

When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis

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I. THE CRITIQUE OF ACKERMAN'S THESIS

Scholars have dealt harshly with Bruce Ackerman's audacious reconfiguring of American constitutional history.¹ Suzanna Sherry, who calls the Yale Law School professor "one of our best constitutional theorists," nonetheless concluded that "Ackerman's tale fails to inspire, because it is mired in a fictional past and envisions a utopian future" and because his "historical analysis is simplistic."² G. Edward White, viewing Ackerman as "clearly one of the important figures of his generation, all the more visible because of the vivid combination of fluency and chutzpah which has enabled him to write on anything he pleases and to annoy anyone he chooses along the way," voiced skepticism about "a jurisprudential strategy unlikely to work and a bid for influence unlikely to be successful."³ Don Herzog, after questioning whether "poor Clio can shoulder the burdens he assigns her," derided Ackerman's rhetoric as "debased or vulgar,"⁴ while Richard Posner, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, found Ackerman's argument "unpersuasive" and his style "cheeky."⁵

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1. Ackerman has elaborated his grand design in 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), and in 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). These volumes expand upon ideas Ackerman explored in earlier works: BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) [hereinafter ACKERMAN, *RECONSTRUCTING*]; BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989); Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (S. Levinson ed., 1995); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984); and Bruce A. Ackerman, *Transformative Appointments*, 101 *HARV. L. REV.* 1164 (1988).

2. Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *HARV. L. REV.* 918, 918, 924 (1992).

3. G. Edward White, Book Review, 34 *J. LEGAL EDUC.* 731, 731, 736 (1984) (reviewing ACKERMAN, *RECONSTRUCTING*).

4. Don Herzog, *Democratic Credentials*, 104 *ETHICS* 467, 477, 479 (1994).

5. Richard A. Posner, *This Magic Moment*, *NEW REPUBLIC*, Apr. 6, 1998, at 36. Eben Moglen, however, has called Ackerman "the most original and important writer on constitutional

Much of the dispute has been aroused by one particular element of Ackerman's claim: that ours is a "dualist" system that has experienced, over the course of more than two centuries, three "constitutional moments" when a mobilized citizenry has awakened from its quotidian concerns to create new "constitutional regimes." Though scholars have raised questions about Ackerman's account of the first two constitutional moments—the Founding and Reconstruction—they have found considerably more troublesome his contention that heightened popular involvement in 1936 succeeded in amending the Constitution in a manner just as legitimate as if the country had followed Article V procedures. "Most Presidents do not come into office with a mandate for fundamental change of the kind that Franklin Delano Roosevelt plausibly claimed in the aftermath of the elections of 1936," Ackerman has written. "If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930's."⁶

A good many scholars, though often admiring Ackerman's adventurousness, have questioned that bold assertion. "How could he present the 1936 election as a referendum on the Court's interpretation of New Deal legislation?" Laura Kalman has inquired.⁷ Kent Greenawalt has disputed the conceit that "New Deal activists self-consciously conceived themselves as amending the Constitution by something other than ordinary formal means, and further conceived themselves as establishing techniques of higher lawmaking different from the classic mode of amendment."⁸ Terrance Sandalow has concluded that "it is doubtful that the People made, or can be shown to have made, the decisions he attributes to them."⁹ Larry Kramer has protested that

the engaged public—the "We the People" Ackerman celebrates—was never asked to adopt the broad principles that come to define its new constitutional regime. . . . [T]he people themselves, in the midst of the political upheavals that qualify under Ackerman's

theory in the contemporary English-speaking world." Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531, 531 (1993). For another more positive view of Ackerman's theory, see Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996). Martin Flaherty, while observing that Ackerman's approach "has left him open to a degree of unpublished skepticism among legal and constitutional historians," pointed out "that historians who have looked into the substance of Ackerman's project have been favorable to his approach." Martin Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 583-84 & n.292 (1995).

6. 1 ACKERMAN, *supra* note 1, at 53.

7. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 348 n.70 (1996).

8. Kent Greenawalt, *Dualism and Its Status*, 104 ETHICS 480, 487 (1994).

9. Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People*, 9 CONST. COMMENTARY 309, 329 (1992).

theory as genuine constitutional moments, did not think they were fundamentally restructuring their entire constitutional order.¹⁰

Similarly, Jennifer Nedelsky has pointed to the “formidable problems of determining that ‘we the people’ were the authors of any major political change in the United States—from the elite gathering of the constitutional convention in 1787 to the embrace of the regulatory state by much of the corporate elite in the New Deal era.”¹¹ Furthermore, as Lawrence Lessig has noted, the first two moments—the Founding and Reconstruction—at least provided visible texts in the U.S. Constitution and in the three post-Civil War amendments, but these were conspicuously absent in the New Deal decade.¹²

It is my intention in this piece to assess how Ackerman’s paradigm fares under this barrage of objections by scrutinizing the evidence on developments in 1936. In particular, I shall ask: Did Roosevelt raise the Supreme Court issue in the 1936 campaign—in the Democratic platform or in his speeches? If he did not, did anyone else do so? Did “the People” conceive of the 1936 election as centering on their attitude toward the Supreme Court? Did “the People” see any significant difference between Roosevelt and his Republican opponent on the constitutional question? And, finally, when all of these questions are answered, what does one conclude about the Ackerman thesis?

II. THE MUTED CONSTITUTIONAL ISSUE, 1935-36

The constitutional controversy of 1936 that looms so large in Ackerman’s work originated not in that campaign year but some months earlier, though President Roosevelt downplayed the issue almost immediately after raising it. At an extraordinary press conference on June 2, 1935, in the wake of the Supreme Court’s invalidation of the National Industrial Recovery Act¹³ in *Schechter Poultry Corp. v. United States*,¹⁴ Roosevelt told White House correspondents, “We are facing a very, very great national non-partisan issue,” and charged that “[w]e have been relegated to the horse-and-buggy definition of interstate commerce.”¹⁵ Yet

10. Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 893 (1996).

11. Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 ETHICS 500, 503 (1994).

12. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 449 (1995).

13. Ch. 90, 48 Stat 195 (1933).

14. 295 U.S. 495 (1935). Three years earlier, in a 1932 Presidential campaign speech, Roosevelt had attacked the Court.

15. 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 218, 221 (Samuel I. Rosenman comp., 1938) [hereinafter PUBLIC PAPERS].

far from insisting that the forthcoming 1936 campaign be treated as a referendum on the Constitution and the Court, he stated that the question of whether the federal government would have adequate power would not be decided soon: "I don't mean this summer or winter or next fall, but over a period, perhaps, of five years or ten years."¹⁶ Moreover, when, near the end of the conference, a reporter asked him if he had "any suggestion" for a solution, he replied: "No, we haven't got to that yet."¹⁷

Circumspect though Roosevelt was about precipitating an immediate confrontation, his "horse-and-buggy" remarks produced cries of outrage. Republican Senator Arthur Vandenberg of Michigan likened his attitude to that of Hitler and Stalin;¹⁸ the *Baltimore Sun* rejected his "lugubrious lamentation" as "undergraduate pessimism";¹⁹ and an editor for William Randolph Hearst's newspaper chain said that FDR had "made a holy show of himself."²⁰ Roosevelt's fellow patrician, Henry Stimson, who had served in two cabinets, wrote the President that his harangue "was a wrong statement, an unfair statement and, if it had not been so extreme as to be recognizable as hyperbole, a rather dangerous and inflammatory statement."²¹

The horse-and-buggy conference inspired right-wing ideologues and gave new life to the Republicans, who had been in despair since being badly beaten in the 1934 elections, by permitting them to go to the country not as opponents of beneficial social legislation but as staunch defenders of the Constitution. Kansas Governor Alf Landon wrote John Hamilton, who was to manage Landon's 1936 presidential campaign, that Roosevelt had "cracked up" at his meeting with the press, and that the GOP could make hay by pursuing a "line of criticism . . . that it is a terrible thing for the President to gamble with the social and economic welfare of a hundred and thirty million people because he is peeved at the Supreme Court's decision."²² Similarly, the publisher Frank Knox, who was to be Landon's running mate in 1936, expressed satisfaction that "the President's attack upon the Constitution has proved a disastrous boomerang,"²³ while the

16. *Id.* at 218.

17. *Id.* at 222.

18. See *Capitol Split on Roosevelt's NRA Comment*, WASH. POST, June 1, 1935, at 1.

19. BALT. SUN, June 1, 1935.

20. Letter from James T. Williams to his father (May 31, 1935) (on file with the Univ. of S.C. South Caroliniana Collection, in the James T. Williams Papers).

21. Letter from Henry Stimson to Franklin D. Roosevelt (June 4, 1935) (on file in the Franklin D. Roosevelt Papers, Hyde Park, N.Y., PPF 20). A few public figures did approve of the President's performance. See, e.g., Edward Keating Manuscript Diary (May 31, 1935) (on file with the Univ. of Colo., in the Western Historical Collections); Letter from Hiram Johnson to Hiram Johnson, Jr. (June 2, 1935) (on file with the Bancroft Library, Univ. of Cal., Berkeley, in the Hiram Johnson Papers, Box 4).

22. DONALD R. MCCOY, LANDON OF KANSAS 216 (1966) (citations omitted).

23. Letter from Frank Knox to Frank O. Lowden (Aug. 1, 1935) (on file with the Univ. of Chicago, in the Frank O. Lowden Papers, Series I, Box 25, Folder 8).

editor of the *North American Review* called FDR “one of the greater Benefactors of our Nation” because he had “converted millions of people to the conservative point of view. His famous press conference attack on the Supreme Court did more to re-popularize the Constitution than one hundred years of political and educational oratory.”²⁴

At a “Grass-Roots” conclave of Midwestern Republicans in Springfield, Illinois, ten days after FDR’s meeting with the press, party leaders exploited that approach to the fullest. Delegates to the gathering, billed as “the largest and perhaps the liveliest sectional political convention of this generation,” walked down hotel corridors under banners displaying the slogan “Save the Constitution.”²⁵ When Harrison Spangler, Republican National Committeeman from Iowa, asserted: “The issue today is individualism against regimentation; liberty against autocracy; abundance against a planned scarcity; the philosophies of Lincoln against those of Franklin Delano Roosevelt,” the audience rose to its feet singing the *Battle Hymn of the Republic*.²⁶ The keynoter declared that “no crisis so grave as the present” had arisen since the Civil War.²⁷ Just as Republicans had once fought the secessionists to maintain the union, they must now fight in a no-less-important struggle to safeguard the “indestructible states.”²⁸ The galleries and coliseum floor greeted these words with shouts of “Yes, yes, we will fight as then.”²⁹

The ferocity of the instant condemnation of his horse-and-buggy innuendo persuaded Roosevelt to retrench. “The comments of the papers were so severe this morning that by noon the White House seemed to be taking back some of the remarks of the day before,” noted a Hearst editor.³⁰ Indeed, the British Ambassador at Washington, Sir Ronald Lindsay, informed the Foreign Secretary, Sir Samuel Hoare, that the “unfavorable reaction” was so pronounced that the President “allowed his trial balloon to float away into the empyrean.”³¹

24. Letter from John Pell to Frank R. Kent (Oct. 3, 1935) (on file with the Md. Historical Soc’y, in the Frank R. Kent Papers).

25. Charles R. Michael, *Platform Drafted by ‘Grass Rooters’ Opposes New Deal*, N.Y. TIMES, June 9, 1935, at 1.

26. Charles R. Michael, *‘Grassroots’ G.O.P. Pledge Defense of States’ Rights*, N.Y. TIMES, June 11, 1935, at 1.

27. *Id.*

28. *Id.*

29. *Id.*; see also 2 WILLIAM T. HUTCHINSON, *LOWDEN OF ILLINOIS* 680-81 (1957).

30. Letter from James T. Williams to his father (June 1, 1935) (on file with the Univ. of S.C. South Caroliniana Collection, in the James T. Williams Papers).

31. Letter from R. C. Lindsay to Sir Samuel Hoare (June 11, 1935) (on file with the London Pub. Records Office, F.O. 371, 18752 (A5501/293/45)). Two weeks after the horse-and-buggy interview, a prominent Republican Senator told a former U.S. Attorney General that “most of the New Dealers are substantially mellowed and restrained by their recent experiences with the Supreme Court. I think this is particularly true with our distinguished President after he sensed the wholly unfortunate reactions to his first press conference after the Schechter case had been

At the beginning of summer, reported a *New York Times* correspondent, a fog hung low over Washington from the White House to Capitol Hill as that “sprawling, infinitely busy village” tried to orient itself in the void created by *Schechter*.³² “It is difficult to believe that any past decision of a court could have so profoundly affected an entire nation, and more specifically every individual at the seat of government,” he observed.³³ Though the Roosevelt administration had a plethora of important alphabet agencies, there could be “no denying that the NRA [National Recovery Administration] had become the symbol of the New Deal itself, and that with its passing, . . . something very tangible has been removed from the atmosphere of the nation’s capital.”³⁴ What, the city wondered, was going to happen now? The President had spoken sharply at the horse-and-buggy conference, and Washington had “become accustomed to a Roosevelt who follows words with actions, whose public utterance on any national matter is pretty certain to be followed by concrete proposals.”³⁵ This time, however, there was only an unnerving silence from the White House, and consequently federal officials were sitting around trying to figure out how to rebuild from the shards of the NRA but were “mainly waiting, waiting for word from the Boss.”³⁶ More than a year would go by, though, before Roosevelt again made public reference to the Supreme Court, even when additional adverse decisions appeared to require some sort of response.

Roosevelt refused either to act or to speak out for three reasons. First, at a time when the economy was improving and millions of Americans were grateful for New Deal largesse, he did not want to permit the Republicans, bereft of appealing issues, to rally their followers around the Constitution. Second, though he knew that rulings by the Court had angered workers and farmers, he also recognized that many Americans disapproved of tampering with either the Constitution or the Court, and he reckoned that, if he bided his time, the Court would wreak enough additional mischief to create a popular demand for action. Finally, he did not want to precipitate a crisis until he and his advisers had agreed upon a specific plan. As it turned out,

decided.” Letter from Senator Arthur Vandenberg to William D. Mitchell (June 13, 1935) (on file with the Minn. Historical Soc’y, in the William D. Mitchell Papers, Box 1). Arthur Krock later wrote: “The way in which his comments were received convinced the President that the occasion and tone of his remarks constituted a blunder.” Arthur Krock, *Roosevelt Charged with Court Design in 1932*, N.Y. TIMES, Feb. 11, 1937, at 22.

32. Delbert Clark, *Washington Now Pauses To Take Stock*, N.Y. TIMES, June 23, 1935, § 7 (Magazine), at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

the solution they were seeking did not emerge until after the 1936 election.³⁷

Roosevelt held his tongue despite a series of provocative rulings by the Supreme Court in 1936 that began when the new year was less than a week old. On January 6, the Court dynamited the remaining foundation stone of Roosevelt's recovery program by destroying the Agricultural Adjustment Act³⁸ in *United States v. Butler*,³⁹ but Roosevelt never uttered a word in response. A week after *Butler* was handed down, Assistant Attorney General John Dickinson wrote the prominent editor and historian George Fort Milton:

The way in which the high command has apparently decided to treat the AAA decision has been to smother its effect as much as possible. I am not at all sure that this is a wise strategy, but apparently the feeling is that there is a widespread readiness, throughout the country, to blaze up against the Supreme Court and that this state of mind must be wet-blanketed, for fear that otherwise it would drive the Administration into the position of either attacking the Court, or calling for an amendment, which they are not yet prepared to do.⁴⁰

Again and again in the spring of 1936, the Supreme Court announced rulings that displeased the Administration, but Roosevelt remained silent. On April 6, in *Jones v. SEC*,⁴¹ Justice George Sutherland, speaking for the Court, likened the actions of the SEC to those of the notorious Star Chamber in Stuart England. On May 18, in *Carter v. Carter Coal Co.*,⁴² the Court held unconstitutional the Guffey Act⁴³ establishing a "little NRA" in the bituminous coal industry. Finally, on May 25, in *Ashton v. Cameron County Water Improvement District No. 1*,⁴⁴ it invalidated the Municipal Bankruptcy Act of 1934⁴⁵. Only the *Carter* decision prompted a presidential response, and Roosevelt's general comments came in a genial three-minute discourse throughout which he maintained a smile. When a pesky reporter tried to get him to add something, Roosevelt, with unmistakable irritation,

37. For the origins of the plan, see WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82-131 (1995).

38. Ch. 25, 48 Stat 31 (1933).

39. 297 U.S. 1 (1936).

40. Letter from John Dickinson to George Fort Milton (Jan. 13, 1936) (on file with the Library of Congress, in the George Fort Milton Papers, Box 19).

41. 298 U.S. 1 (1936).

42. 298 U.S. 238 (1936).

43. Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (1935).

44. 298 U.S. 513 (1936).

45. Ch. 345, §§ 78-80, 48 Stat. 798 (1934).

retorted, "I said that is all there was to be said."⁴⁶ On the following day, the *Washington Post*, after noting FDR's reputation for wide-open press conferences, observed:

But yesterday, when interrogated about his reaction to the Guffey coal decision of the Supreme Court, the President used what might be termed strong-arm methods to shut off questions. He did not undertake to parry questions—he bluntly shut them off in such a manner that if anyone had attempted to pursue the subject he would have been guilty of rudeness.⁴⁷

Only on the final day of the Term on June 2, when the Court struck down a New York state minimum wage law for women in *Morehead v. New York ex rel Tipaldo*,⁴⁸ did Roosevelt offer anything directly critical, and that observation was terse. Sensing that *Tipaldo* was so unpopular that he could safely comment, Roosevelt spoke out for the first time in more than a year—since his ill-fated "horse-and-buggy" conference. This time, too, he contributed a memorable phrase. Asked bluntly at his White House press conference what he thought of *Tipaldo*, Roosevelt hesitated, took a long drag on a cigarette in his familiar holder, and then said: "It seems to be fairly clear . . . that the 'no-man's-land' where no Government—State or Federal—can function is being more clearly defined. A State cannot do it and the Federal Government cannot do it." But when a correspondent asked, "How can you meet the situation?" the President replied: "I think that is about all there is to say on it," a rejoinder that drew a burst of laughter. A reporter, his interest piqued by this World War I metaphor, persisted, "I think there are dangers in the existence of that 'no-man's land.'" Roosevelt, though, would not be budged. "I think that is all there is to say about it," he reiterated.⁴⁹

The President also deliberately avoided making any issue of the behavior of the Supreme Court in his bid for reelection in 1936. In February, George Fort Milton wrote a philanthropist who was well-disposed toward the New Deal:

I thought a month ago that the Court and the Constitution were very definitely going to be in this year's presidential debate. But everything in Washington is of the hush, hush attitude. . . . What I am feeling is that maybe he is depending too much on this

46. Press Conference of May 19, 1936, in 7 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 261 (1972).

47. Franklyn Waltman, *President Uses 'Strong-Arm' Method on Question Concerning Guffey Ruling Reactions*, WASH. POST, May 20, 1936, at 2.

48. 298 U.S. 587 (1936).

49. 5 PUBLIC PAPERS, *supra* note 15, at 191-92.

resourcefulness and that he could do some thinking on what would be the usefulness of being re-elected if he was going to have to go into a second term denied the essential powers of nationality. Wouldn't he be all dressed up and have nowhere to go?⁵⁰

As the Democratic National Convention approached, both Roosevelt and the Chairman of the Resolutions Committee, Senator Robert Wagner of New York, heard requests to put the party behind proposals such as one requiring a super-majority of the Court to invalidate legislation,⁵¹ but each was wary of this counsel. Attorney General Homer Cummings, who would subsequently be the chief author of the Court-packing plan, warned the President that seeking to outbid the Republicans by backing a far-reaching constitutional amendment would permit the GOP to center the entire campaign on the Constitution when the Democrats wanted to focus on FDR's achievements. Moreover, Cummings and Roosevelt sought to avoid being trapped in a commitment to the amendment route. The Attorney General advocated wording that would plant "the thought that perhaps, after all, an amendment may not be necessary."⁵² In keeping with this reasoning, the President approved a calculatedly vague construction that came out for a "clarifying amendment," but only if the problems could not "be effectively solved by legislation within the Constitution."⁵³ Reassuringly, it added, "[t]hus we propose to maintain the letter and spirit of the Constitution."⁵⁴

During the ensuing campaign, Roosevelt, a shrewd judge of public attitudes, never indicated that he intended to do anything in his second term to alter the Constitution or to deal with obstruction of his program by the Supreme Court. Indeed, he did not mention the Court even once. His advisers cautioned him against making any declaration that could revive the issue of disrespect for the judiciary stirred up by his "horse-and-buggy" remarks.⁵⁵ Opinion surveys revealed that, though the Court had alienated

50. Letter from George Fort Milton to George Foster Peabody (Feb. 10, 1936) (on file with the Library of Congress, in the George Fort Milton Papers, Box 19).

51. See Letter from Louis Boehm to Robert Wagner (June 6, 1936) (on file in the Franklin D. Roosevelt Papers, OF 1871-A); Letter from Clarence V. Tiers to Presidential Press Secretary Stephen Early (June 24, 1936) (on file in the Franklin D. Roosevelt Papers, OF 1871-A).

52. Letter from Homer S. Cummings to Franklin D. Roosevelt (June 20, 1936) (on file in the Franklin D. Roosevelt Papers, PSF Justice).

53. RAYMOND MOLEY, *AFTER SEVEN YEARS* 346-47 (1939).

54. 3 *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968*, at 2855 (Arthur M. Schlesinger, Jr. & Fred L. Israel, eds. 1971). For the drafting of the plank, see DONALD R. RICHBERG, *MY HERO: THE INDISCREET MEMOIRS OF AN EVENTFUL BUT UNHEROIC LIFE* 204-05 (1954); and SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 100-03 (1953).

55. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 39 (1996); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 *POL. SCI. Q.* 267, 275 (1988); Stephen Early, Memorandum for the President (May 22, 1936) (on file with Princeton Univ., in the Bernard Baruch Papers, XXXIX); Stanley High Manuscript Diary (Apr. 13, 1936) (on file with the Franklin D. Roosevelt Library, in

farmers and workers, the country did not share his sense of a constitutional crisis. Given two choices, only twenty-two percent of those surveyed in April said that the Supreme Court had “recently . . . [s]tood in the way of the people’s will.”⁵⁶ In striking contrast, thirty-nine percent answered that the Court had “recently . . . [p]rotected the people against rash legislation.”⁵⁷ Most of the remainder of the sample expressed no opinion, in itself significant for it was a larger segment than those who were critical of the Court.⁵⁸

Raising the constitutional question seemed too great a risk to take at a time when many political experts anticipated a close election or even a Landon victory.⁵⁹ On July 12, Gallup reported the results of his most recent polling: Roosevelt led Landon only narrowly, 51.8% to 48.2%, suggesting that, given the probable margin of error, the candidates were dead even.⁶⁰ Gallup found that the President trailed in the electoral vote-rich Northeast and Central states, leaving him ahead in only the traditionally Democratic South, the sparsely settled Mountain states, and the Pacific coast.⁶¹ Even more chilling was the final reckoning by the prestigious *Literary Digest*, which had called every election since 1920 correctly and in 1932 had forecast FDR’s victory within one percentage point. Landon, the *Literary Digest* predicted, would win decisively, 370 electoral votes to 161.⁶²

Roosevelt’s studied silence on the Court in the 1936 campaign made it possible for commentators and his supporters to deny that he had any intention of revamping the judiciary if he was elected to a second term. In a syndicated column in October, Raymond Clapper scoffed at the notion that the President was, as Republicans claimed, “hell-bent on setting himself up as dictator.” After all, Clapper noted, “Roosevelt is a shrewd politician.” If

the Stanley High Papers). Henry Wallace later claimed that “at the very close of the campaign, I submitted to Roosevelt the suggestion that he should bring out definitely the Supreme Court issue so that he would have a mandate from the people when he was elected.” Henry Wallace, *in* Columbia Oral History Collection 427 (unpublished transcript, on file with Columbia Univ. Library). That recollection, though, came a generation later.

56. Elmo Roper, *YOU AND YOUR LEADERS: THEIR ACTIONS AND YOUR REACTIONS 1936-1956*, at 31 (1957).

57. *Id.*

58. *See id.*

59. Among those with a sanguine view of Landon’s chances were two Supreme Court Justices. During the summer, Justice James McReynolds wrote his brother, “There seems a growing feeling that Roosevelt may be defeated,” Letter from Justice James C. McReynolds to Dr. Robert P. McReynolds (July 4, 1936) (on file with the Univ. of Va., in the James McReynolds Papers), while as late as early November, only a day before the election, Justice Willis Van Devanter thought the outcome would be close. Letter from Justice Willis Van Devanter to Mrs. John W. Lacey (Nov. 2, 1936) (on file with the Library of Congress, in the Willis Van Devanter Papers, Vol. 52).

60. *See* 1 *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 28 (1972) [hereinafter *THE GALLUP POLL*]; *see also* Letter from Alf M. Landon to Bertrand H. Snell (May 25, 1936) (on file with the State Univ. of N.Y. College at Potsdam, in the Bertrand H. Snell Papers).

61. *See* 1 *THE GALLUP POLL*, *supra* note 60, at 28.

62. *Topics of the Day*, *LITERARY DIGEST*, Oct. 31, 1936, at 5, 5-6.

he had such an ambition, “he would have struck while the iron was hot,” and as one of his very first steps “he would have jammed through a law increasing the size of the Supreme Court or curbing its powers to veto acts of Congress.”⁶³ In the closing weeks of the campaign, the *New York Times* led off its “Letters to the Times” feature with a long communication from the director of the Institute of International Education, Stephen Duggan, who asserted, “Mr. Roosevelt has given no evidence that he wants to ‘pack’ the court by an increase in its membership,”⁶⁴ and the conservative Senator Josiah Bailey of North Carolina defended Roosevelt on the Court question.⁶⁵ Frederick Lewis Allen, author of the best seller *Only Yesterday*, wrote in an election-eve issue of *Harper’s* that enlarging the Court “need hardly be regarded as a serious possibility in the immediate future: it would be too obviously a cowardly move.”⁶⁶

When Roosevelt unveiled his Court-packing plan only three months after the 1936 election, infuriated opponents maintained that he had no mandate for so drastic a scheme, or indeed for any alteration of the Court or the Constitution, since he had kept altogether mum about such matters during the campaign. One constituent spoke for many others in writing a Florida Congressman, “The people when they voted for Roosevelt did not have any idea of giving him such a tremendous extension of power as is now proposed. This issue was carefully kept out of the campaign.”⁶⁷

Given all of these considerations, Professor Ackerman’s critics appear to be fully justified in denying that 1936 was a constitutional moment. “[I]t is difficult to see how the Court could have construed the 1936 election as a constitutional referendum,” Barry Cushman has observed. Among other considerations, “Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign.”⁶⁸ In like manner,

63. RAYMOND CLAPPER, *WATCHING THE WORLD* 116-17 (1944).

64. Stephen Duggan, Letter to the Editor, *N.Y. TIMES*, Oct. 26, 1936, at 16.

65. See JOHN ROBERT MOORE, *SENATOR JOSIAH BAILEY OF NORTH CAROLINA* 126 (1968).

66. Frederick Lewis Allen, *Behind the Campaign*, 173 *HARPER’S MONTHLY MAG.* 470, 476 (1936).

67. Letter from Gordon Barnett to Joseph Hendricks (Feb. 9, 1937) (on file with the P.K. Yonge Library of Fla. History, Univ. of Fla., in the Joseph Hendricks Papers, Box 2). A number of people denied that Roosevelt had a mandate in 1936 on different grounds—that “apart from the subsidised, to use a polite word, the actual majority was against him!!!” and that it was only “indigents who gave the President the land slide.” Letter from D. Walter Bell to William Allen White (Feb. 12, 1937) (on file with the Library of Congress, in the William Allen White Papers, Box 185); Letter from W. Lee Smith to Senator William Borah (June 6, 1937) (on file with the Library of Congress, in the William Borah Papers, Box 414). A Republican politician claimed that Roosevelt’s appeals to class hatred and the improper favors he bestowed on “the grand army of federal employees,” “the colored,” and others “had the effect of nullifying the natural order, of defeating the candidate who would otherwise have been the choice of the American people.” Letter from Henry Ware Allen to John Hamilton (Dec. 10, 1936) (on file with the Library of Congress, in the William Allen White Papers, Box 185).

68. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 27 (1998).

Michael J. Klarman has written, "Ackerman asserts that the 1936 election represented a popular mandate against the Court's constriction of the New Deal. Perhaps the most problematic aspect of this thesis is that Roosevelt scarcely mentioned the Court during the 1936 campaign."⁶⁹

III. ROOSEVELT'S OPPONENTS RAISE THE CONSTITUTIONAL QUESTION

The Ackerman thesis cannot so easily be disposed of, however, for if Roosevelt did not raise the constitutional issue in 1936, many others, especially his political rivals, did. Not a month went by without someone's alluding to it. The new year had hardly begun when the obstreperous Democratic Governor of Georgia, Eugene Talmadge, urged a gathering in Macon not to "allow a bunch of Communists to have four more years to appoint the successors to such stalwart men as Chief Justice Hughes, and Associate Justices Butler, McReynolds, Sutherland, and Van Devanter."⁷⁰ In February, in the course of promoting a candidate for the Republican presidential nomination in 1936, the publisher Frank Gannett declared:

Interest in the political situation is intense because the vote this Fall will shape our individual lives and the nation's future. This election will determine who shall appoint perhaps a majority of the Supreme Court. These Justices to be appointed as vacancies occur must not

69. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 771 (1992). On this same page, Klarman repeats a common error: "[T]he popular mandate may have been to reverse only those Supreme Court decisions that narrowly invalidated New Deal legislation, rather than those unanimous rulings that invalidated laws regarded even by many contemporary liberals as ill-advised and poorly drafted." *Id.* In fact, only one piece of "New Deal legislation" of any significance, the National Industrial Recovery Act, was struck down unanimously. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). True, there were two other 9-0 rulings that day. One of them, however, involved not legislation but an executive act. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The other, to which Ackerman gives inordinate prominence, see 2 ACKERMAN, *supra* note 1, at 303-04, resulted in the invalidation of a the Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934), a federal farm bankruptcy law. See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). The Frazier-Lemke Act, however, was not even remotely "New Deal legislation" but, as its name indicates, the brainchild of two North Dakota Republicans. "I have never endorsed the Frazier-Lemke bill," Roosevelt told his press secretary. "If this type of wild legislation passes, the responsibility for wrecking recovery will be squarely on Congress." DAVID H. BENNETT, *DEMAGOGUES IN THE DEPRESSION: AMERICAN RADICALS AND THE UNION PARTY, 1932-1936*, at 96 (1969). Roosevelt signed the measure only reluctantly and with the warning that it would "require amendment at the next session of Congress." 3 PUBLIC PAPERS, *supra* note 15, at 332. Save for the ruling against the NIRA, the only unanimous decision against the New Deal came in a little noticed case invalidating one feature of the Home Owners' Loan Act, 48 Stat. 128, 132 (1933). See *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935). *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936), merely recognized the consequence of the ending of Roosevelt's farm program in *Butler*.

70. R.E. Fossett, *The Impact of the New Deal on Georgia Politics, 1933-1941*, at 150 (1960) (unpublished Ph.D. dissertation, University of Florida) (on file with the Univ. of Florida) (quoting Gov. Talmadge).

be advocates of any new ideas concerning our Federal Government.⁷¹

The following month, Gannett informed a friend that if Roosevelt had the opportunity to name liberals to the bench, “then the America that you and I love will be a thing of the past, and we will be on the road to dictatorship such as they have in Italy and Germany. God save us from this!”⁷²

Throughout the spring, Americans heard a theme sounded again and again. A future Republican Senator from South Dakota stated: “Leave the Supreme Court alone.”⁷³ At the end of April, William L. Ransom, President of the American Bar Association, told the annual dinner of the Chamber of Commerce of the United States that, if the movement to whittle down the jurisdiction of the courts succeeded, Congress could enact laws stipulating

that no red-headed man could have a job, that no Catholic could go to mass, that no Jew could adhere to his religion or marry, that no employer of labor could vote in a Federal election, that no worker could belong to a trade union or that every worker must belong to a trade union or that no woman could be employed, except as a housewife.⁷⁴

Similarly, in mid-May, former Secretary of State Bainbridge Colby, commemorating the capture of Fort Ticonderoga, declared that “the Supreme Court of the United States was created to keep watch over” the liberties won by Ethan Allen and his Green Mountain Boys and enshrined in the Constitution.⁷⁵ “No man is a good American,” he insisted, “who is not for the Constitution of the United States and loyally behind the Supreme Court.”⁷⁶

As their national convention in June approached, the Republicans savored the opportunity to take advantage of these sentiments, only to have the *Tipaldo* decision—and the outcry against it—come as a rude shock. This development could not have arrived at a worse time, less than two

71. *Gannett Calls Borah the Best Candidate*, N.Y. TIMES, Feb. 23, 1936, at 31.

72. RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT* 60 (1966) (quoting Frank Gannett).

73. Chan Gurney, Address at Yankton, S.D. (Spring 1936) (on file with the Yankton County Museum, in the Chan Gurney Papers).

74. *Bar Head Warns of a 'Dictatorship'*, N.Y. TIMES, May 1, 1936, at 15 (quoting William L. Ransom). After denouncing the NRA and the AAA as “aimed at a complete regimentation of the nation, in complete disregard of the Constitution,” the columnist Frank Kent warned a correspondent, “The Supreme Court has saved us from that for the time being, but it is generally recognized that reelection of Mr. Roosevelt will give him control of the Court. The Brain Trust waits only for that to revive its unconstitutional and unamerican schemes.” Letter from Frank R. Kent to Mrs. John S. Biggs (Apr. 10, 1936) (on file with the Md. Historical Soc’y, in the Frank R. Kent Papers).

75. *Colby Declares Liberty Not Won*, N.Y. TIMES, May 17, 1936, at 31.

76. *Id.*

weeks before the convention at which they had intended to stand squarely behind the Court as the guardian of states' rights. As a consequence of the five-to-four *Tipaldo* ruling, there ensued "one of the swiftest changes on a convention agenda that observers can remember," Krock remarked.⁷⁷

Disappearing is the confident plan to put in the Cleveland platform a pious party promise to accept unquestioningly any Supreme Court majority decision, as the slavery Democrats did in 1860. . . .

The simple fact is that the Republican politicians have discovered that the narrow constructionists on the Supreme Court have become a liability for them instead of an asset.⁷⁸

On the House floor, the upstate-New York GOP Congressman Hamilton Fish, a champion of the Supreme Court and a relentless critic of his Hudson Valley neighbor Franklin Roosevelt, expressed consternation at the ruling. "I say to my Republican friends if you lend or express any sympathy for this decision . . . it will mean a million votes for the Democratic party," he declared.⁷⁹ Herbert Hoover, too, thought that "something should be done to give back to the states the powers they thought they already had."⁸⁰

At the Republican national convention in Cleveland that month, though, Hoover struck a different note in declaring: "The American people should thank Almighty God for the Constitution and the Supreme Court."⁸¹ When he spoke that sentence, one of his biographers has noted, "the hall erupted in sounds of approval that lasted two full minutes; an applause meter soared to 100."⁸² Buoyed by that reaction, Hoover continued:

You might contemplate what would have happened if Mr. Roosevelt could have appointed enough Supreme Court Justices in the first year of his administration. Suppose these New Deal acts had remained upon the statute books. We would have been a regimented people. Have you any assurance that he will not have the appointments if he is re-elected?

The delegates responded with thunderous cries of "No."⁸³

77. Arthur Krock, *Wage Ruling May Plague Cleveland Convention*, N.Y. TIMES, June 5, 1936, at 20.

78. *Id.*

79. *Supreme Court: Wage Ruling Causes a Political Dilemma*, NEWS-WEEK, June 13, 1936, at 12.

80. *Hoover Advocates Women's Wage Law*, N.Y. TIMES, June 7, 1936, at 1.

81. RICHARD NORTON SMITH, *AN UNCOMMON MAN: THE TRIUMPH OF HERBERT HOOVER* 226 (1984).

82. *Id.*

83. Herbert Hoover, *Address Delivered to the Republican National Convention, Cleveland, Ohio (June 10, 1936)* (on file in the Republican Nat'l Comm. Papers, Washington, D. C., Box 40).

Hoover's oration found fitting accompaniments in other addresses at the Republican convention. Especially unrestrained was the permanent chairman, Congressman Bertrand H. Snell, who denounced "the unconstitutional dictatorship—yes, the arrogant individualism of Franklin Delano Roosevelt."⁸⁴ Noting "the President's personal affection for a government-dictated collectivist order," Snell said of FDR:

He runs the true course of the dictator. Having seduced the legislative branch by billions in pork-barrel patronage, he now casts a calculating eye upon the judiciary, and by advice to Congress and sneer and gibe seeks to usurp the last bulwark of the citizen against unbridled autocracy!⁸⁵

The Republican Party adopted a platform that, in a deliberate effort to polarize the electorate on the issue of respect for the judiciary, proclaimed:

The New Deal Administration has dishonored American traditions and flagrantly betrayed the pledges upon which the Democratic Party received public support. . . . The integrity and authority of the Supreme Court have been flouted. . . . [The New Deal Administration] has insisted on the passage of laws contrary to the Constitution. . . . It has dishonored our country by repudiating its most sacred obligations. . . . We pledge ourselves . . . to maintain the American system of Constitutional and local self government, and to resist all attempts to impair the authority of the Supreme Court of the United States, the final protector of the rights of our citizens against the arbitrary encroachments of the legislative and executive branches of government. There can be no individual liberty without an independent judiciary.⁸⁶

To rid themselves of the albatross of *Tipaldo*, they went on to resolve:

We pledge ourselves to . . . [s]upport the adoption of state laws and interstate compacts to abolish sweatshops and child labor, and to protect women and children with respect to maximum hours, minimum wages and working conditions. We believe that this can be done within the Constitution as it now stands.⁸⁷

In short, the GOP was repudiating *Tipaldo* and saying that no amendment was required to authorize state regulation.

84. Bertrand H. Snell, Address at Cleveland, Ohio (June 10, 1936), in *REPUBLICAN NAT'L COMM., TEXT BOOK OF THE REPUBLICAN PARTY 1936*, at 73, 73 (1936).

85. *Id.* at 81.

86. *Republican Platform for 1936*, in *NATIONAL PARTY PLATFORMS 1840-1956*, at 365, 365-66 (Kirk H. Porter & Donald Bruce Johnson eds., 1956).

87. *Id.* at 367.

Once nominated, Republican presidential candidate Alf Landon had to work out a strategy for dealing with the Supreme Court question. When his running mate, Frank Knox, visited him in Topeka a week after the Republican convention, Landon told him that the Constitution would no more be a winning issue in 1936 than it had been in 1934. After the GOP debacle in the 1934 midterm elections, he noted, Senator Borah had said, "You can't eat the Constitution."⁸⁸ Yet Landon subsequently offered two conflicting explanations of what he then told Knox. In one version, he stated that their contest with Roosevelt should resemble the Lincoln-Douglas debates in 1858. They should force him to face a choice between revealing his intention toward the Supreme Court, which could be damaging politically, or keeping quiet, in which case he could never claim a mandate for tampering with the judiciary.⁸⁹ But in another version presented almost simultaneously he claimed that, with no little foresight, he deliberately held back from smoking out FDR because, had he done so, Democratic Congressmen would have had little choice but to go on record behind their party's candidate. The President would then have been able to bank on their support for revamping the Court in the next session.⁹⁰

There is no doubt at all, though, about what Landon actually said in the 1936 campaign. In a series of speeches, he hammered out the argument that Roosevelt sought to regiment American society but had been balked by the judiciary. Only "the courage and integrity of the Supreme Court," he told a September audience in Portland, Maine, had saved the country from the NRA.⁹¹ A month later in Detroit, he accused the New Deal's "gigantic propaganda machine" of unfairly attacking the Justices for striking down laws "which an untrammelled Congress would not have passed and a wise Executive would not have signed."⁹² At the Los Angeles Coliseum, Landon said of the Roosevelt administration: "[W]hen the Supreme Court declared its methods unconstitutional, the administration actually attempted to bring the Supreme Court into disrepute. . . . Even the President joined in this undermining attack on men who were only doing their duty—men sworn to uphold the Constitution of the United States."⁹³

88. See Letter from Gov. Alf M. Landon to Arthur A. Ballantine (Feb. 8, 1937) (on file with the Kan. State Hist. Soc'y, in the Alf Landon Papers, Box 83)

89. *Id.*

90. See Stanley High Manuscript Diary (Feb. 14, 1937) (on file with the Franklin D. Roosevelt Library, in the Stanley High Papers).

91. *Text of Governor Landon's Maine Campaign Speech Attacking the President*, N.Y. TIMES, Sept. 13, 1936, at 36 (transcribing the speech by Gov. Alf Landon in Portland, Maine, on Sept. 12, 1936).

92. *The Texts of Governor Landon's Addresses Yesterday*, N.Y. TIMES, Oct. 14, 1936, at 21 (transcribing the speech by Gov. Alf Landon in Detroit on Oct. 13, 1936).

93. MCCOY, *supra* note 22, at 323-24 (quoting Gov. Alf Landon).

At an enthusiastic rally in Madison Square Garden on the eve of the election, Landon posed searching questions about Roosevelt's intentions. To each, he gave the same answer, and after a time the boisterous crowd began to join him in the refrain: "The answer is: no one can be sure."⁹⁴ The biggest question, Landon declared, was "whether our American form of government is to be preserved."⁹⁵ Roosevelt, he charged, had carried out nine unconstitutional statutes, had encouraged Congress to enact laws when he was in doubt about their validity, and had demeaned both the Supreme Court and the Constitution. "What are the intentions of the President with respect to the Constitution?" Landon asked. "Does he believe changes are required? If so, will an amendment be submitted to the people, or will he attempt to get around the Constitution by tampering with the Supreme Court? The answer is: no one can be sure."⁹⁶ Forty-eight hours later, Landon noted, the President would be speaking at the same spot in Madison Square Garden, just two days before the election. Landon threw down the gauntlet: "Tell us where you stand, Mr. President. Tell us not in generalities, but clearly so that no one can mistake your meaning. And tell us why you have evaded the issue until the eve of the election."⁹⁷

Landon found support for his challenge to Roosevelt from a wide range of sources. GOP speakers claimed that the Court alone had rescued the nation from the abyss. Senator Vandenberg declared that "had it not been for the courageous Supreme Court, our institutions would have been made over in three short years,"⁹⁸ while Knox asserted that the Justices had blocked a "course toward ruin" by casting out "the incredible experiments and evil policies of this administration."⁹⁹ Assaults on government policies did not come only from Landon's fellow Republicans. The "Radio Priest," the Reverend Charles E. Coughlin, who denounced the President for "crucifying the Supreme Court,"¹⁰⁰ told a crowd of ten thousand gathered at a baseball field in New Haven that he was "chagrined" that Roosevelt, "surrounded by the ablest legal minds of the nation, and himself a lawyer," had approached the problem of amending the Constitution with "so much gaucherie, resulting in bringing odium on the Supreme Court as he has done."¹⁰¹ Under the leadership of the founder of the annual Constitution Day at Chicago's Soldiers Field, a group of seventy-five attorneys formed a

94. *Id.* at 334.

95. *Id.* at 335.

96. *Id.*

97. *Id.*

98. *Congress Scored as 'Money-Dumb,'* N.Y. TIMES, Sept. 20, 1936, at 25.

99. *Knox Says High Court Ended Course to Ruin,* N.Y. TIMES, Sept. 18, 1936, at 11.

100. BENNETT, *supra* note 69, at 229 (quoting Coughlin) (citation omitted).

101. *Coughlin 'Chagrined' by Roosevelt Action,* N.Y. TIMES, Sept. 17, 1936, at 8 (quoting Rev. Charles E. Coughlin).

“Lawyers’ Committee for the Defense of the Constitution,” charging that the New Deal imperiled the people’s rights.¹⁰²

After a meeting at the White House with the President, Louis Taber, Master of the National Grange, emerged fearful of what a second term for FDR might mean for the judiciary. “Fred, what are we going to do if President Roosevelt attacks the Supreme Court?” he asked the Grange’s Washington lobbyist, Frederic Brenckman. Raising that question, Taber later recalled, “was just like striking a match to paper. We both were on fire . . . in an instant, as we realized the tremendous historic consequences that could be ahead of us.” Brenckman told him, “That’s been botherin’ me too, Lou, and I believe it’s a possibility.” They conspired to offer “a ringing defense of the judiciary” to each rural gathering they addressed thereafter. “At every Grange meeting we spoke, hoping something would happen, and sure enough the Lord was with us, because at several state Grange meetings, and at Pomona Grange meetings, resolutions were adopted favoring the integrity of the judiciary, or favoring the constitutional processes of government,” Taber remembered.¹⁰³

In 1936 voters repeatedly heard warnings that, if reelected, Roosevelt would pack the Supreme Court. The central figure in these allegations was the publisher Paul Block. In an advertisement he paid for that ran in a number of newspapers, Block asserted, “The voters must be determined to remove from office an administration which definitely seeks to alter the Constitution and usurp the power of the Supreme Court.”¹⁰⁴ At the Waldorf-Astoria in New York in October, James A. Reed, former Democratic Senator from Missouri, charged that “the President broadly intimated that he would pack the Supreme Court by increasing its membership. I assert that Franklin D. Roosevelt in substance and effect made that threat to Paul Block, . . . and I challenge denial. And if they deny it, I’ll prove it by documentary evidence.”¹⁰⁵ Block maintained that, in the aftermath of *Schechter*, Roosevelt had hinted to him that he would pack the Supreme Court in order to have his way.¹⁰⁶

Block’s yarn found ready acceptance because allegations about Roosevelt’s intentions had been circulating all year long. Early in January, a New York newspaper speculated: “The President may, as President Grant

102. CHICAGO TRIB., July 24, 1936 (clipping on file with the Univ.77 of Michigan, in the Frank Murphy Collection).

103. Louis Taber Memoir, in Columbia Oral History Collection, *supra* note 55, at 315-17; Supplementary Notes, *id.* at 31.

104. Letter from A.F. Whitney to Frank O. Lowden (Apr. 17, 1937) (on file in the Frank O. Lowden Papers, Series 5, Box 25, Folder 5) (quoting the advertisement).

105. *Reed Cites Threat To Pack High Court*, N.Y. TIMES, Oct. 8, 1936, at 18 (quoting former Sen. James A. Reed).

106. See Advertisement by Paul Block, *President Roosevelt Dodges Governor Landon’s Challenge*, in N.Y. TIMES, Oct. 29, 1936, at 15.

did, increase the membership of the Court. He may add four liberals in order to insure a sympathetic approach by the Court to the New Deal Program.”¹⁰⁷ In May, a syndicated columnist summed up what he understood to be the attitude of FDR’s closest advisers in the aftermath of *Carter*:

The conservative U.S. Supreme Court majority has burned its bridges and assured a bitter-end struggle to curb the powers which it has assumed over congressional legislation.

If Roosevelt is re-elected, his battle with the six justices who have shown themselves grimly opposed to the New Deal is likely to be the most spectacular feature of his second term. . . . You can mark it down as a strong possibility that some time within the next year there will be more than nine justices. By a simple act of Congress the president would be enabled to appoint three or four additional members of the court. . . . Strategists whisper that it is more than a tentative proposal.¹⁰⁸

In a feature editorial, the editor of *The Catholic World* opened the pre-election issue of his magazine by writing:

[L]iberals sing in chorus “Nine Old Fogies,” and comedians upon the stage burlesque what used to be called proudly “the most august tribunal on earth.” At which, it is said, Mr. Roosevelt laughs, and it is even bruited about that he threatens to “pack” the Court with men who make decisions upholding his policies. The rumor is not without apparent foundation.¹⁰⁹

An army of conservative publicists and Republican partisans feasted upon such surmises. In July, Sterling Edmunds issued a call for a meeting of “Constitutional Democrats” in Detroit in August with this statement:

We are agreed, as are all who have any knowledge of constitutional history, that the re-election of President Roosevelt and his perseverance in his collectivist policies, with the prospect of his packing the Supreme Court to validate them, presents one of the

107. N.Y. EVENING POST, Jan. 8, 1936 (clipping on file in the Herbert Hoover Papers, West Branch, Iowa, PPS Box 70).

108. R. Dutcher, *Behind the Scenes in Washington*, BROWNSVILLE HERALD (Texas), May 27, 1936.

109. J.M. Gillis, *President Roosevelt’s Communistic Sympathies?*, CATH. WORLD, Nov. 1936, at 132.

gravest problems which has ever confronted the free American citizen.¹¹⁰

On October 30, in an address to a Republican meeting in Denver, Hoover demanded that Roosevelt answer in “plain words” these questions:

Does he propose to revive the nine acts which the Supreme Court had rejected as invasions of the safeguards of free men?

Has he abandoned his implied determination to change the Constitution? . . . Does he intend to stuff the court itself?¹¹¹

Ten days earlier, William Randolph Hearst’s principal subordinate had wired editors in the newspaper chain ordering them to run an editorial by the “Chief” on page one of their papers the next day. After stating that, if elected, Roosevelt would revive the NRA, Hearst went on:

But how, say you, can the Administration restore the NRA and other impositions which have been decreed unconstitutional by the Supreme Court?

By doing exactly what Mr. Roosevelt intends to do if re-elected and popularly endorsed: namely, change the Constitution and pack the Supreme Court.

There are three Justices of the Supreme Court who will retire in the next four years anyway.

How would you like to see Richberg, the revolutionist, Tugwell, the Bolshevist, and Frankfurter, the Communist, in their places?¹¹²

110. Letter from James H. Winston to Sterling E. Edmunds (July 30, 1936), *copied in* Letter from James H. Winston to Franklin D. Roosevelt (Aug. 1, 1936) (on file in the Franklin D. Roosevelt Papers, PPF 1786); *see also* Letter from James H. Winston to James Hamilton Lewis (June 24, 1937) (on file with the Univ. of N.C. S. Historical Collection, in the James H. Winston Papers, Folder 51).

111. *The Text of Hoover’s Denver Address Warning of New Deal ‘Shackles on Liberty,’* N.Y. TIMES, Oct. 31, 1936, at 4; *see also* Letter from James R. Sheffield to Elihu Root, Jr. (Feb. 17, 1937) (on file with Yale Univ., in the James R. Sheffield Papers, Box 11).

112. Telegram from E.D. Coblentz to Editors, All Hearst Morning Papers and Afternoons Where No Mornings (Oct. 21, 1936) (on file with the Bancroft Library, Univ. of Cal., Berkeley, in the E.D. Coblentz Papers, Part 1, Box 4). Donald Richberg, one of Roosevelt’s advisers, had been chief counsel of the National Recovery Administration. Rexford Tugwell, a member of the original Brain Trust, headed the Resettlement Administration. Felix Frankfurter, a professor at Harvard Law School, associated himself closely with the President and New Deal officials.

The charges disturbed some Democrats. A Chicagoan wired Secretary of Commerce Daniel Roper: “Personally know some employers intend discharging employees account fear Administration’s future policies. Since reemployment by a confident industry imperative consider extremely important you urge the President in tonight’s radio address to state definitely Supreme Court will not be packed.” Telegram from S.H. Boddinhouse to Daniel Roper (Nov. 6, 1936) (on file in the Franklin D. Roosevelt Papers, OF 41-A, Box 116). On the other hand, Dean Acheson wrote in the final week of the campaign, “The rumors about packing the Court really don’t disturb me, because it is very difficult to be sure what sort of packing you are getting and if you are sure,

IV. CRITICS FIND FAULT WITH THE COURT

In 1936, prospective voters heard the constitutional question raised in another, and very different, quarter: supporters of the President and critics of the Supreme Court, especially of its decisions that year starting with *United States v. Butler*. Roosevelt's silence on the demise of his farm program did not mean that anger at the ruling was not widely aired. In Manhattan, New Yorkers queued up to see the Federal Theatre Project's *Triple-A Plowed Under*, with actors portraying Supreme Court Justices in giant masks.¹¹³ In eastern North Carolina a traveling salesman complained:

I couldn't do any business at all. All I could do was to listen to talk about the death of the AAA. How it was bound to ruin us right quickly. I didn't do a bit of business the next day after the decision. I finally snapped my bags shut about 2 p.m. and came on home.¹¹⁴

Throughout the South and West, farmers voiced resentment at the *Butler* ruling and demanded immediate redress. "The farmers are not going to take this AAA defeat lying down," an Oklahoman wrote the White House,¹¹⁵ while from the coastal country of North Carolina, one constituent reported to his Congressman:

The decision of the Supreme Court against the AAA has cast a shadow of gloom and despair throughout this section. It seems to have blasted the hopes of both the Farmers and business men. . . . I do hope that some substitute legislation may be enacted, because otherwise there will be dark days ahead for this little Agricultural County.¹¹⁶

From one of the largest farming areas in Florida, a mass meeting wired Senator Park Trammell:

Controlled agriculture under the Triple A programs has increased the income of the four thousand farmers of Jackson County Florida more than \$500,000 yearly. It has enabled . . . [them] to regain

to have an appointment confirmed which upsets any large section of the country." Letter from Dean Acheson to Grenville Clark (Oct. 31, 1936) (on file with the Harry S. Truman Library, in the Dean Acheson Papers, Box 95).

113. JANE DEHART MATHEWS, *THE FEDERAL THEATRE, 1935-1939*, at 70-73, 310 (1967).

114. ANTHONY J. BADGER, *PROSPERITY ROAD 123* (1980).

115. Letter from John Harrison to M.H. McIntyre (Jan. 8, 1936) (on file with the Nat'l Archives, 5-36-346).

116. Letter from Carroll E. Kramer to Lindsay C. Warren (Jan. 8, 1936) (on file with the Univ. of N.C. S. Historical Collection, in the Lindsay C. Warren Papers, Box 15).

partially their rightful place in the economic picture of the nation. We do not intend having that place again taken from us.¹¹⁷

Edward A. O'Neal, leader of the American Farm Bureau Federation, the nation's largest farm organization, summed up the belligerent mood: "The fight is on. . . . And this time all gloves are off. Those who believe the American farmer is going to stand idly by and watch his program for economic equality and parity, for which he has fought more than a decade, swept into the discard, will be badly mistaken."¹¹⁸

In Ames, Iowa, the Court incited a particularly strong response. On the morning of January 6, concern about the fate of the Agricultural Adjustment Act was so keen that farmers occupied every seat and lined up along the walls of the Iowa State College auditorium to hear addresses by national and regional agricultural leaders. As he stood at the podium, Claude Wickard, an important AAA official who would one day succeed Henry Wallace as Secretary of Agriculture, glanced at his watch. It read 10:50 [A.M.]—11:50 Eastern Time—and he knew that shortly after noon the Court was likely to decide the fate of the farm program. He talked on for some minutes to the good-humored throng, then saw a boy push his way through the audience clutching a piece of paper that he carried up onto the stage. The crowd, which had been laughing at Wickard's latest quip, suddenly sobered and looked apprehensive as it saw his expression after he read the note. "The worst has happened," he told them. "The Supreme Court has invalidated the Triple-A." The crowd sat thunderstruck. "Now who's going to laugh?" Wickard asked bitterly. Dismay and befuddlement written on their faces, the farmers filed silently out of the hall.¹¹⁹ But that night alongside a highway near the campus, police cut down effigies of the six Justices who had voted to invalidate the processing tax. Each was life-size; each wore a black robe; and each bore a cardboard sign identifying the particular Justice who had been hanged.¹²⁰

The invalidation of the AAA's processing tax infuriated members of Congress in both houses and led to the introduction of bills such as one stipulating that no statute could be held unconstitutional unless the ruling commanded the votes of at least seven Justices.¹²¹ Senator Morris Sheppard of Texas castigated the "ridiculous" reasoning in the AAA case as

117. Letter from W.B. Anderson et al. to Park Trammell (Jan. 13, 1936) (on file with the Park Trammell Public Library, Lakeland, Fla., in the Park Trammell Papers).

118. *Farmers Are Split on End of the AAA*, N.Y. TIMES, Jan. 7, 1936, at 1 (quoting Edward A. O'Neal); see also Morton Taylor, *The Middle West Answers the Court*, 86 NEW REPUBLIC 71 (1936) (describing the unpopularity of Court decisions in the Midwest).

119. DEAN ALBERTSON, ROOSEVELT'S FARMER 100-02 (1961).

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

121. See MITCHELL DAILY REPUBLICAN (S. D.), Jan. 15, 1936 (clipping on file in the Peter Norbeck Papers, Box 105).

representing the “epitome of obsolescence.” *Butler*, he stated, “is the opinion of a mind that has ceased to live, and that can ruminate only on a dim recalled past.”¹²² A North Carolina Congressman was no less incensed. “The Supreme Court . . . voted against the Triple A by a vote of 6 to 3; the farmers voted for the Triple A by a vote of nineteen to one, yet the Triple A is no more,” said Harold Cooley. “You actually have no idea,” he told a constituent, “how many people would like to get a crack at at least six of the old boys.”¹²³

With the President taciturn, Congress stepped in to stir up a clamor about the judicial branch. “The years 1935-1937,” Michael Nelson has pointed out, “saw more ‘Court-curbing’ bills introduced in Congress than in any other three-year (or thirty-five year) period in history.”¹²⁴ The year 1936 alone witnessed more than a hundred measures, including one that anticipated FDR’s later proposal by authorizing an expansion of the Supreme Court to fifteen Justices. As the country awaited the outcome of a suit against the Tennessee Valley Authority, a Montana Congressman sponsored a measure providing that if the Court struck down the TVA Act, the seat of every Justice who so voted would automatically become vacant.¹²⁵

The well-respected Senator George Norris of Nebraska created a sensation with a speech on the Senate floor in February stating that nowhere in the Constitution “is there a syllable, a word, or a sentence giving to any court the right to declare an act of Congress unconstitutional.” He protested: “The members of the Supreme Court are not elected by anybody. They are responsible to nobody. Yet they hold dominion over everybody.”¹²⁶ Congress should break that hold, he said, by stipulating that no law it enacted could be invalidated save by the unanimous vote of the Justices.¹²⁷ Norris’s notion endorsed a popular remedy. A month earlier, a Tacoma man had written Roosevelt, “The extreme penalty is not exacted from the vilest culprit, save on a unanimous verdict. Why should the will of the people be crucified for less?”¹²⁸ Afterward, a nationally syndicated columnist told Norris of the “tremendous response,” including “extraordinary press coverage,” that his oration had elicited, adding “Even

122. E.F. Duke, *The Political Career of Morris Sheppard, 1875-1941*, at 436-37 (1958) (unpublished Ph.D. dissertation, Univ. of Texas) (on file with the Univ. of Texas).

123. See BADGER, *supra* note 114, at 122.

124. Nelson, *supra* note 55, at 273 (citing Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965)).

125. See *Capital Again Set for TVA Decision*, N.Y. TIMES, Feb. 10, 1936, at 4.

126. George Norris, *Legislation by the Judiciary* (on file with the Library of Congress, in the George W. Norris Papers).

127. See *id.*

128. Letter from Fred A. Smith to President Franklin D. Roosevelt (Jan. 9, 1936) (on file with the Nat’l Archives, Dep’t of Justice 235773).

the filthy Hearst jackals carried almost a column of your remarks. It was also amazing to me how deeply moved the press gallery was. Reactionary old bastards who haven't had an intelligent idea in decades spoke respectfully of your views."¹²⁹

An episode on the floor of the House in the second week of February indicated how acrimonious the dispute over the Court had become. Some "two-bit" editor in his home state of Texas had disparaged the Justices as minions of wealth, said Representative Thomas Blanton. He dared any Member to say that. "Mostly they have been," returned Congressman Marion Zioncheck of Washington. This same journalist had also called the Justices "nine old fossils," Blanton went on. "Four or five of them are, anyway," Zioncheck retorted. Undeterred, Blanton raised another challenge: Did any member of the House have the audacity to describe the Justices as "corporation lawyers?" Quickly, Zioncheck answered, "Seven of the nine are."¹³⁰

The Court's decision in *Carter* striking down the Guffey Coal Act enraged labor unions much as *Butler* had disconcerted farm groups. "It is a sad commentary on our form of government . . . when every decision of the Supreme Court seems designed to fatten capital and starve labor," said John L. Lewis, who headed both the United Mine Workers and the Committee for Industrial Organization.¹³¹ Even blunter was the *United Mineworkers' Journal*: "[I]f the decision of the Court is right, then, we need a new Constitution; if the Constitution means what it says, then we need a new Supreme Court."¹³²

Even some of the less conspicuous decisions elicited condemnation. No editorial writer on constitutional matters was more highly regarded than Irving Brant of the *St. Louis Star-Times*. "It is simply incredible," he commented on *Jones v. SEC*,¹³³

that an opinion such as that of Justice Sutherland could come from any body of men entrusted with the supreme duty of construing and applying the laws of this nation. . . . Such . . . moral obtuseness

129. Letter from Robert S. Allen to George W. Norris (Feb. 12, 1936) (on file with the George W. Norris Papers). For more reaction to Norris's speech, see Letter from Thomas R. Amlie to W. Jett Lauck (March 6, 1937) (on file with the State Historical Soc'y of Wis., in the Amlie Papers, Box 6); Letter from O.H. Cross to Stanley Reed (Jan. 17, 1936) (on file with the Nat'l Archives, Dep't of Justice 235868); and Letter from George W. Norris to Francis Heney (Apr. 25, 1936) (on file with the Bancroft Library, Univ. of Cal., Berkeley, in the Francis Heney Papers).

130. *Four High Court Justices Called 'Fossils' in House*, N.Y. TIMES, Feb. 11, 1936, at 15.

131. JAMES P. JOHNSON, *THE POLITICS OF SOFT COAL* 228 (1979).

132. James C. Duram, *The Labor Union Journals and the Constitutional Issues of the New Deal: The Case for Court Restriction*, 15 LABOR HISTORY 216, 227 (1974) (quoting UNITED MINeworkers J., June 1, 1936, at 3-4).

133. 298 U.S. 1 (1936).

does more to discredit the Supreme Court majority than any difference of opinion as to the general powers of Congress.¹³⁴

When, in *Ashton*, the Court struck down the Municipal Bankruptcy Act of 1934, Brant observed, “Keep this up . . . and nothing will be left of the Constitution.”¹³⁵

Five days after *Ashton* was handed down, the *Philadelphia Record* devoted its Memorial Day editorial to the Court. The paper noted that on an occasion when the nation honored the nearly half a million Union and Confederate dead, it should remember that “four horrible years of death, destruction and devastation” could be traced to a single cause: “the infamous Dred Scott decision” of the Supreme Court under Chief Justice Roger Taney.¹³⁶ Today, the newspaper continued, the country faced the same kind of issue—“wage slavery”—and “it is confronted with a Supreme Court majority as determined to prevent solution of that problem by orderly process as was the Court majority under Taney.” The *Record* declared:

Congress could have curbed the Court in 1857. It did not do so.

Congress can curb the Court today.

It must do so. . . .

On Memorial Day, of all days, we have before us a recollection of the terrifying cost of a judiciary unrestrained.¹³⁷

These statements, however, did not begin to match the outcry that greeted the final ruling of the Term in *Tipaldo*. As Alpheus T. Mason later commented: “At any time up to June 1, 1936, the Court might have retreated and thus avoided a showdown. The New York Minimum Wage opinion, handed down that day, convinced even the most reverent that five stubborn old men had planted themselves squarely in the path of progress.”¹³⁸ The *Washington Post*, which had been relentlessly critical of FDR on constitutional matters, entitled its editorial on *Tipaldo* “An Unfortunate Decision,” and its Supreme Court correspondent wrote regretfully: “Hereafter whenever New Dealers are taunted with trying to break down the rights of the States to manage their own affairs, the taunters will have this decision tossed in their faces”¹³⁹ In a year when better

134. ST. LOUIS STAR-TIMES (n.d.) (clipping on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 7).

135. See ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 421 (1956) (quoting Irving Brant).

136. PHILADELPHIA REC., May 30, 1936 (clipping on file with the Library of Congress, in the Raymond Clapper Papers, Box 230).

137. *Id.*

138. See MASON, *supra* note 135, at 438.

139. Franklyn Waltman, *Politics and People*, WASHINGTON POST, June 2, 1936, at 2.

than sixty percent of newspapers opposed FDR's reelection, a sample of 344 editorials found only ten, largely from textile towns, favorably disposed toward the ruling. The Independent Republican *Knickerbocker Press* of Albany wrote, "The law that would jail any laundry-man for having an underfed horse should jail him for having an underfed girl employee,"¹⁴⁰ and the widely read columnist Raymond Clapper confided, "On the subject of the Supreme Court I have reached the point where I am almost unable to say anything printable."¹⁴¹ The editor of the die-hard conservative *Boston Herald*, which described the decision as "[a]dmittedly a shocking blow to enlightened conservatives,"¹⁴² called up Felix Frankfurter to ask jocularly, "Is it true that the President bribed Butler and his four associates to decide the Minimum Wage case for him the way they did?"¹⁴³

The *Boston Transcript*, that mainstay of the town houses of Beacon Hill and the J.P. Marquand clubs of Back Bay, commented:

An eminent lawyer of Boston, now eighty-five years of age, has written for his grandson, who he hopes will likewise become a lawyer, a brief testament of instructions. In that document, summing up essential observations of a long and unusually successful practice at the bar, he says: "Remember this always. Fundamentally, what judges most desire is that their decisions shall appeal to the common sense of the community."

Can it be said that such appeal is made by the majority decision of five of the justices of the Supreme Court invalidating the New York Minimum Wage Law, and with it imperiling the like statutes enacted by Massachusetts, Connecticut, New Hampshire, Rhode Island, New Jersey, Ohio and Illinois? In these State-adopted laws, there was no hint of the national centralization of bureaucratic power over industry, the high pressure, the extremism that marked the Federal NRA, so gloriously put down by the Supreme Court.¹⁴⁴

If there was one newspaper the most devoted admirers of the Supreme Court could count on, it was the uncompromisingly Republican *New York Herald Tribune*, but when its readers opened its pages, they found the columnist Dorothy Thompson writing:

140. KNICKERBOCKER PRESS, June 4, 1936 (clipping on file with Cornell Univ. Sch. of Indus. & Labor Relations, in the Max Meyer Papers, Box 5).

141. Letter from Raymond Clapper to James M. Landis (June 4, 1936) (on file with the Library of Congress, in the James M. Landis Papers, Box 9).

142. See, MASON, *supra* note 135, at 424.

143. Letter from Felix Frankfurter to Franklin D. Roosevelt (June 6, 1936) (on file with the Library of Congress, in the Felix Frankfurter Papers, Box 98).

144. N.Y. TIMES, June 7, 1936, § 4, at 8 (reprinting an editorial from the *Boston Transcript*).

Monday's Supreme Court decision was the most momentous thing, was the most serious thing that has happened to this country in a very long time. It presents us with a problem that cannot possibly be evaded. We are now flat up against the fact that under the Constitution, or the prevailing interpretation of it, it is impossible for the American people through any instrument of government, be it state, or be it Federal, to offer protection for the most essential conditions of life to even the poorest and weakest of its members. Those—and there are some—who see in the very institution of the Supreme Court an instrument which will eternally block the path of social progress are not the ones to be perturbed. The citizens who will be perturbed are those who cherish the Supreme Court as the expression of the greatest genius of our founders and as the greatest safeguard of order and liberty.¹⁴⁵

Even stronger condemnation of *Tipaldo* came from outside the Republican camp. Under the rubric "A Deplorable Decision," the Catholic periodical *The Commonweal* wrote, "When five justices of the Supreme Court decided to outlaw the New York minimum wage law for women, they did something to public opinion which is comparable—we do not say equivalent—to a few activities by Louis XVI."¹⁴⁶ The Court, *The Commonweal* added,

has now, in the minds of many, become a terrible obstacle in the road of moral progress. Certainly there is nowhere in any Catholic or Christian system of morality any room whatever for a commendation of the minimum wage decision. It is bad. It is a blunder of magnitude. It will do more to undermine the prestige of the Court than everything else said or done during the past four years.¹⁴⁷

At the Democratic national convention that summer, Senator Alben Barkley of Kentucky capitalized on this discontent in his keynote address by denouncing the "tortured" construction of the Constitution.¹⁴⁸ "Is the court beyond criticism?" he asked. "May it be regarded as too sacred to be disagreed with?" The Democratic delegates answered with shouts of "No."¹⁴⁹

V. DISSENTING JUSTICES AND LAW PROFESSORS

145. Dorothy Thompson, N.Y. HERALD TRIB., June 4, 1936, at 23.

146. *A Deplorable Decision*, 24 THE COMMONWEAL 199, 199 (1936).

147. *Id.*

148. OFFICIAL REPORT OF THE PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION HELD AT PHILADELPHIA, PENNSYLVANIA, JUNE 23RD TO JUNE 27TH, INCLUSIVE, 1936 at 46 (1936).

149. *Id.* at 45.

CRITICIZE THE COURT MAJORITY

Finally, prospective voters saw Roosevelt's actions justified and the rulings of the judiciary questioned in the last place they might have expected: the Supreme Court—or, more accurately, the chambers of its dissenting Justices whose statements in turn won an enthusiastic reception in the nation's law schools. The first of these vigorous protests came at the very beginning of the pivotal year of 1936 with *Butler*. As Justice Harlan Fiske Stone pored over the draft of Owen Roberts' opinion, his gorge rose. He was not disturbed that the New Deal's farm experiment was being scuttled. "You do not dislike the AAA any more than I do," he later told a New York attorney.¹⁵⁰ But he was appalled by what he regarded as the arrogance of the majority in usurping powers that the Constitution bestowed on the legislative branch. On New Year's Day, 1936, he wrote the better part of a dissent that was uncharacteristically vituperative. So withering was the draft he circulated that Justice Roberts pleaded with Chief Justice Hughes to persuade Justice Stone to modify it. Hughes, who would do nothing himself, suggested that Roberts talk to Justice Brandeis, but Brandeis had already written, "I join in a fine job."¹⁵¹ Stone did tone down his draft, but it remained a scorching document.

Stone did not dissemble his contempt for Roberts's performance. "That the governmental power of the purse is a great one is not now for the first time announced," he said acidly. The suggestion of the majority that the spending power "must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument," he continued. "So may judicial power be abused." There were many constraints on the power to tax and spend, he observed, not least "the conscience and patriotism of Congress and the Executive."¹⁵² With obvious relish, he quoted Justice Holmes: "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."¹⁵³

This dissent attracted an extraordinarily favorable response from legal scholars. From Harvard Law School, Felix Frankfurter wrote SEC Chairman James M. Landis, "They know not what they do, these bunnies on the Court. . . . It is a great comfort, however, that Stone has put in

150. Letter from Justice Harlan Fiske Stone to C.C. Burlingham (Jan. 9, 1936) (on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 7).

151. MASON, *supra* note 135, at 408 n.†; *see also* Harlan Fiske Stone Memorandum (Feb. 4, 1936) (on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 62).

152. *United States v. Butler*, 297 U.S.1, 87 (1936) (Stone, J., dissenting).

153. *Id.* (Stone, J., dissenting) (quoting *Missouri K & T.R. Co. v. May*, 194 U.S. 267, 270 (1904)).

memorable language the ultimate issues regarding the Court's responsibility and behavior."¹⁵⁴ From New Haven, Fleming James told Justice Stone:

You may be interested to know a dictum that has been going about among the students of the Law School here—a dictum attributed to a certain colorful member of the faculty, who says he didn't say it, but it's true . . . that Owen's decision would not get a D in any course in constitutional law in any first class law-school.¹⁵⁵

Justice Stone's opinion radically changed the nature of the debate over the behavior of the judiciary. The language employed by the majority had brought forth from Stone, as the *New York Times* noted the next day, "words burning enough to light fires of dissatisfaction,"¹⁵⁶ while a leading constitutional commentator stated that never before had dissenters "gone quite so far toward calling into question the motive of the majority and clearly implying that they have abused their judicial prerogative."¹⁵⁷ No longer was the controversy simply one between the Court and its defenders on one side and the Roosevelt administration and its allies on the other. Indeed, as a Washington columnist observed, "the lawyers in ermine are the most scathing assailants of the constitutional opinions of one another."¹⁵⁸

The alliance in the *Butler* case of the three dissenters—Justices Stone, Brandeis, and Cardozo—held steady for the rest of the Term, a development that made implausible the contention of FDR's critics that the constitutional crisis was wholly the result of the President's failure to abide by the clear imperatives of the Constitution, especially when the Justices in the minority, who were sometimes joined by Chief Justice Hughes, had so much prestige. One columnist noted that the so-called liberal trio was comprised of "a former professor of law, a defender of public causes, and a

154. Letter from Felix Frankfurter to James M. Landis (Jan. 9, 1936) (on file with the Library of Congress, in the James M. Landis Papers, Box 10).

155. Letter from Fleming James to Harlan Fiske Stone (Jan. 23, 1936) (on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 82). The "certain colorful member" was almost certainly Fred Rodell. See, too, letters in that same box of the Stone Papers from Howard Lee McBain, Fred Rodell, and others, and Letter from John H. Clarke to Newton D. Baker (Feb. 11, 1936) (on file with the Western Reserve Historical Society, in the John H. Clarke Papers, File 3, Folder 24).

156. Arthur Krock, *Farm Act Is Swept Away*, N.Y. TIMES, Jan. 7, 1936, at 1.

157. Howard Lee McBain, *The Issue: Court or Congress*, N.Y. TIMES, Jan. 19, 1936, § 7 (Magazine), at 1. "Mr. Justice Stone's minority report does more than any outsider could do to destroy the illusion that the Supreme Court is actuated only by scientific reasoning," observed another newspaper. N.Y. EVENING POST, Jan. 8, 1936 (clipping on file in the Herbert Hoover Papers, PPS Box 70).

158. Arthur Krock, *Supreme Court Moves to the Fore as an Issue*, N.Y. TIMES, Jan. 8, 1936, at 18.

jurist, as distinguished from six men whose backgrounds are predominantly those of corporation lawyers.”¹⁵⁹

The dissenters continued to use vivid language in denouncing the majority. Cardozo, after circulating his dissent in *Jones*, thought it might be too acerbic and asked Justice Stone if he should soften it. Stone is said to have replied, “If you change a word in that, I’ll never speak to you again in your life.”¹⁶⁰ Cardozo’s words seared the paper. “To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection,” he asserted. “The statute and its sanctions become the sport of clever knaves.” Noting that a routine action by the SEC had been “likened with denunciatory fervor to the Star Chamber of the Stuarts,” Cardozo concluded dismissively, “Historians may find hyperbole in the sanguinary simile.”¹⁶¹ In a lengthy editorial in the *St. Louis Star-Times*, Irving Brant observed that “in the entire history of the United States Supreme Court it is doubtful if there has ever been such a blistering attack upon the majority of the Court as that launched by Justice Cardozo.”¹⁶² Had the dissent been assigned to Stone, it might have been even more vitriolic. “You doubtless have read by this time the Court’s opinion in the *Jones* (Securities Act) case,” he wrote Frankfurter. “It was written for morons, and such will no doubt take comfort from it. But I can hardly believe that intelligent people, trained in the law, will swallow such buncombe.”¹⁶³

In the following month, dissenting in *Ashton*,¹⁶⁴ Justice Cardozo concluded with two well-honed sentences that recalled his scoffing comments at the expense of the majority in *Jones*. To hold that an advantageous resolution of a local financial crisis “must be thwarted by the courts because of a supposed affront to the dignity of a state, though the state disclaims the affront and is doing all it can to keep the law alive, is to make dignity a doubtful blessing,” he said. “Not by arguments so divorced from the realities of life has the bankruptcy power been brought to the present state of its development during the century and a half of our national existence.”¹⁶⁵ Once again, Cardozo’s views coincided with those of Frankfurter. “Monday certainly was a field day for McReynolds,” Frankfurter wrote Justice Stone. He continued:

159. See Dutcher, *supra* note 108.

160. Chester Lane, in Columbia Oral History Collection, *supra* note 55, at 277.

161. *Jones v. SEC*, 298 U.S. 1, 32 (1936) (Cardozo, J., dissenting).

162. ST. LOUIS STAR-TIMES (n.d.) (clipping on file with the Library of Congress, in the Harlan Fiske Stone Papers, Box 7).

163. Letter from Harlan Fiske Stone to Felix Frankfurter (Apr. 7, 1936) (on file with the Library of Congress, in the Felix Frankfurter Papers, Box 105).

164. *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936).

165. *Id.* at 541 (Cardozo, J., dissenting) (1936).

I am bound to say that his decision in the Municipal Bankruptcy case is intellectually . . . contemptible. . . . You will agree, I know, what Holmes, J., would have said to the argument that the acceptance of a voluntary bankruptcy by a municipality necessarily leads to recognition of the right to impose involuntary bankruptcy. He would have said, "It makes me puke."¹⁶⁶

On the final day of the Term, in his dissent in *Tipaldo*, Justice Stone excoriated his brethren in the majority for indulging "personal economic predilections"¹⁶⁷ and read them a stern lesson in constitutional exegesis. "It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces," he declared.¹⁶⁸ "The legislature must be free to choose unless government is to be rendered impotent."¹⁶⁹ In words reminiscent of Justice Holmes's celebrated dissent in *Lochner v. New York*,¹⁷⁰ Stone asserted, "The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted, in the name of liberty, the system of theology which we may happen to approve."¹⁷¹

Consequently, Roosevelt did not have to make an issue of the Supreme Court in 1936 because the dissenting Justices, along with others, were making it for him. Immediately after the *Tipaldo* ruling, one of the President's aides, Stanley High, sent him a memorandum:

It seems to me that the minority opinions in recent Supreme Court decisions (particularly the Guffey and Women's Wage Law Decisions) can be used to make an invulnerable position on the Supreme Court. We can say that we stand where Hughes and Cardozo and Brandeis stand, and quote them. No one asserts that the Supreme Court minority is un-American because it disagrees with the majority opinion. The issue is not whether we are for the Supreme Court but, rather, which of the two Supreme Courts we are for.

A combing through of these minority opinions would . . . uncover material that would make our case for us—but in the actual words of the Justices, themselves.

166. Letter from Felix Frankfurter to Harlan Fiske Stone (May 28, 1936) (on file with the Library of Congress, in the Felix Frankfurter Papers, Box 105).

167. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 633 (1936) (Stone, J., dissenting).

168. *Id.* at 636.

169. *Id.*

170. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

171. *Tipaldo*, 298 U.S. at 636 (Stone, J., dissenting).

The memo was returned to High with a large scrawl on the bottom: "S.H. Yes FDR."¹⁷²

When the Justices closed up shop for the summer, shortly after the minimum wage ruling and just as the 1936 campaign was getting underway, politicians and commentators emphasized how the Court, by its behavior in recent months, had focused attention on itself. The Supreme Court, noted Arthur Krock, was "to go more or less on trial in a Presidential campaign for the first time in years," the "natural result," he thought, of "dissents expressed more forcibly among the brethren themselves than by public or press." Moreover, he pointed out, Republicans were arguing "that a vote against the President is a vote to prevent the court's future majority from being more sympathetic with his attempts than is the present one."¹⁷³ If it is a bit much to say, as Ackerman does, that "with such questions ringing in their ears, Americans went to the polls" in 1936,¹⁷⁴ that claim is, despite FDR's silence on the Court issue and the mealy-mouthed Democratic plank, not nearly so wide of the mark as his critics maintain.

VI. THE PEOPLE SPEAK

On November 3, the country registered its verdict on the contest between Roosevelt and Landon. Some of Ackerman's critics have said that the two candidates were so alike that there was no real choice, or even that Landon was the more progressive of the pair. Americans in 1936 would have been bemused, and perhaps amused, by such a notion. They perceived enough difference to give FDR the greatest proportion of the popular vote in recorded history as well as the largest plurality ever. Furthermore, the President chalked up the largest electoral margin since James Monroe ran in 1820 with no opposition. Roosevelt won all but two states, and the holdouts, Maine and Vermont, quickly became objects of derision. Interior Secretary Harold Ickes proposed establishing Vermont as a national park to "foster and protect that rapidly disappearing specimen, the homo Republicanus,"¹⁷⁵ while Alben Barkley suggested that "Maine and Vermont should be given to the Duke of Windsor as a wedding present."¹⁷⁶

Demographic analysis reveals even more tangibly how correct Ackerman is in viewing 1936 as a watershed. Voting broke sharply on class

172. Stanley High, Memorandum for the President (June 2, 1936) (on file with the Franklin D. Roosevelt Library, in the Stanley High Papers).

173. Arthur Krock, *Supreme Court Knows It Is on Trial in Election*, N.Y. TIMES, May 27, 1936, at 22.

174. 2 ACKERMAN, *supra* note 1, at 310.

175. Letter from Harold L. Ickes to J.F. Quinn (Dec. 3, 1936) (on file with the Library of Congress, in the Harold L. Ickes Papers, Box 231)

176. SPRINGFIELD DAILY NEWS (Missouri) (Jan. 8, 1937) (clipping on file with the Univ. of Ky., in the Alben Barkley Papers, Alben Barkley Scrapbooks).

lines. A canvass of 129 homes in a working-class bailiwick in Lansing found 116 backing FDR.¹⁷⁷ In Pennsylvania, Roosevelt carried Homestead, the notorious site of strike violence in the 1890s, by a four-to-one margin, and Aliquippa, the home of the Jones & Laughlin steelworks, by a vote of 6145 to 2970.¹⁷⁸ At the beginning of October, Stanley High had recorded in his diary Senator Joseph Guffey's report on the reception Roosevelt received in Pittsburgh: "Only 'ecstatic frenzy' would describe attitude particularly among women. R. went through poor districts going to Forbes Field—Streets lined five and six deep. Returned thru rich districts—Houses all dark. . . . But servants from houses stood in front in little knots and cheered."¹⁷⁹

Especially dramatic was the response of African-American voters. As late as 1932, despite the disproportionate suffering they endured in the Great Depression and despite the lily-white policies of the Republicans, they had maintained their historic allegiance to the party of Lincoln by voting emphatically for Hoover over Roosevelt. But in 1936 they switched to FDR and the Democrats, and the Democratic Party has been their home ever since.¹⁸⁰

But in giving Roosevelt this huge victory, were the voters motivated by concern over the way the Constitution was being construed? There is some evidence that they may have been. Supporters of the two candidates viewed the constitutional issue very differently. Asked whether they favored an amendment to the Constitution authorizing minimum wage laws, Democrats answered "Yes," 84% to 16%, whereas Republicans divided almost evenly, 51% for to 49% against. Furthermore, when interviewers inquired of those who advocated an amendment whether the new power should be lodged with Congress or the states, Democrats chose Congress, 65% to 35%, while Republicans preferred the states, 60% to 40%. Asked at about the time of the election, "Should the Supreme Court be more liberal in reviewing New Deal measures?" respondents could hardly have shown more conspicuously the party cleavages. Republicans replied "No," 78% to 22%; Democrats said "Yes," 80% to 20%. Strikingly, the Democrats were considerably more affirmative than those who identified themselves as Socialists.¹⁸¹

So apparent were party differences on the Court issue in 1936, and so frequently had they been aired, that when in 1937 the President's opponents

177. See IRVING BERNSTEIN, *A CARING SOCIETY: THE NEW DEAL, THE WORKER, AND THE GREAT DEPRESSION* 297 (1985).

178. Mary Heaton Vorse, *A Year of the C.I.O.*, 89 *NEW REPUBLIC* 106, 107 (1936).

179. Stanley High Manuscript Diary (Oct. 1, 1936) (on file with the Franklin D. Roosevelt Library, in the Stanley High Papers).

180. For analysis of the voting, see WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* 145-58 (1995).

181. See *THE GALLUP POLL*, *supra* note 60, at 29, 43.

charged that he had no mandate for Court-packing, Secretary Ickes could write to the renowned Kansas editor, William Allen White:

Why isn't the President justified in going ahead now? You Republicans charged constantly during the campaign that his reelection would mean undermining the courts, tampering with our judicial system, perhaps even amending the Constitution, or packing the court. You raised these issues and the people brought in a verdict against you—an overwhelming verdict. Aren't you estopped from saying now that the question of judicial reform was not raised? All that you can possibly say as to that issue is that we merely rested our case without argument to the jury. If it were a law case, tried in any court, that would be the exact status.¹⁸²

To be sure, Roosevelt in 1936 had deliberately sought to leave the impression that he had no designs on the Court, but did the electorate believe him? In February, a constituent urged him to leave the Court matter

till after the campaign, so as not to supply ammunition to the "constitution cryers." When the campaign is over, Congress could proceed in a calm mood and adopt certain changes. . . . Congress could suggest to the President to add to the present Tribunal two, four or six justices to make the number 11, 13 or 15.¹⁸³

At the Washington journalists' Gridiron Club banquet that spring, one skit took advantage of the notice accorded Erskine Caldwell's raunchy *Tobacco Road* and its most prominent character, Jeeter Lester. Two of the reporters discussed what Jeeter would do if he were President:

JEETER: Well, I certainly would crack down on everybody that didn't agree with me including the Supreme Court.

MA LESTER: Well, suppose the people showed they was strong for the Supreme Court?

JEETER: Why I'd shut up mighty quick—till after the election.¹⁸⁴

In October, the President's son James blurted out that as soon as his father began his second term he intended to change the Constitution in order to be

182. Letter from Harold Ickes to William Allen White (Feb. 20, 1937) (on file with the Library of Congress, in the William Allen White Papers, Box 186). The same point was made by the President of the Brotherhood of Railroad Trainmen. See Letter from A.F. Whitney to Frank O. Lowden (Apr. 17, 1937) (on file in the Frank O. Lowden Papers, Series 5, Box 25, Folder 5).

183. Letter from Jacob Hayman to Franklin D. Roosevelt (Feb. 24, 1936) (on file with the Franklin D. Roosevelt Library, OF 41-A, Box 116).

184. HAROLD BRAYMAN, *THE PRESIDENT SPEAKS OFF-THE-RECORD* 284 (1976).

able to revive the NRA. That blunder led the former NRA Administrator Hugh Johnson to write in his newspaper column that “son Jimmy ought to have a Maxim silencer for a birthday present.”¹⁸⁵

Still, all of these considerations fail to demonstrate the validity of Ackerman’s implication that in 1936 the voters were consciously amending the Constitution. Surely, whatever else they were doing, they were not doing that. At about the time of the election, Americans who were asked whether they favored “limiting the power of the Supreme Court to declare acts of Congress unconstitutional” replied “No,” 59% to 41%,¹⁸⁶ which came close to reversing the FDR-Landon proportions. Around the turn of the year, George Gallup posed the question, “What do you regard as the most vital issue before the American people today?” Neither the Supreme Court nor the Constitution appeared anywhere on the list of the nine most frequent answers.¹⁸⁷

VII. THE RATIFICATION OF GOVERNMENTAL POWER

Yet, like the protagonist of a silent screen melodrama, the Ackerman thesis is not altogether done in by this telling evidence, for if the country was not amending the Constitution, it was doing something else of immense importance: legitimating the advent of the Leviathan State. The nation understood perfectly well that it confronted a fundamental choice in 1936. The Democrats, who in the Grover Cleveland era had been the party of *laissez faire*, had become the sponsors of Big Government, with Roosevelt, piling one alphabet agency on top of another, the articulate spokesman for this changed emphasis. On the other hand, the Republicans, once the champions of a robust national union, had become the advocates of devolution.

Roosevelt, though largely silent on the Court question in 1936, had spoken out again and again that year on behalf of Big Government. In his annual message to Congress in January, he boasted that “in thirty-four months we have built up new instruments of public power,” and he warned that “political puppets of an economic autocracy,” if they seized that power, “would provide shackles for the liberties of the people” and “enslavement for the public.”¹⁸⁸ In June, in his address at Philadelphia’s Franklin Field accepting the Democratic nomination, he declared:

185. James Truslow Adams, *The Court Issue: Is Democracy Menaced?*, N.Y. TIMES, Feb. 21, 1937, § 8 (Magazine), at 1 (quoting Johnson without providing a more detailed citation).

186. See THE GALLUP POLL, *supra* note 60, at 43.

187. *Id.* at 47.

188. 5 PUBLIC PAPERS, *supra* note 15, at 16.

The brave and clear platform adopted by this Convention, to which I heartily subscribe, sets forth that Government in a modern civilization has certain inescapable obligations to its citizens, among which are protection of the family and the home, the establishment of a democracy of opportunity, and aid to those overtaken by disaster. . . .

Governments can err, Presidents do make mistakes, but the immortal Dante tells us that divine justice weighs the sins of the cold-blooded and the sins of the warm-hearted in different scales.

Better the occasional faults of a Government that lives in a spirit of charity than the consistent omissions of a Government frozen in the ice of its own indifference.¹⁸⁹

The President brought the 1936 campaign to a frenzied climax in a speech to a screaming, cheering gathering in Madison Square Garden at which he abandoned all restraint. He told the election-eve crowd:

Tonight I call the roll—the roll of honor of those who stood with us in 1932 and still stand with us today.

Written on it are the names of millions who never had a chance—men at starvation wages, women in sweatshops, children at looms.

He went on to warn that “powerful influences” sought to reinstitute the doctrine that “that Government is best which is most indifferent” and worked his followers up to a fever pitch by declaring:

Never before in all our history have these forces been so united against one candidate as they stand today. They are unanimous in their hate for me—and I welcome their hatred. I should like to have it said of my first Administration that in it the forces of selfishness and of lust for power met their match. I should like to have it said of my second Administration that in it these forces met their master.¹⁹⁰

Landon and his followers presented the country with a markedly different vision. A California newspaper, the *Fullerton Tribune*, wrote in 1936:

It is apparent that a basic issue in the coming national election will be that of concentration of powers in the national government. The New Deal . . . is now demanding that things be so changed . . . as to permit the unlimited functioning of the federal government in its

189. *Id.* at 234-35.

190. *Id.* at 567-69.

numerous programs on behalf of a “new social order.” Such a change would mean an entire overturning of . . . the American system of government. It would bring about the very thing which the builders of the Constitution sought to avoid¹⁹¹

Though Landon was a man with some liberal proclivities, he got so carried away during the campaign that he insisted that workers under Social Security would have to wear identification tags around their necks every day for the rest of their lives and that FDR’s policies would lead to the guillotine.¹⁹²

With lines so sharply drawn, millions of Americans had no doubt about how to mark their ballots. Asked at about the time of the election whether they favored the old age insurance feature of the Social Security Act, respondents answered affirmatively 68% to 32%.¹⁹³ Moreover, the question was phrased in a way that might have been expected to enhance negative replies, for it used the word “compulsory” and made a point of noting that workers would have to contribute an equal amount to that put in by employers.¹⁹⁴ Thanks to Roosevelt and the Democrats, the country had been introduced to the Welfare State, and in 1936 voters gave it a ringing endorsement.

VIII. CONCLUSION

How, then, should we assess Ackerman’s contention that 1936 was a constitutional moment? Without doubt, he goes much too far in maintaining that the American people were consciously amending the Constitution in 1936. In perusing correspondence in hundreds of manuscript collections, I have not come upon a single letter stating or implying such a sentiment. Ackerman is unquestionably right, however, in advancing a very significant claim: that “the People were . . . supporting a change in their governing philosophy.”¹⁹⁵ Given the opportunity to choose Landon, who could be

191. Robert L. Pritchard, *Orange County During the Depressed Thirties: A Study in Twentieth-Century California Local History*, in *HITTING HOME: THE GREAT DEPRESSION IN TOWN AND COUNTRY* 247, 260 (Bernard Sternsher ed., rev. ed., 1989).

192. See LEUCHTENBURG, *supra* note 180, at 113, 116.

193. See THE GALLUP POLL, *supra* note 60, at 40. The survey was conducted from November 6-11, 1936.

194. *Id.* The question stated: “Do you favor the compulsory old age insurance plan, starting in January, which requires employers and workers to make equal contributions to workers’ pensions?” *Id.*

195. For the impact of the 1936 election and related events on the Court, see David A. Pepper’s exceptionally perceptive article, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 146-50 (1998). Another scholar, William Lasser, has written that after the 1936 outcome “the Court succumbed to the verdict of the people within six months of the election.” William Lasser, *The Supreme Court in Periods of Critical Realignment*, 47 J. OF POL. 1174, 1182 (1985).

counted on to preserve the old order, they had instead voted overwhelmingly for Roosevelt, the tribune of Big Government and the sometime critic of the judiciary.

We cannot be sure how Americans squared this decision with their reverence for the Constitution and the Supreme Court. In a year when millions were still jobless, and millions more were surviving only because of the programs of the New Deal, that conundrum was not foremost in their minds. We also cannot be certain how well they comprehended that there was no way that the seismic “change in their governing philosophy”¹⁹⁶ could be validated unless the Court altered its course. It is not unreasonable to assume that “the People” would not long tolerate a Court that persisted in striking down legislation they cherished such as the Social Security Act. Yet they also continued to revere the Court as an institution and did not want anyone to tamper with it. Those clashing notions created a predicament not only for defenders of the Court, but also for the President.

What, finally, are we to say about the Ackerman thesis? There are aspects of his exposition, especially his celebration of the behavior of the Supreme Court in Roosevelt’s first term, that I find unpersuasive. But he stands on firm ground, I am confident, in characterizing 1936 as a watershed. If, in sum, the evidence falls short of sustaining Professor Ackerman’s bold claim about the intent of the electorate to amend the Constitution, it also indicates that his critics would be well advised to grant him more than they have.

196. 2 ACKERMAN, *supra* note 1, at 311.