139]

In addition to Roosevelt's supposed partiality, the AFL perceived the NLRB as "a sham and a CIO front," which further precipitated divisions between the AFL and CIO.[140] And because the NLRB was an arm of the Roosevelt Administration, the AFL might have been less inclined to support the Administration's agenda, including the court-packing plan.

Aside from the internal divides, the support of labor organizations for the court-packing plan was fleeting because the Supreme Court upheld the Wagner Act in April 1937.[141] The Wagner Act, also known as the National Labor Relations Act, created the National Labor Relations Board and enshrined the rights of workers to form and join unions and to bargain with their employers.[142] Upholding the Wagner Act on Commerce Clause grounds, the Supreme Court provided a victory for labor rights that unions had very much sought. During the court-packing debate, both the AFL and CIO were waiting for the Supreme Court to deliver its decision on the Wagner Act before fully committing their resources to support the plan.[143] When the Wagner Act was upheld, both unions believed that the court-packing plan was no longer worth the fight.[144] Thus, the already half-hearted support unions provided prior to the *Jones & Laughlin Steel* decision declined precipitously.[145] However, if the Supreme Court had struck down the Wagner Act, the AFL and CIO likely would have rallied and provided the necessary pressure on Democrat Senators to pass the court-packing plan.[146]

Ultimately, the overarching reason for the lack of union participation in the court-packing lobbying scheme is the Roosevelt Administration's inability to sell it to unions as a means of deliverance from oppressive working conditions.[147] The Supreme Court exacerbated this problem by upholding the Wagner Act, creating a more certain political calculation for the unions: exhausting resources and forging unity with rival factions of the labor movement to reinvigorate an alliance through the Labor Non-Partisan League to support the plan was not worthwhile.[148] Because of this political calculation, labor's support for the plan was fleeting at best, and this contributed to the debate being reframed in a way more favorable to the opposition.

139. SHESOL, *supra* note 11, at 424–25.

140. *See* CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 164 (1985).

141. *See* Alsop & Catledge, *supra* note 127, at 16.

142. *The 1935 Passage of the Wagner Act*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-wagner-act [https://perma.cc/D7X5-U8T7] (last visited May 25, 2019).

143. *See* SHESOL, *supra* note 11, at 425.

144. *See* Alsop & Catledge, *supra* note 127, at 16–17.

145. *See id.*; *see also* Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 277 (1988) (noting that labor's interest in the Court was "narrow[]" and "extend[ed] mainly to the Wagner Act").

146. *See* Alsop & Catledge, *supra* note 127, at 16.

147. *See* SHESOL, *supra* note 11, at 424–25.

148. *See* Alsop & Catledge, *supra* note 127, at 16.

III. COURT-PACKING 2.0?: LESSONS LEARNED FROM THE NEW DEAL FOR A MODERN-DAY COURT-PACKING PLAN

Following the confirmation of Justice Brett Kavanaugh, some Democrats running for President in 2020 have expressed openness to once again trying to increase the size of the U.S. Supreme Court.[149] Although these calls are premature and far from making their way into the platform of the Democratic Party, they are not far-fetched, especially given the real possibility that President Donald Trump may have the opportunity to nominate more Justices to the Supreme Court during his presidency. If a more conservative Supreme Court begins to snuff out favored liberal precedents on issues like abortion, affirmative action, or same-sex marriage, or strengthen conservative precedents on issues such as Second Amendment rights, religious liberty, and campaign finance, then there may be enough grassroots support in the Democratic Party to catapult a court-packing proposal from the fringe to the mainstream. But if Democrats pursue that option, they should remember the lessons from the failure of President Roosevelt's plan.

Modern-day proponents should be especially aware of how plan opponents transformed court-packing into a dirty phrase, synonymous with gutting the rule of law and fracturing judicial integrity. That transformation occurred for two reasons. First, the organizational alignment of labor on the affirmative side and legal professionals on the negative allowed the opposition to claim the intellectual high-ground over constitutional matters. Although labor leaders made constitutional arguments, most of which were populist, they were not perceived as nuanced or thoughtful legal professionals. Indeed, the opposition used labor's desire to pack the courts as evidence that the plan served only the political interests of President Roosevelt's allies. The opposition wielded its credibility over legal matters like a sharp chisel, reshaping the debate to favor its strongest arguments.

Second, the affirmative side was unable to generate and sustain support because the Supreme Court upheld the Wagner Act and there were divides within the labor movement. Furthermore, the Roosevelt Administration failed to market a consistent message in support of the plan capable of galvanizing labor's support. Not only did this result in half-hearted support from labor, but it also

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149. *See, e.g.*, Pema Levy, *How Court-Packing Went From a Fringe Idea to a Serious Democratic Proposal*, MOTHER JONES (Mar. 22, 2019, 11:35 AM), https://www.motherjones.com/politics/2019/03/court-packing-2020/ [https://perma.cc/3PRN-QWB2]; Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625 [https://perma.cc/H69N-6X6V]; Paul Waldman, *Why Court-Packing Suddenly Looks Appealing to Democrats*, WASH. POST (Mar. 18, 2019), https://www.washingtonpost.com/opinions/2019/03/18/why-court-packing-suddenly-looks-appealing-democrats/?utm_term=.edd2d3b0f0df [https://perma.cc/G7UP-EEAK]; Philip Elliott, *The Next Big Idea in the Democratic Primary: Expanding the Supreme Court?*, TIME (Mar. 13, 2019), http://time.com/5550325/democrats-court-packing/ [https://perma.cc/H2V8-D2WV].

contributed to labor's lack of discipline during the debate, as the labor strikes demonstrate.

Overall, the conversion of the debate into one about law and judicial integrity undermined not only labor but all plan proponents. Simultaneously, that shift elevated the credibility of lawyers and the opposition. The conversion of the debate over the court-packing plan and its effects played a major role in defeating the court-packing plan.

Modern-day opponents can also learn lessons from the debate over the 1937 court-packing plan. Most importantly, they can—and should—recycle the successful rule of law and judicial integrity arguments used in 1937. But they should also be aware of some distinctions from the 1937 debate that may handicap their ability to repeal a new wave of expansion efforts. First, proponents are likely to be armed with history and be aware of the proponents' shortcomings in 1937. Second, today's opponents likely cannot count on the ABA and a large segment of the legal profession to join their ranks. The legal profession is much more liberal today, making it less likely to oppose a court-packing plan with the same fervor that characterized a 1937-style predominately conservative bar. And without support from the legal profession, opponents may lack the presumptive credibility they held over matters of constitutional law more than eighty years ago. And without that credibility, which allowed opponents to reshape the debate in 1937, modern-day opponents are less likely to succeed. Overall, however, given the substantial political obstacles Democrat proponents will need to overcome to enact the plan, there is little doubt that opponents still maintain an advantage, with or without a supportive bar.

A. Setting the Stage for a Modern-Day Court-Packing Plan

On June 27, 2018, Justice Anthony Kennedy announced he would retire as a Justice of the U.S. Supreme Court at the conclusion of the Court's term.[150] Justice Kennedy aligned with the Republican-appointed Justices on most cases.[151] Among these were cases that garnered public attention, like *Citizens United v. FEC*[152] and *NFIB v. Sebelius*.[153] But Justice Kennedy also drew the ire of social conservatives for some of his decisions, most especially *Planned Parenthood v. Casey*[154] and *Obergefell v. Hodges*.[155] Because he was the fifth vote in cases dealing with polarizing issues that divided the Court, he earned the reputation as the

150. *See* Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html [https://perma.cc/FNR8-9ANR].

151. *See* Amelia Thomson-DeVeaux, *Justice Kennedy Wasn't A Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/ [https://perma.cc/23EV-5GKS].

152. 558 U.S. 310 (2010).

153. 567 U.S. 519 (2012).

154. 505 U.S. 833 (1992).

155. 135 S. Ct. 2584 (2015).

"swing Justice."[156]

Kennedy's reputation for being the kingmaker on several important issues set the stage for the confirmation of his replacement to be the most combative in American history. Before President Trump announced Judge Brett Kavanaugh as his replacement, liberal and conservative groups readied their arsenals for the confirmation fight. As soon as President Trump nominated Kavanaugh, both sides pounced.[157] One liberal group reacted so swiftly to Trump's announcement of Kavanaugh that it made the unfortunate mistake of sending out a mass communication declaring, "Donald Trump's *nomination of XX* to the Supreme Court . . . is a death sentence for thousands of women in the United States."[158]

On July 9, 2018, President Trump announced the nomination of D.C. Circuit Court Judge Brett M. Kavanaugh to succeed Kennedy.[159] Kavanaugh came from Trump's list of potential Supreme Court choices, but he did not appear on the list until after Justice Neil Gorsuch had been confirmed to fill the vacancy Justice Scalia left.[160] Kavanaugh's Supreme Court confirmation hearing was one of the most contentious in American history. There is much to say about Justice Kavanaugh's confirmation, but that is best reserved for a separate article.

Now that a Republican president has replaced Justice Kennedy with a jurist some believe is more likely to reach conservative outcomes than Justice Kennedy,[161] some Democrats running for President in 2020 are open to the idea of packing the Court.[162] Right now, the conversation about court-packing is merely an academic exercise, but after Justice Kavanaugh's confirmation, several events could move this conversation into the mainstream. After the 2018 midterm

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156. *See, e.g.*, Colin Dwyer, *A Brief History Of Anthony Kennedy's Swing Vote — And The Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00 PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed [https://perma.cc/4HLJ-JD7A].

157. *See, e.g.*, Tucker Higgins, *Trump Nominates Brett Kavanaugh to the Supreme Court*, CNBC (July 9, 2018, 8:52 PM), https://www.cnbc.com/2018/07/05/trump-picks-brett-kavanaugh-for-supreme-court.html [https://perma.cc/CQ9E-4BEU].

158. Diana Stancy Correll, *Oops: Women's March Denounces 'XX' in Statement on Brett Kavanaugh's Supreme Court Nomination*, WASH. EXAMINER (July 10, 2018, 12:22 AM), https://www.washingtonexaminer.com/news/oops-womens-march-denounces-xx-in-statement-on-brett-kavanaughs-supreme-court-nomination [https://perma.cc/JBG5-4KJE] (emphasis added).

159. *Trump Announces Brett Kavanaugh as Supreme Court Nominee: Full Video and Transcript*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-announcement-transcript.html [https://perma.cc/UJ8P-53DE].

160. Richard Wolf & Gregory Korte, *Trump Adds Five Names to List of Potential Supreme Court Justices*, USA TODAY (Nov. 17, 2017, 5:28 PM), https://www.usatoday.com/story/news/politics/2017/11/17/trump-adds-five-names-list-potential-supreme-court-justices/875983001/ [https://perma.cc/7NEX-44M3].

161. *See* Amanda Arnold, *Brett Kavanaugh Poses a Serious Threat to Reproductive Rights*, THE CUT (July 9, 2018), https://www.thecut.com/2018/07/brett-kavanaugh-supreme-court-abortion.html [https://perma.cc/EN7A-JLK8]; Dylan Matthews, *America Under Brett Kavanaugh*, VOX (Oct. 5, 2018, 3:50 PM), https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform [https://perma.cc/B64G-AF69].

162. *See, e.g.*, *supra* note 149.

elections, Republicans expanded their majority in the Senate by two seats.[163] Some have speculated Justice Thomas will step down from the Supreme Court to allow a Republican president to nominate his successor.[164] With a larger majority in the Senate and votes to spare, President Trump could nominate someone even more appealing to conservatives than Kavanaugh. If President Trump is able to replace Thomas with a younger but equally conservative nominee, he will make it much more likely a conservative majority on the Supreme Court survives through the presidency of his successor and possibly beyond.

Another factor that could send the Supreme Court in an even more conservative direction is the re-election of President Trump in 2020. His re-election, coupled with the Republicans maintaining control of the Senate, would mean President Trump could plausibly fill as many as three vacancies—two of whom (the two oldest justices: Ruth Bader Ginsburg and Stephen Breyer) were appointed by Democrat President Bill Clinton.[165] Justice Thomas is the third oldest justice at the age of seventy.[166] The ages of the two oldest Democrat-appointed justices are undoubtedly a concern for Democrats, and this concern is likely to be amplified if President Trump is re-elected.[167]

Even the Supreme Court as currently constructed increases the odds that Democrats will start another court-packing fight. After all, some Democrats running for President in 2020 have already floated the idea of packing the Court.[168] This, of course, would require they not only regain control of the presidency but also obtain majorities of sufficient size in both the House of Representatives and the Senate to pass a law to increase the size of the Supreme Court. As the court-packing fight from 1937 shows, Democrats will likely need majorities large enough to account for both the likely absolute opposition from Republicans as well as the likely defection of conservative and moderate Democrats.[169] Like

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163. *See* John Fritze & Maureen Groppe, *Donald Trump Still Faces Senate Headaches Despite a Wider Republican Majority*, USA TODAY (Nov. 20, 2018, 6:46 AM), https://www.usatoday.com/story/news/politics/elections/2018/11/20/donald-trump-faces-senate-challenges-despite-gop-midterm-wins/2059265002/ [https://perma.cc/29KS-8JH3].

164. *See, e.g.*, Jonathan Bernstein, Opinion, *Clarence Thomas Has a Big Decision to Make*, BLOOMBERG (Mar. 16, 2018, 8:56 AM), https://www.bloomberg.com/opinion/articles/2018-03-16/clarence-thomas-has-a-big-decision-to-make [https://perma.cc/FQ8S-3UJH]; Philip Wegmann, Opinion, *If Republicans Hold The Senate, Clarence Thomas Should Consider Retiring*, WASH. EXAMINER (Nov. 1, 2018, 2:31 PM), https://www.washingtonexaminer.com/opinion/if-republicans-hold-the-senate-clarence-thomas-should-consider-retiring [https://perma.cc/7W4G-YC68].

165. Meghan Keneally, *Meet All of The Sitting Supreme Court Justices Ahead of the New Term*, ABC NEWS (Nov. 30, 2018, 10:49 AM), https://abcnews.go.com/Politics/meet-sitting-supreme-court-justices/story?id=37229761 [https://perma.cc/CP4P-KA93].

166. *Id.*

167. *See, e.g.*, Greg Stohr, *Ginsburg's Cancer Surgery Reminds Liberals of Supreme Court's Fragility*, BLOOMBERG (Dec. 22, 2018, 4:00 AM), https://www.bloomberg.com/news/articles/2018-12-22/ginsburg-s-cancer-surgery-reminds-liberals-of-court-fragility [https://perma.cc/JC5W-PL72].

168. *See supra* note 149.

169. *Cf.* MCKENNA, *supra* note 1, at 394. Sen. Joseph O'Mahoney (D-Wyoming) was a supporter of most of the New Deal programs but was notably opposed to the court-packing plan. *See* Gene M. Gressley, *Joseph C. O'Mahoney, FDR, and the Supreme Court*, 40 PAC. HIST. REV. 183, 190–91 (1971).

President Roosevelt, modern-day proponents may also find themselves combatting some liberal Democrat opponents of the plan, too.[170]

B. Court-Packing 2.0: Can It Be Done?

Although purely hypothetical, a modern-day court-packing plan is worth anticipating because the Republican-appointed majority on the Supreme Court has already become more solidified and more conservative in President Trump's first term. And the High Court is arguably the most conservative it has been since 1937—when the last serious attempt to pack the Supreme Court occurred. Thus, looking forward is important because President Trump and a Republican-controlled Senate may have the opportunity to take the Supreme Court in an even more conservative direction.

Ultimately, two factors will play a significant role in determining whether a modern-day court-packing plan is successful. The first is which groups support or oppose the plan (i.e. organizational alignment) and what arguments they use to justify their position. Coalition composition will likely depend on which—if any—precedents the Supreme Court alters or strengthens going forward.[171] Like President Roosevelt, proponents will need to decide whether or not to center their arguments on a popular appeal that focuses on the salient political issues.

The second factor is whether a much more liberal bar mostly supports the plan (either in principle or out of political expediency), stays mostly silent out of political sympathy, or mostly opposes plan as it did in 1937. The ABA and the various state and local bars stand out from other organizations because of their unique ability to speak with authority over matters of constitutional law and the judiciary, as demonstrated in 1937.[172] Given the change in the political stance of the legal profession, 1937-style opposition is unlikely.

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170. *See* MCKENNA, *supra* note 1, at 390.

171. If any issue will be singularly responsible for catalyzing serious consideration in the Democratic Party for expanding the size of the Court, then I believe the constitutional right to obtain an abortion will be that issue. Intensifying matters, some liberals believe this right is threatened significantly with the confirmation of Justice Kavanaugh. *See* Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn Roe. Here's How They'd Do It.*, VOX (Oct. 5, 2018, 3:53 PM), https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump [https://perma.cc/2BLV-WJ9A]. Professor Steven Calabresi and I have written previously about how the issue of abortion has resulted in an onslaught of criticism and skepticism of prominent conservative jurists from liberal academics and politicians. *See* Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver*, 9 N.Y.U. J.L. & LIBERTY 793, 831–48 (2015) (disputing a claim made by Professor Murphy that Justice Scalia's opposition to a constitutional right to obtain an abortion in his opinions is the result of his adherence to pre-Vatican II Roman Catholicism); Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on the Tempting of America*, 13 AVE MARIA L. REV. 47, 62–64 (2015) (discussing the interplay of the Ninth Amendment and abortion rights in Judge Bork's writings and his Supreme Court confirmation hearing). The issue galvanized liberals to fiercely oppose Republican nominees who opposed abortion, such as Judge Robert Bork, *see, e.g.*, *id.*, and those who ended up supporting a constitutional right to abortion, such as Justice David Souter. 164 CONG. REC. S6587 (daily ed. Oct. 5, 2018) (statement of Sen. Collins).

172. *See* MCKENNA, *supra* note 1, at 311.

1. The Coalitions and Their Arguments

A court-packing plan will likely feature similar coalition-building and arguments to that of the 1937 plan. Proponents could argue, like President Roosevelt did, that increasing the size of the Supreme Court is a matter of judicial efficiency.[173] The Supreme Court hears less than one percent of appeals that come from the circuit courts of appeals.[174] Thus, having more Justices might allow the Supreme Court to weigh in on more issues. For this argument to be successful, proponents would need to show that nine Justices are unable to hear more cases and that adding additional Justices could expand the Supreme Court's caseload. In response to this, opponents are likely to counter that the Supreme Court hearing fewer cases is a positive attribute of our federalist system. When the Supreme Court decides fewer issues, the circuit courts have greater power. And this is arguably a good thing in a federalist system because circuit courts operate closer to the people and states within their jurisdiction than a singular court that sits in Washington, D.C.[175]

Ultimately, the judicial efficiency argument is unlikely to be a driving force for a modern-day court-packing plan. Recall that President Roosevelt realized several weeks into the debate over his court-packing plan that the judicial efficiency argument was ineffective because few people understood it and it failed to mobilize people and interest groups.[176] A similar result is likely if a court-packing plan is proposed in the near future. While the legal community may debate the pros and cons of the number of cases the Supreme Court hears, it is not clear that this is an issue that concerns most Americans nor most interest groups. Thus, it is unlikely to galvanize support for a court-packing plan and certainly will not overcome the arguments of opponents that the plan is a Democrat political power grab to advance a liberal agenda through the Supreme Court.[177]

Proponents of a modern-day court-packing plan can learn from the mistakes of President Roosevelt and avoid making judicial efficiency arguments the centerpiece of their advocacy. Recall also that President Roosevelt's closest advisers encouraged him to make a popular appeal to the people and the New Deal coalition for expanding the size of the Court.[178] This "popular appeal" consisted of arguing for increasing the size of the Court by pointing out unpopular

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173. *See* SHESOL, *supra* note 11, at 367.

174. Thomas Jipping, *President Trump Continues to Fill Court Vacancies, Despite Senate Democrats' Obstruction*, HERITAGE FOUND. (Oct. 18, 2018), https://www.heritage.org/courts/commentary/president-trump-continues-fill-court-vacancies-despite-senate-democrats [https://perma.cc/YM78-26YD].

175. This statement about the federal circuit courts being an attribute of our federalist system is a synopsis of an idea Professor Steven G. Calabresi mentioned either in a class or in a conversation with me.

176. *See* MCKENNA, *supra* note 1, at 389–90; SHESOL, *supra* note 11, at 368.

177. President Roosevelt's argument in favor of increasing the size of the Supreme Court focused on "congested court dockets and aged justices refusing to hear important cases" in the plan's early days. SHESOL, *supra* note 11, at 367. At the urging of his advisors, he ultimately abandoned this strategy. *Id.* at 368. But his original strategy damaged the likelihood of the Congress enacting the plan. *Id.*

178. *Id.* at 368.

decisions the Supreme Court has made and pointing out how its method of legal interpretation—and thus its outcomes—were incapable of keeping up with the demands of the present day.[179] Today's proponents could make a similar appeal, but there are several variables they must consider: (1) Which issue(s) should be part of the "popular appeal" to pack the Court?; (2) If multiple issues will be part of the appeal, how might the differing popularities of liberal positions on these issues affect the success of the plan?; (3) Do the various interest groups that will be part of this "popular appeal" share a common support for increasing the size of the Court? Of course, many of these variables hinge on which precedents a more conservative Supreme Court do and do not overturn. For instance, if the Supreme Court overturned *Roe v. Wade* but left in place precedent concerning affirmative action and the rights of same-sex couples to marry, then groups that support abortion rights like Planned Parenthood are more likely to provide grassroots support for a court-packing plan than groups that primarily concern themselves with affirmative action and the rights of same-sex couples to wed. Having fewer interest groups as part of the coalition has both potential drawbacks and benefits. Fewer groups may mean less grassroots support, which could be damaging to the prospects of success for the plan. But fewer groups may also mean less infighting, which, when reviewing the debate over the 1937 plan and the infighting among various labor groups, could be a benefit.[180]

It is also worth noting that the issues over which a modern-day court-packing proposal would likely result are very different from those that preceded the 1937 plan. In the heart of the Great Depression and the debate over the New Deal, much of the grassroots support for the 1937 plan derived from those concerned with economic issues, especially labor groups supporting collective bargaining rights.[181] Today, the issues likely to drive grassroots support are more likely to fall in the category of "social issues." Likely partners to a modern-day court-packing plan could consist of groups seeking to protect Supreme Court precedents concerning issues such as abortion,[182] affirmative action,[183] and the right of same-sex couples to wed;[184] and those seeking to overturn conservative precedents concerning Second Amendment rights,[185] the regulation of campaign finance,[186] and the Court's treatment of religious freedom and conscientious objectors.[187] Thus, labor organizations are unlikely to have as much of a role in a contemporary court-packing plan as they did in 1937. Nevertheless, labor

179. *See id.*

180. *See id.* at 425.

181. *See id.*

182. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

183. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

184. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

185. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008).

186. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

187. *See, e.g.*, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

organizations may join their liberal coalition partners in the fight in what might be considered a political *quid pro quo*, especially in light of the recent *Janus* decision.[188]

Although the issues may be different from 1937, the central themes are likely to be very similar. If proponents choose to use a popular appeal, they should argue the Supreme Court's conservative rulings are antiquated and do not address modern demands on important issues. Opponents are likely to accuse liberals of circumventing the political process and instead seeking a political power grab by creating a majority on the Supreme Court.[189] They would be wise to learn from the 1937 debate and attempt to recast the debate about one involving the rule of law and integrity of the judiciary. For example, as in 1937, opponents should argue that the rule of law and political ambition should be kept separate and argue that packing the Supreme Court will impair the judiciary's ability to claim political impartiality, both of which will harm its integrity as a coequal branch of the government.

Modern day proponents should also be aware of the prospect of waning support if the modern Supreme Court has its own "switch in time to save nine." This could come in two forms. The Supreme Court could replace a liberal legal outcome with a conservative outcome before reverting to a liberal outcome, as it did when it ultimately upheld minimum wage legislation in *West Coast Hotel v. Parrish*.[190] The Court could also preempt a vote on a court-packing plan by giving its interest group proponents the outcome they desire, as the Court did in 1937 when it upheld the Wagner Act.[191] When the Court did this, it upended much of labor's support for the plan.[192] Because labor essentially got what it wanted, it no longer had a dog in the fight over the court-packing plan.[193] Thus, the current Supreme Court could prevent an attempt to pack the Court from succeeding by affirming current precedents on issues likely to spur calls for packing the Court. The Court could also overturn some precedents but leave others in place in such a way that there will be insufficient support to increase the size of the Court. If Democrats and liberal interest groups plan to wage a court-packing fight, they should be aware of the possibility that support will wane fast if the Supreme Court reverses course from conservative outcomes or achieves a less conservative outcome than proponents anticipated, for this contributed to the demise of the 1937 plan.[194]

188. *See* Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
189. *See* MCKENNA, *supra* note 1, at 394.
190. 300 U.S. 379 (1937).
191. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937).
192. *See* Alsop & Catledge, *supra* note 127, at 16.
193. *See id.*
194. *See id.*

2. The Alignment of the Legal Profession

Like in 1937, the involvement of the legal profession in the debate over a modern-day court-packing plan is important. Lawyers are perceived as having credibility on matters concerning the Constitution and the judiciary, so they are especially significant to a debate on the merits of a court-packing plan.[195] The legal profession was considered a politically conservative profession at the time President Roosevelt's court-packing plan was introduced and debated.[196] The legal profession also emphatically opposed Roosevelt's court-packing plan.[197] This opposition from the legal community included the ABA lobbying in opposition to the plan.[198]

But it is almost unimaginable to think the ABA and a sizable proportion of the profession would rise up to fight a modern-day court-packing plan as it did in 1937. This is because the legal profession shifted from a conservative profession during the New Deal Era to a more liberal profession during the Civil Rights Era.[199] Today, the legal profession is considered left-leaning, although it is not the most politically liberal profession.[200] Anyone who ponders the matter even briefly will conclude that at the very least the legal profession would not wage an opposition to the degree it did in 1937. Indeed, it is reasonable to predict that a greater number of lawyers will actively support it and a number may stay silent out of sympathy to the liberal politics of the proponents.

Diminished support for the opposition to a modern-day court-packing plan from the legal profession, whether it is because more lawyers support the plan or more stay on sidelines than in 1937, is likely to affect the opposition negatively. As noted, the intense opposition to the 1937 court-packing plan from lawyers contributed to sinking the plan in Congress because lawyers are perceived as having credibility on matters concerning the Constitution and the judiciary.[201] Thus, if the bar joined forces with liberal interest groups in supporting a modern-day court-packing plan, or if it was not as forthrightly opposed as it was in 1937, then this could mean a plan has a higher likelihood of being enacted than in 1937.

CONCLUSION

This note sketches the outline of what a modern-day court-packing debate may encompass and highlights some considerations for plan proponents and opponents. As stated, there are many significant hurdles potential proponents of a court-packing plan would need to overcome before such a proposal could be

195. *See* MCKENNA, *supra* note 1, at 311.
196. *See id.*
197. *See id.* at 313–14.
198. *Id.*
199. *See* Christina Pazzanese, *Gauging The Bias Of Lawyers*, HARV. GAZETTE (Aug. 10, 2017), https://news.harvard.edu/gazette/story/2017/08/analyst-gauges-the-political-bias-of-lawyers/ [https://perma.cc/YG7B-9FD4].
200. *Id.*
201. *See* MCKENNA, *supra* note 1, at 311.

taken seriously. But if we reach a point in which Democrats regain the presidency, have sizable majorities in Congress, and the Supreme Court has taken actions that invite strong backlashes from the left, then we may find ourselves embroiled in a 1937-style court-packing debate. In my view, there are key similarities and differences between the 1937 debate and its modern counterpart. There are also lessons to be learned from 1937 about the importance of (1) coalition-building, (2) appropriately affirming or opposing a court-packing scheme, and (3) winning the support of lawyers. These lessons offer value to modern proponents and opponents of court-packing alike, which suggests we should all strive to improve our modern court-packing discourse by thoroughly engaging our past.