

Debates on the Federal Judiciary: A Documentary History

Volume II: 1875–1939

compiled and edited by

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Introduction

This documentary collection introduces readers to public debates on federal judicial authority in the late nineteenth and early twentieth centuries. The documents illustrate the contending and evolving views of lawyers, judges, legislators, legal scholars, and ordinary citizens on the judiciary's role in American constitutional government. The volume focuses on the debates sparked by legislative proposals to alter the organization, jurisdiction, and administration of the federal courts, as well as the tenure and authority of federal judges. Documents are drawn from a variety of governmental and nongovernmental sources, including congressional floor debates, testimony in congressional hearings, bar association meetings, public addresses, legal treatises, law reviews, and popular periodicals. The documents selected represent the most prevalent and influential ideas about the courts and are but an introduction to the breadth and depth of materials available on the history of the federal courts.

This collection illuminates the many paths that were possible for the federal courts during a period of rapid social and economic change. The federal courts have not simply evolved in response to the needs of society—they are the product of political contests that reflect both competing economic and social interests and changing ideas about the role of the nation's courts in the American system of government. The speakers and writers in these documents believed that the stakes of these debates were high—that the organization, administration, and authority of the federal courts would have important consequences for core American governmental principles like separation of powers, political representation, and the rule of law.

Between 1875 and 1939, the federal judiciary's role in American law, politics, and society grew dramatically. The federal courts took on new responsibilities as the United States became an urban, industrialized country with an economy characterized by large business corporations operating on a national scale. In the name of protecting the property rights of individuals and corporations, the Supreme Court gradually broadened its interpretation of the Fourteenth Amendment and the role of the federal courts as a check on state government power. Congress's expansion of federal court jurisdiction over civil suits

based on diversity of citizenship along with the growth in new federal regulatory and criminal statutes in the early twentieth century led to an unprecedented amount of litigation before federal judges.

The expanded authority of the federal judiciary became the subject of heated political debate in the late nineteenth and early twentieth centuries. Southern Congressmen, already resentful of the federal government's Reconstruction era interventions on behalf of freed African Americans, saw the growing reach of federal courts as further evidence of encroaching federal power. By the 1870s and 1880s, southerners were joined by midwestern and western state lawmakers, judges, and lawyers angered that eastern financiers and corporations could force their citizens into federal courts, which they believed were more distant, expensive, and congested than state courts. They protested Supreme Court decisions nullifying state regulation of corporations and argued that the federal courts were infringing on the authority of state governments, and especially state courts, to govern themselves. Labor leaders throughout the country charged the federal courts with protecting the interests of business at the expense of workers. Congressional Democrats, local lawyers, and some progressive political reformers proposed legislation to restrict federal court jurisdiction, to limit the exercise of judicial review, and to weaken judicial equity powers. Court critics also proposed measures to make federal judges more accountable to the people through the election of judges and the popular recall of judicial decisions.

At the same time, interstate corporations and their lawyers praised federal courts for protecting their property rights under the Constitution from hostile legislative majorities in the states. They asserted that access to the federal courts under diversity jurisdiction shielded them from the prejudice of local judges and juries and provided businesses with predictable law throughout the country.

For them, the most important challenges facing the courts were congested court dockets, persistent delays, and rising litigation costs arising from the record number of cases that strained the institutional capacity of the courts to handle the new business. Republican politicians, federal judges, and elite corporation lawyers in the American Bar Association-pressed Congress to adopt innovations in court organization and administration to help the courts process more cases and more efficiently use judicial resources. They fought to establish circuit courts of appeals, to ease the Supreme Court's burdensome caseload,

and to grant the Court greater authority to manage the judicial system. Advocates for greater administrative independence, like Chief Justice William Howard Taft, believed that greater judicial control over court resources and operations would keep rising delays and costs of litigation in check and preserve the legitimacy of federal judicial power.

All of these proposals implicated enduring ideas about the federal courts and their role in American constitutional government. Among the most important recurring issues were the separation of powers and judicial independence. As federal judges declared more federal and state statutes in violation of the Constitution—including the income tax and child labor laws—supporters of greater government regulation criticized judges for usurping legislative power. Congress considered bills to abolish judicial review of federal laws, to allow congressional override of a judicial decision, and to require a supermajority for the Supreme Court to declare a law unconstitutional. Others called for greater responsiveness to the people themselves through judicial term limits or the popular election of federal judges. Finally, during the New Deal, President Franklin Roosevelt sought to impose judicial deference to Congress by giving himself the ability to appoint a host of new judges and Supreme Court justices. Roosevelt’s “court-packing” plan raised important questions about the authority of the President to influence judicial decisions. Opponents of the plan—including some strong critics of the Court’s decisions—claimed that all of these measures threatened the independence that allowed judges to enforce the rule of law free of political considerations. Roosevelt’s bold move to try to manipulate judicial policy through enhanced appointment authority led to a fiery storm that ultimately reinforced and strengthened public support for judicial independence.

The proposals for reform of court administration also raised important questions about the separation of powers. When American Bar Association leader Thomas W. Shelton campaigned to give the Supreme Court authority to write uniform rules of civil procedure for the federal courts, he argued that establishing procedural rules was a judicial function that had been usurped by Congress. In 1922, Congress, in response to Chief Justice William Howard Taft’s proposal, created a new Conference of Senior Circuit Judges, with the authority to study court conditions, to recommend the appointment of new judges, and to authorize the chief justice to transfer judges across circuit lines. Taft argued that judges were the best qualified to know how to manage

the judiciary and wanted to take questions of where judges would be assigned away from the political considerations of Congress. Taft's plan generated strong criticism from those who saw all of those things as the proper realm of the legislative power. By the 1930s, members of the Conference of Senior Circuit Judges, concerned about the influence that Congress and the executive branch had over court finances and administration—and with the ultimate support of the Department of Justice—persuaded Congress to usher in a new era of judicial branch independence with the creation of the Administrative Office of the U.S. Courts.

Debates over the federal courts also touched on the other hallmark of American government: federalism. Defenders of states' rights protested that the broadened diversity jurisdiction of federal courts over common law disputes represented an unwarranted transfer of authority from state courts to federal courts. The Supreme Court's broad interpretation of the Fourteenth Amendment's Due Process Clause, as well as district judges' use of injunctions against state officials, signaled to many Democratic lawmakers that state government authority was being threatened by federal judges. Their proposals for limiting federal jurisdiction led the representatives of eastern business and financial interests to defend the authority of the federal courts. They saw national courts as indispensable in an economy increasingly defined by commercial transactions and relationships that crossed state boundaries.

The questions over federalism were part of a broader ongoing debate about the relationship of localism and centralization in the courts. Chief Justice Taft and members of the American Bar Association believed that the only way the federal courts could keep up with their growing responsibilities was to centralize authority over court administration in the hands of the Supreme Court and the Conference of Senior Circuit Judges. These proposals met objections from members of Congress who valued decentralization in the federal courts. Taft's plan to assign "at-large judges"—the so-called flying squadron of judges—alarmed those who believed that federal judges should be intimately connected to the communities in which their courts were held. The movement to create a true three-tiered system of courts—with judges of the trial courts, appellate courts, and the Supreme Court functionally separated—represented a break from the traditional belief that appellate judges should sit in trial courts and maintain a connection with

the people. Many Democratic lawmakers were critical of the American Bar Association's push for uniform federal procedure because they believed that federal courts should share the procedure of the various state courts and mirror the local legal culture. This emphasis on decentralization was durable within the judiciary as well, as a number of judges resisted greater oversight of their courts and the erosion of their traditional autonomy. Even as the judiciary received greater administrative control with the creation of the Administrative Office of the U.S. Courts in 1939, circuit judges—at Chief Justice Charles Evans Hughes's insistence—maintained a decentralized structure of supervisory power in the Conference of Senior Circuit Judges.

Finally, the proposals to adapt the federal courts to handle their increased responsibilities led to ongoing debate about access to justice. A major aspect of the debate over creating new circuit appeals courts in the 1880s was what kinds of cases could be taken to the Supreme Court. The new, intermediate level of appeals courts meant that the Supreme Court would no longer serve as—at least in principle—the final arbiter of disputes for all Americans. Debate over the 1925 Judges' Bill, which increased substantially the Supreme Court's discretion over its appellate docket, represented to many the further erosion of access to the highest court in the land. Debate over federal jurisdiction throughout this period centered on the extent to which federal courts were too distant and costly for poorer litigants, limiting poorer litigants' ability to achieve justice against corporations and other powerful litigants.

The collection is presented in four main parts. Part One traces the debates over court jurisdiction and organization from the expansion of federal jurisdiction in the Judiciary and Removal Act of 1875 to the 1891 creation of the circuit courts of appeals and the 1911 consolidation of the district courts with the old circuit trial courts. Part Two presents the competing responses to federal judges' increased use of judicial review and injunctions from the 1890s to the 1920s. Part Three focuses on debates over judicial administration as lawyers and judges struggled with the delays that accompanied the growing responsibilities of the federal courts. Part Four concludes the volume with debates about judicial independence and executive authority in the 1930s that grew out of Franklin D. Roosevelt's aborted court reorganization plan and the establishment of the Administrative Office of the United States Courts in 1939.

Court Organization and Jurisdiction

By the late 1870s, the combination of national commercial development and congressional expansion of federal court jurisdiction had led to a rapid increase in the number of cases in the federal courts, especially in the Supreme Court of the United States. Lawmakers, lawyers, and judges lamented the costs and delays of litigating a case in the federal courts and debated a number of proposals designed to decrease the workload of the Supreme Court. In doing so, they launched a decades-long reexamination of court organization, federal jurisdiction, and the role of the federal judiciary in American society.

Almost everyone in the late nineteenth century agreed that Congress had to do something to stem the flow of cases to the Supreme Court. A vocal group of lawyers and federal legislators argued throughout the period that the best solution was to leave the structure of the courts intact but drastically reduce the jurisdiction of federal trial courts. These lawmakers, especially Democrats from the South and West, were more concerned with reducing the size and power of the federal court system than helping the courts adjust to their growing caseloads. They worried about the expense and inconvenience for ordinary Americans forced to litigate in federal courts against increasingly powerful interstate business interests. By keeping private suits in state courts—especially those cases that were now entering federal courts based on diversity of citizenship—Congress could avoid creating new courts and judgeships and shift the balance of authority between the state and federal governments.

A majority in Congress was not prepared to reduce drastically federal court jurisdiction in an era of expanding interstate commerce and federal government engagement with the economy. Debate ultimately centered on establishing new courts and altering federal appellate jurisdiction. The most popular plan throughout the second half of the nineteenth century, and the one that Congress ultimately adopted in 1891, was to establish an appeals court in each of the nine judicial circuits and make it the court of final determination in select categories of cases. The proposal raised important questions about the role of the Supreme Court in the federal judicial system and was debated alongside a number of rival plans, including allowing the Supreme Court

to divide its caseload among smaller panels of justices. Lawmakers struggled, however, with whether the Supreme Court would continue to fulfill the Constitution's mandate for "one Supreme Court" if appeals were final in a collection of circuit appeals courts or a subgroup of only three justices. If more cases were excluded from the Supreme Court's jurisdiction, what criteria should be established for doing so? While appeals from the circuit courts were already limited by the 1875 Removal Act to cases involving more than \$5,000, proposals to increase that amount in controversy even further led to debate about the ever-decreasing access of Americans to appellate justice from the nation's highest court.

Crisis in the Federal Courts

Delays in the Supreme Court of the United States, 1875–1890

In the late nineteenth century, rapid growth of civil litigation in the federal courts led to unprecedented costs, delays, and inconveniences for litigants. The Supreme Court, which had almost no discretion to decline to hear a case properly before it, faced mounting case-loads. In 1860, 310 cases were pending before the Supreme Court at the start of its term. That number had risen to 636 at the start of the 1870 term and nearly tripled over the next twenty years, with 1,212 cases pending before the 1880 term and 1,800 at the start of the 1890 term.¹ It could take up to three years for an appeal from the trial level to be decided by the Supreme Court.

Throughout the late 1870s and 1880s, members of Congress, lawyers, journalists, government officials, and judges called attention to the workload of the Supreme Court and the consequences of congressional inaction. Current and former Supreme Court justices themselves published articles and made speeches pointing out that the Court's jurisdiction had not much changed since the nation's founding, even as the population, territory, and commercial activity of the country had grown dramatically. Presidents of the United States, attorneys general, and members of Congress stressed that the delay in resolving cases had become oppressive for litigants and amounted to a denial of justice. Few of the writers below agreed on what measures to take to relieve the Court and the American public from these delays, but all agreed that Congress had to do something.

1. Felix Frankfurter and James Landis, *The Business of the Supreme Court* (New York: Macmillan, 1928; Johnson Reprint Company, 1972), 60.

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For several years there have been constantly repeated complaints concerning the condition of business, and the manner in which it is transacted, in the Supreme Court of the United States. . . . Questions of law are not always treated with the precision which great care would give, and which ought to mark the judgments of the highest court of appeal. This carelessness appears sometimes in the conclusions arrived at, sometimes in the language in which they are expressed, sometimes from the too frequent presence of dissent among the judges. The evil is a real and serious obstacle to the administration of justice, and is weakening the beneficial influence of the Court, and the respect in which it is held.

[Document Source: "The Supreme Court," *American Law Review* 9, no. 4 (July 1875): 668.]

Whoever properly estimates the marvelous increase in our population and in our commerce, the vast multiplication of corporations, and the infinite variety of questions growing out of such institutions legitimately coming before that court, cannot fail to appreciate the fact that the business of the court must continue to increase in a like proportion. The fact is that there were one hundred and eleven more causes added to the docket of the Supreme Court of the United States during the last four months than there were causes disposed of within the same period, including those summarily dismissed. And if the business of that court shall continue to increase with the same ratio, it will not be long until it will reach a point when fully five years must elapse from the time of filing the record until a final adjudication is reached; to say nothing of the delay, frequently considerable, which must take place from the taking of the appeal to the deposit of the record in the office of the clerk of the Supreme Court! Five years' delay of justice! Five lingering, weary years of anxious waiting! And that, too, frequently attended with absolute ruin to the unfortunate suitor!

[Document Source: Representative James Knott (D-KY), Speech Before House of Representatives, February 16, 1876, *Congressional Record*, 44th Cong., 1st sess., 1876, 4, pt. 2:1126.]

I desire to call attention also to the necessity of making some additional provision for the transaction of the business in the Federal courts. In the Supreme Court the business is usually at present from two years and a half to three years behind, and it is impossible that this accumulation can be diminished while so large an amount is annually added to it. The cases ... are of the gravest character, involving necessarily elaborate discussion and laborious examination. It cannot be expected that more can be decided than are now disposed of in the annual session, or that any assiduity on the part of the distinguished magistrates who compose the court will enable them to accomplish more than that which they now do. The evils which the delay of justice occasions are too obvious to require discussion, and the consideration of Congress is respectfully called to some appropriate remedy.

[Document Source: Attorney General Charles Devens, in U.S. Dept. of Justice, *Annual Report of the Attorney General of the United States* (Washington, D.C.: Gov't Printing Office, 1877), 11–12.]

It is now a well-known fact, and one that has excited much discussion for a number of years in the country, that the courts of the United States, as now organized, cannot possibly transact the business before them with the promptness that justice requires. They are overburdened with business to such an extent that delays in determining litigation amount, in very many instances, to a denial of justice.

[Document Source: Attorney General August H. Garland, in U.S. Dept. of Justice, *Annual Report of the Attorney General of the United States* (Washington, D.C.: Gov't Printing Office, 1885), 36.]

The subject of relieving the Supreme Court of the United States from the arrears of its business, and preventing their future accumulation, has for some years attracted the attention of those interested....

There is ... a continued pressure in favor of some appropriate action. The court is not less than three years behind its docket; though fully equipped with a full bench of able-bodied men, up to the beginning of the present term, it has not been able to make any gain in its rate of progress. The arrearage still continues, and even

grows....An appeal to the present Congress for immediate relief is, therefore, pressingly made.

[Document Source: Justice Stanley Matthews, "The Relief of the Supreme Court," *The Independent*, December 9, 1886, 2.]

The law which fixes at this time the appellate jurisdiction of the Supreme Court was enacted substantially in its present form at the first session of Congress, nearly one hundred years ago. With few exceptions ... the jurisdiction remains to-day as it was at first, and consequently, with a population in the United States approaching 60,000,000 and a territory embracing nearly 3,000,000 square miles, the Supreme Court has appellate jurisdiction in all of the classes of cases it had when the population was less than 4,000,000 and the territory but little more than 800,000 square miles. Under such circumstances it is not to be wondered at that the annual appeal docket of that court has increased from 100 cases ... a half century ago, to nearly 1,400, and that its business is now more than three years and a half behind; that is to say, that cases entered now, when the term of 1887 is about to begin, are not likely to be reached in their regular order for hearing until late in the term of 1890.

In the face of such facts it cannot admit of a doubt that something should be done, and that at once, for relief against this oppressive wrong. ... What is needed is relief for the people against the ruinous consequences of the tedious and oppressive delays, which as the law now stands, are necessarily attendant on the final disposition of very many of the suits in the courts of the United States because of the overcrowded and constantly increasing docket of the Supreme Court.

[Document Source: Chief Justice Morrison Waite, Remarks at Philadelphia Bar Association Breakfast for the Supreme Court, September 15, 1887, printed in "Remarks of Chief Justice Waite," *Albany Law Journal* 36 (1887–1888), 318.]

The condition of business in the courts of the United States is such that there seems to be an imperative necessity for remedial legislation on the subject. Some of these courts are so overburdened with pending causes that the delays in determining litigation amount often to a denial of justice.

[Document Source: President Grover Cleveland, First Annual Message to Congress, December 8, 1885, *Congressional Record*, 49th Cong., 1st sess., 1885, 17, pt. 1:117.]

The necessity of providing some more speedy method for disposing of the cases which now come for final adjudication to the Supreme Court becomes every year more apparent and urgent.

[Document Source: President Benjamin Harrison, First Annual Message to Congress, December 3, 1889, *Congressional Record*, 51st Cong., 1st sess., 1889, 21, pt. 1:87.]

The court cannot relieve itself. . . . With the extremest industry it is impossible to dispose of more than about four hundred cases in any one year. Long experience has demonstrated that. It will require nearly four years to clear the present calendar, and if it were now clear, the next calendar would in all probability be beyond the power of the court to dispose of in due season. From three to four years must elapse before a case now brought into the court can be reached for decision, and in view of past experience, and of the amazing growth of the country, of its wealth and business, of the multitude of startling inventions, of the increase of railroads, and the prospective increase of commerce, it is not unreasonable to anticipate that, if relief does not come, the burdens under which the court is now struggling will grow larger from year to year. Is the present condition of things establishing justice? Is it not, rather, a practical denial of justice? Has a suitor no just cause of complaint against a government avowedly organized “to establish justice” between itself and its constituents, and among its individual subjects, when he must wait three or four years before he can obtain it?

[Document Source: William Strong, “Relief for the Supreme Court,” *North American Review*, Nov. 1890, 568–69.]

Although the court has each year increased its labors, so that more causes are disposed of at a single term than during a whole decade half a century ago, the fact yet remains that the business is gradually gaining upon the court. Notwithstanding its heroic effort to shake itself free, it is gradually sinking under the weight of fast-accumulating appeal records. The evils of the present condition of affairs are grave, immedicable, and, in many cases, well-nigh intolerable. He suffers wrong who is denied the opportunity to enforce a right. Justice postponed is injustice. To refuse a hearing to a litigant is to do him affirmative mischief. The cases are not few in

which a court might as well turn the suitor at once from the temple of justice as close the door in his face for four years.

[Document Source: Alfred Conkling Coxe, "Relief for the Supreme Court," *Forum*, February 1889, 568.]

Circuit Judge George McCrary, Congestion in the Trial Courts, *Central Law Journal*, September 2, 1881

While most observers focused on the burdens of the Supreme Court of the United States in the late nineteenth century, others drew attention to the challenges faced by judges in the trial courts.

The federal judiciary included two types of trial courts—the district courts and the circuit courts. In each judicial district, a U.S. district court served as the federal trial court for admiralty and maritime cases as well as for noncapital criminal cases. The districts were organized into nine judicial circuits, with each district hosting a circuit court. By statute, the circuit courts were held by a district judge and a Supreme Court justice assigned to the circuit, though district judges were permitted since 1802 to hold circuit courts on their own. In 1869, Congress authorized the appointment of a circuit judge in each circuit to exercise the same authority as Supreme Court justices in the circuit courts. Congress also reduced the required attendance of the justices to one session every two years. The circuit courts had jurisdiction over all federal criminal cases, suits between citizens of different states (diversity cases), most equity cases, and, concurrently with the district courts, civil suits initiated by the United States. The circuit courts also heard appeals from the district courts in some cases.

Even with the appointment of circuit judges, the federal trial courts struggled to keep up with increasingly crowded dockets in the late nineteenth century. In 1873, there were 29,013 cases pending in the lower courts. The federal bankruptcy act passed by Congress in 1867 contributed to the growing caseloads, with 5,118 bankruptcy cases pending that year. Even after the bankruptcy act was repealed in 1878, however, the number of cases pending in 1880 had risen to 38,045.²

Circuit Judge George W. McCrary—who as a member of the House of Representatives sponsored a plan to create intermediate appellate courts in 1876—argued in 1881 that the growing caseloads in the circuit courts made it almost impossible for circuit judges to visit all

2. Frankfurter and Landis, *The Business of the Supreme Court*, 60.

of their courts in a given term, leaving overworked district judges to sit alone in many circuit courts. McCrary pointed out that Americans expected the important class of cases in the circuit courts to be considered by a panel of judges. Like the Supreme Court, the circuit courts faced an ever growing problem as the increases in population and interstate commerce of the country brought more and more litigants into federal court. Ultimately, McCrary argued, Congress would have to respond by giving the courts an adequate number of judges to handle the caseload.

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The evil [of delay] is increasing with the growth of inter-State commerce and the extension of the Federal jurisdiction, to such an extent that a remedy is demanded by the needs of the Supreme Court alone. Our purpose in this article is to show that some such legislation is also required, and not less urgently, by the needs of the Circuit Courts. It is believed that no court was ever before clothed with an original jurisdiction more varied, important and extensive, than that which is devolved by law upon the Circuit Courts of the United States; and it is not to be supposed that Congress will long delay to provide the means necessary to the proper performance of public duties so important....

...A large majority of all the cases must be heard and determined by a single judge. Even when two judges are present, the great pressure of business, and the great expense to litigants attendant upon delay, makes it necessary for the judges to avail themselves of the privilege given by law,—of separating, and holding two courts at the same time. The theory of the judiciary acts is, that all important questions of law should be determined by the full bench; and litigants justly complain when they are deprived of this right. It is an important right. The value of discussion, and a comparison of views by judges in conference, can hardly be overestimated. The Federal judicial system is based upon the theory that the concurrence of two judges in the judgment of the circuit courts in important cases is desirable; or that in case of a difference of opinion, while the view of the presiding judge shall prevail, the case, irrespective of the amount in controversy, may go to the Supreme Court. The theory is sound, and nothing is lacking save the necessary judicial force to carry it out. This evil is greatly enhanced since the right of

appeal has been taken away in all cases involving less than \$5,000.

...

...The present judicial force is so small that the circuit judge can not, by possibility, attend all the terms of the circuit court. This will be made apparent as we proceed. It certainly requires no argument to show that the policy of establishing circuit courts which the circuit judge can not attend, and which must, however important the cases, be held by a single district judge, with final jurisdiction in all criminal cases, and in all civil cases involving \$5,000 or less, without opportunity for conference, and without power to certify a division in case of doubt, is a policy which can not be defended. It is a policy which violates the spirit of our judicial system. I do not believe that Congress has erred in establishing Federal courts in too many places. As it is, they are few and widely separated. The error is not in establishing so large a number of courts, but in providing too small a number of judges.

The present deplorable lack of judicial force makes litigation in the Federal courts both tedious and expensive. As already suggested, these courts are comparatively few in number, and necessarily far removed from many of the people who are compelled to litigate in them. The importance of promptness in the dispatch of business is, therefore, manifest. When parties and witnesses have traveled, as they often must, several hundred miles to reach the place where the court sits, it is a great hardship to keep them waiting indefinitely for a hearing, or to send them home, to return again at the next term....

...How inadequate has been the legislation of Congress to provide increased facilities to meet the vast increase of judicial business growing out of the marvelous growth of the country! ... The business of the Federal courts is necessarily increasing with the growth of commerce, the increase of population and wealth, and the multiplication and extension of railroads and other arteries of inter-State trade. These courts deal very largely with controversies between citizens of different States over which the Constitution itself gives the Federal judiciary jurisdiction. It is manifest that in these days of rapid transit, trade and traffic between citizens of different States must continue to increase, and the evils complained of must grow annually more burdensome, until the remedy is applied. We must remember, too, that our great territories, now rapidly

being settled, must soon come into the Union as States, bringing with them a vast amount of business for the Federal courts growing, not only out of their trade with citizens of other States, but also out of the laws of Congress concerning public land, mines and mining, and the Indians. All things being considered, the utter inadequacy of the present judicial force is so apparent, that no argument can make it more so.

[Document Source: George W. McCrary, "Needs of the Federal Judiciary," *Central Law Journal*, September 2, 1881, 167–69.]

Campaign to Limit Federal Jurisdiction

Lawmakers, judges, and lawyers debated proposals throughout the 1870s and 1880s to reorganize the federal courts in order to accommodate growing caseloads (see the following section). Some argued, however, that the federal courts' swelling dockets had less to do with the inexorable growth of the nation's population and commerce than with the expansion of federal court jurisdiction adopted by Congress in the 1875 Jurisdiction and Removal Act.³ The 1875 act expanded the authority of lower federal courts to hear cases involving so-called federal questions—cases arising under the laws, treaties, and Constitution of the United States—and provided greater opportunities for litigants to initiate and remove suits to federal courts when litigants resided in different states.⁴ The authority of the federal courts to hear these "diversity" cases had been controversial since the debates over the Constitution and became even more so after the 1875 act made it easier for litigants to remove cases to federal courts.⁵ Many argued that limiting federal jurisdiction over cases arising under diversity of citizenship would dramatically lower the number of cases in both the Supreme Court and the lower courts—by as much as a third—and reduce the costs and delays of litigating in federal court.

3. *U.S. Statutes at Large* 18 (1875): 470.

4. Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1982), 154–56.

5. Henry J. Friendly, "The Historic Basis of Diversity Jurisdiction," *Harvard Law Review* 41, no. 4 (February 1928): 483–510; Robert L. Jones, "Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction," *New York University Law Review* 82 (September 2007): 997–1101.

Court congestion was only a small part of the controversy over federal court jurisdiction in the late nineteenth century, however. The debate over jurisdiction was fundamentally about the power and reach of the federal courts and their relationship with the expanding corporate economy.

Democratic members of Congress from the South and the West accused federal courts in the 1870s and 1880s of favoring the interests of business corporations and eastern investors. Railroad and insurance corporations—which the Supreme Court recognized for the purposes of jurisdiction as citizens of the states in which they were chartered—were facing numerous contract and injury lawsuits in the state courts and took advantage of the expansive removal rights under the 1875 Jurisdiction Act to force plaintiffs into federal court based on diversity of citizenship. Railroads with federal corporate charters also removed suits to federal courts under the 1875 act's grant of federal question jurisdiction. In addition, based on the doctrine set down in the 1842 case of *Swift v. Tyson*,⁶ federal judges, in cases turning on nonfederal questions, implemented their own interpretation of state common law and effectively established a federal common law that was in many cases beneficial to corporate litigants.⁷

Southern and western lawmakers cited diversity jurisdiction as the root of an alleged pro-business bias in the federal courts. They argued that the federal courts were usurping the authority of state courts and the power of state governments to control corporations operating in their borders. Cases brought into federal courts based on diversity of citizenship dealt with state and common-law issues which, critics argued, state judges were perfectly capable of handling in an efficient and impartial manner. They objected that corporations forced litigants into congested federal courts to delay and increase the costs of proceedings in order to press them into unfavorable settlements. Court critics argued that restoring the law of diversity jurisdiction as it had existed prior to 1875 would keep litigants out of congested courts, reduce existing congestion, level the playing field between corporations and individuals, and reestablish the authority of state judiciaries.

6. 41 U.S. 1 (1842).

7. Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford University Press, 1992).

Republicans countered that diversity jurisdiction protected interstate businesses and investors from local prejudice and the anticorporate sentiments of state courts. They argued that the *Swift* doctrine brought about more uniform and predictable law, which was necessary to encourage interstate commerce. Federal court protection, Republicans stated, was necessary to encourage investment and economic development in the southern and western states.

Beginning in 1878, the Democratic members of the House of Representatives introduced legislation to dramatically limit federal jurisdiction. The House passed in 1880, 1883, and 1884 a bill drafted by Texas Democrat David B. Culberson that raised the minimum amount in controversy required to enter circuit court, narrowed the right of litigants to remove cases from state courts, and prevented corporations from entering federal courts based on diversity of citizenship. The bill also prohibited federally chartered corporations from removing suits to a federal court based on the claim that their charter made the case one of federal question jurisdiction. The Senate failed to act on Culberson's bill, however, until 1887 when the two houses reached a compromise. The Judiciary Act of 1887 increased the amount in controversy necessary to enter federal courts from \$500 to \$2,000 and eliminated the ability of plaintiffs to remove a case they had brought in state court.⁸ The Senate did not agree to block corporations from federal courts, though, and only accepted a provision that declared that national banks would be deemed citizens of the states in which they operated for jurisdictional purposes. Movements to reduce corporate access to the federal courts would recur periodically into the 1930s, without success.

Representative David B. Culberson, Call to Limit Federal Jurisdiction, House of Representatives, Speech of February 18, 1876

In the Congressional session following passage of the 1875 Jurisdiction and Removal Act, lawmakers introduced numerous bills to limit the right of litigants to remove cases from state to federal courts. When Congress began to seriously consider legislation to address

8. *U.S. Statutes at Large* 24, 49th Cong., 2d sess. (1887), 552. The act was passed again in 1888 with minor typographical corrections. 25 Stat. 433, Ch. 866, 50th Cong., 1st sess. (1888).

congestion in the Supreme Court in 1876, a number of vocal congressmen from the South and West responded by arguing that court congestion could best be alleviated by repealing key portions of the 1875 act.

Texas Democratic Representative David B. Culberson, who would introduce legislation continuously between 1880 and 1896 to limit jurisdiction, argued that the courts had the capacity to handle the natural growth of the nation's litigation if Congress would reestablish the boundaries of federal jurisdiction as they existed prior to 1875. Culberson saw the 1875 act as an attack on the authority of state courts and called for legislation that would limit the number of cases that could be removed to federal courts. He contended that retrenching federal jurisdiction would in one motion relieve the Supreme Court of its burdensome caseload and restore the proper balance between the federal and state tribunals. Culberson warned that establishing new courts would only reinforce the growth of federal judicial power at the expense of state courts and make it more difficult to reverse course and retrench federal jurisdiction in the future.

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I am frank to confess the business before the Supreme Court of the United States has grown to such extent that some remedy is demanded. But I deny, sir, that result has followed the fact that the number of States in this Union has increased, or that the population of this country has increased, or that the business of the country has increased. . . . I admit that these have had their influence to increase the business of the Supreme Court, but I apprehend the increase of the number of judges on that bench would have met the natural increase of business before that tribunal.

The cause of the increase of the business in that tribunal I attribute to another cause rather than to those which have been referred to. . . . For the last fifteen years the tendency of the Federal legislation of this country has been to take away power and importance from the States and vest them in the Federal Government, not only in a political, but even in a judicial aspect, until the result is to-day that the jurisdiction of the State courts has been contracted and diminished until they now present merely the skeleton of what they were formerly.

. . . I desire to say that the only way in which this evil can be remedied is for the Congress of the United States to take away that

jurisdiction which has been vested in the Federal courts, but which rightfully belongs to the State courts, and re-invest it in those tribunals. If you will do that, Mr. Speaker, you will find that the time of the Supreme Court will conform itself to the business, and that there will be no trouble in disposing of the business which will come before it.

I wish to call attention to the fact that if you . . . establish these appellate courts in the nine circuits of the United States, the result will be that we never can re-invest the jurisdiction of which we have already divested the State courts of this Union under a policy hostile to the States.

My impression is that the best way to accomplish the object we have in view is to . . . reframe the law on the subject of the transfer or removal of causes from State courts into the Federal courts. If you will do that you will find that the Federal courts and the Supreme Court as now organized are fully equal to the discharge of the business which will properly come before them. In my judgment, Mr. Speaker, if you establish these courts in the nine circuits of this country they will build up an influence which the Congress of the United States can never overreach. They will encroach still further upon the jurisdiction of our State courts until the strange anomaly will be presented of the whole important business of the country taken from the State courts and vested in the Federal courts.

[Document Source: *Congressional Record*, 44th Cong., 1st sess., 1876, 4, pt. 2:1167.]

Representative James R. Waddill, Criticism of Corporate Diversity Jurisdiction, House of Representatives, Speech of February 19, 1880

In 1880, Representative Culberson, chairman of the House Judiciary Committee, introduced legislation to modify portions of the 1875 Removal Act. Culberson proposed raising the minimum jurisdictional amount to take any cases—either by original jurisdiction or removal, involving a federal question or diversity of citizenship—into the circuit courts from \$500 to \$2,000. The bill also placed the power to remove a suit exclusively with a defendant sued in a state of which he was not a citizen. Plaintiffs who brought suit in state courts could not change their mind at a later time and remove to federal court unless they filed an affidavit alleging that local prejudice would make a fair trial impossible. Defendants sued in their

home state by a citizen of another state could not remove to federal court under the bill. Most importantly, the bill stipulated that corporations, including those with federal charters, would be considered citizens of each state where they did business and could not remove suits to federal courts based on diversity of citizenship.⁹

In an 1880 speech in support of the Culberson bill, Representative James R. Waddill, a Democrat from Missouri, argued that Congress had a duty to rebalance the power between corporations and individuals. According to Waddill, federal courts were too distant and expensive for ordinary citizens and access to federal courts was an unfair advantage granted to large businesses with greater resources. Waddill argued that corporations should submit to the laws, and the tribunals, of the states, which granted permission for them to operate within their borders.

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Now, sir, I favor this [Culberson's] bill because its provisions will relieve the people of many sections of the country of a grievous cause of complaint; because it provides that the rights of the citizen shall be tried by a jury of his peers and of the vicinage; because in the majority of cases it will remit causes to domestic home courts for trial; because it will put a stop to the harassment and burdensome expense of sending honest suitors for trial of their causes hundreds of miles distance from their homes to a strange court, whose modes of procedure, whose methods of trial and practice are alike unknown to him, and where, unknown to all around him, probity, honor, reputation, character, all go for naught. Mr. Speaker, we hear a great outcry and complaint about United States courts in these days. Numerous bills are now pending in this House to modify and mollify their jurisdiction. Is all this complaint without cause? Are there no reasons for it? Is it a mere passing humor of the people? Sir, there is justice in this outcry. There is reason for this protest. It may at times be unreasonable in its manner, and unmethodical in its assaults, but it has its full justification in the harassments and burdens arising out of the act of 1875 now sought to be partially remedied....

...The United States courts are too remote to be the arbiters of the rights of the citizen as a rule. Especially is this so in the South

9. H.R. 4219, 46th Cong., 2d sess., *Congressional Record*, 1880, 10, pt. 1:681.

and West, where the suitor often is compelled to travel three and four hundred miles, with his witnesses and counsel, to try his cause. And much of this harassment and expense—in fact, by far the most of it—arises from suits between individuals and corporations doing business in the State where the individual resides, and under and by virtue of the laws of that State, too.

This bill makes no assault upon corporations as such, but only seeks to place the individual citizen on an equal footing with the corporate or artificial citizen in the courts. Where is the wrong to corporations . . . ? Is it wrong to say that a corporation doing business in a State, protected by its laws and permitted to go with its goods or business right to the doors of the people of the State, shall only have the same privileges with reference to a forum for trial that the citizens of the State have? Is it an outrage to say that a powerful corporation shall not have the right, while transacting its business under the laws of a State, to drag citizens of that State hundreds of miles from their homes, at great expense and attended with vexatious and often disastrous delays, to a strange court, with its strange procedure, to hear and try their causes which their home courts are perfectly competent to do? Sir, I fail to see the injustice of forbidding to corporations doing business in a State the right of removal to Federal courts when it is not granted to the citizens of a State. The objection to the present bill is that it does not go far enough. Certainly if there is to be any favor shown in the dispensation of justice it should go to the weaker party, the individual citizen, and not as is the case now under the law of 1875, to the stronger, the wealthy and powerful corporations.

[Document Source: *Congressional Record*, 46th Cong., 2d sess., 1880, 10, pt. 2:1014–15.]

Senator George D. Robinson, Defense of Corporate Access to Federal Courts, U.S. Senate, Speech of February 12, 1880

Congressmen from the industrialized states of the East defended the right of corporations to take their cases into federal courts. In the congressional debate over Culberson's bill to restrict diversity jurisdiction and corporate access to federal courts, Massachusetts Republican George D. Robinson opposed discriminating against corporate "citizens." He reasoned that if the Supreme Court recognized the right of corporations as citizens to enter federal courts, Congress

had no constitutional right to rescind it. Furthermore, corporations, as much as any natural citizen, depended on federal protection of their rights. Robinson, who would go on to serve Massachusetts as governor, argued that bouts of “excitement” in the western states led to local prejudice against corporations. He warned that the threat from state courts hostile to outside businesses and creditors would harm the development of the country, which depended greatly on providing security and predictability for eastern capital. While proponents of scaling back the reach of the federal courts worried about the authority of the state courts, Robinson pleaded for preserving federal judicial power and cultivating national rights and uniform national law.

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The Constitution, in article 3, extends the judicial power to citizens of different States. Therefore, in its language and by the adjudication of the courts it extends its power to corporations, for they are citizens of the different States. Have they that right under the Constitution? It has been asserted, and is upheld by the Supreme Court, and of course it cannot be at the present time called in question....

Discriminate! Can this Congress, can you here? I think no one will claim it. Can you say here that the corporations, for instance, of the State of New York, created there and doing business there, shall not be citizens of New York, but shall be citizens of the various States wherever they may go and transact business? No; indeed. That is not within the power of this Congress. Can you say that I, a citizen of Massachusetts, shall not be a citizen of Massachusetts when I want to come to the United States court, but shall be a citizen of Louisiana, or it may be of Ohio, or it may be of Illinois? Certainly not. Can you say by your legislation that the State of Massachusetts, for instance, shall have no rights in the circuit court, that the citizens of Massachusetts shall have no rights in the circuit court? Why, not at all....

If Congress can exclude the citizens of a locality, or the citizens of one color, or the citizens of one occupation, or the citizens of certain classes of wealth or industry, surely it can exclude any other citizens. If you can, in this bill and under our Constitution, declare that the citizens, or any portion of them, in this country, because they act in their corporate capacity, shall lose their rights

in the Federal courts, it is but the next step to legislate that the man who is engaged in rolling iron, or in the manufacture of cotton or of woollen goods, or is a banker or “bloated bondholder,” shall not have any rights in the Federal courts. There is no stop between them.

“Well, but this bill,” it will be said, “does not declare that they shall not be citizens.” And it may be said that this Congress certainly has the power to decline to exercise the whole of its jurisdiction; that the Supreme Court has recognized that as within the discretion and power of Congress. So the court has, but I ask you to observe that the court has never given any countenance . . . that upon this matter of jurisdiction there may be any discrimination as to citizens. There may be a discrimination as to subject-matter, but not as to citizens. . . .

Corporations are citizens for all purposes under the Constitution and laws of the United States relating to the Federal courts, and as such have equal rights. It is not material in this consideration that they are declared not to be citizens under other clauses of the Constitution and for different purposes. . . .

. . . Again, money may be loaned the towns and cities and counties throughout this country. And is it not fresh in your recollection that a good many of your towns and cities have seen fit to deny the obligation of loans made to them? And was it not best and right that the citizen of another State, natural or artificial, whether from the West, the South, or the East, should have the right to go into the United States court to try the question whether a certain county should pay its debts rather than go into the courts of that county? This bill says if you lend money to the town or city or county, and you are a non-resident of that State and a corporation, you shall seek your remedy against the town or city or county in its own court at the hands of its own people, who are to pay the taxes and take the law from the judges who sit on the bench elected by the votes of the people who pay the taxes, voted for generally by the defendants in the cases, and who expect to be elected next time, sometimes because they make this decision or the other that may suit the popular whim. . . .

And in the West there have been granger laws and granger excitements that have led people to commit enormities in legislation

and extravagances in practice; and in the South—why, sir, history is too full for me to particularize.

Capital is needed to restore the waste places of the South and to build up the undeveloped West; it must flow largely from the older States of the East and from foreign lands. But it will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor.

I say, then, let us stand by the national courts; let us preserve their power. Let us take out of those courts the causes of litigation that have multiplied and burdened the court and weighed it down, so that it may transact its business. But let us stand upon the legislation which the country has prospered under, which it has approved by its ninety years of life. Let us give our Constitution that construction which the fathers gave it that we may indeed be not merely a community of States. Let us no more in practice talk of State rights as against the power of the Government or against the rights of the citizens of the nation. Let us have a national power, national rights; and let us have individual interests and rights recognized under the Constitution and the laws of this great Government.

[Document Source: *Congressional Record*, 46th Cong., 2d sess., 1880, 10, pt. 1:848–49.]

William M. Meigs, Confidence in State Courts, *American Law Review*, June 1884

Supporters of Culberson's bill to limit corporate access to federal courts argued that jurisdiction based on diversity of citizenship was a provision that had outlived its usefulness. William M. Meigs, a constitutional scholar and a biographer of Democratic congressional leaders like John C. Calhoun and Thomas Hart Benton, asserted that interstate business and the ease of transportation had largely eroded the kinds of local prejudice against which diversity jurisdiction allegedly provided protection. Meigs reiterated that removal of diversity cases from federal dockets would decrease federal caseloads by at least one-third and obviate creating new courts or radically altering the organization of the federal judicial system.

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The jurisdiction depending exclusively on citizenship involves great and peculiar trouble [on the part of the Supreme Court], and it would seem, therefore, that the decision of a hundred such cases must demand not a little more time and labor than does an average hundred cases of strictly Federal law. Therefore, as the citizenship cases constitute slightly more than a third of all their cases, we should, by abolishing root and branch this source of jurisdiction, reduce their labor considerably more than a third. This is a vast reduction, and the only question that remains is the advisability of the step. Is there any reason to-day for the court's being troubled with this mass of cases which do not belong to the system of jurisprudence which it is their function to erect? We cannot see that there is. The reason for the constitutional grant of jurisdiction in such cases is well known and was doubtless a hundred years ago a very valid one, but it would seem to have no vital force any longer. At the time the provision was adopted, we were emerging from a condition in which each state had been actively engaged in erecting its own walls of restrictions, with the view of helping itself and injuring its neighbors, and there is no doubt that there were strong feelings of jealousy and distrust among the different states of the confederation. This condition of affairs was the very reason for the making and adoption of the constitution, and it is highly natural, therefore, that it contained the provision. There would likely, otherwise, have been frequent bickerings and discontents about verdicts and decisions going against citizens suing in states where they did not live, and one of the very purposes of the constitution would have been frustrated for a time. But the course of nearly one hundred years has changed all this. It is hackneyed now to speak of the nearness of all parts of the country to each other and of the closeness with which we are bound together in all the affairs of daily life, but it is only the more true, because hackneyed. It is undoubtedly the case that San Francisco is effectively as near us to-day as Boston was to Richmond a hundred years ago. The New Yorker is vastly better acquainted to-day with the Chicagoan than he then was with the man from New Haven. We are all closer together in point of mere time, and in other matters our closeness to each other is even greater. And this constant intercourse and knitting of interests has had that effect which was to be expected. We have become better friends, more similar in manners and

customs, more willing to trust each other, and we do not now look with staring eyes at the citizen of another state as he passes us in the street or we deal with him. On the contrary, we daily see and deal with many of them, without even knowing it, or caring, if we do. It may fairly be said that that prejudice, which was the cause of the constitutional provision, is a thing of the past. If it was then, it is no longer, the case that a citizen of any state need fear that he will fail of receiving a fair trial, let his suit be in what state you please. We must not forget that, in the federal as well as the state court, he will meet with a jury of citizens of another state than his; and, if the change proposed is made, the only difference will be that he will have his trial presided over by a judge, who is also a citizen of another state than he, which may, possibly, not be the case, when he has the right to sue in the federal courts. We should be loath to believe that this would put the party from a distance in any peril of not getting an impartial trial, nor do we think there is any evidence whatsoever that such would be the case.

... It is apparent that this one change will make such a reduction [of cases in federal courts] that there would probably be no necessity for several decades, at least, to erect a new court, and he is an unwise physician who applies radical remedies before there is an imperious necessity. The country is certainly growing with tremendous strides, and it is likely that litigation will increase with the growth of population, but we can by no means say that it will grow in anything like the same proportion; and, if one simple remedy can enable the court at its present rate to dispose of considerably more than the annual accession, it is surely not advisable to apply such heroic remedies as are advocated. The future is so uncertain that it is not best to make great changes, when a small one will remedy the present evil. Let us rather provide for our present needs by simple means, and not legislate in the dark for a condition of affairs, which is, maybe, to exist several decades from the present time.

[Document Source: William M. Meigs, "The Relief of the Supreme Court of the United States," *American Law Register* 32, no. 6 (June 1884), 365–67.]

Circuit Judge William Howard Taft, Defense of Federal Jurisdiction, American Bar Association Annual Meeting, Speech of August 28, 1895

Republicans and Democrats reached a compromise on limiting federal jurisdiction in the Judiciary Act of 1887. The act increased the amount-in-controversy necessary to enter federal courts from \$500 to \$2,000 and eliminated the ability of plaintiffs to remove a case they had brought in state court. The act did not achieve the Democrats' goal of blocking the ability of corporations to enter the federal courts based on diversity of citizenship. Congressman David Culberson continued to introduce legislation to end corporate diversity jurisdiction until he left Congress in 1896, and a number of lawyers continued the campaign into the twentieth century.

As a circuit judge for the Sixth Circuit, future President and Chief Justice of the United States William Howard Taft emerged as perhaps the most articulate defender of federal diversity jurisdiction. Taft was among the few who spoke out in defense of not just the federal courts, but also their recognition of the rights of corporations. Taft argued that it was the federal courts' duty to protect all citizens, natural and artificial, from prejudicial action of juries in "corporation-hating communities." He pointed out that federal courts had to guarantee corporate rights in the increasingly national industrial economy in order to ensure that investors would contribute to the economic development of the western and southern regions of the country. The agitation against the federal courts for their allegedly pro-corporate bias was misplaced, argued Taft, and largely cultivated by local and state politicians who failed to adequately check corporate power themselves.

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The jurisdiction of the Federal judiciary does not end with the enforcement of national laws in the interest of the whole country against the temporary interest of a part. They are also required to administer justice between the citizens of different States. It goes without saying that this judicial power was given to prevent the possibility of injustice from local prejudice and not because in every case it was supposed to exist. The entire jurisdiction rests on the exceptional instances, for in a great majority of cases the same results would certainly be reached in the courts of the State as in the Federal courts. But in those courts or States where there is real danger from prejudice against a stranger, the same cause which is

likely to obstruct justice for the foreign suitor creates a local feeling of resentment against the tribunal established to defeat its effect. The capital invested in great enterprises in the South and West is owned in the East or abroad, and the corporations which use it are therefore frequently organized in a different State from that in which the investment is made. Such companies all carry their litigation into the Federal courts on the ground of diverse citizenship with the opposing party, and, in view of the deep seated prejudice entertained against them by the local population, it is not surprising that they do. That in most, if not in all, cases the feeling that prompts this avoidance of the State courts does great injustice to the State judiciary is undoubtedly true. In jury trials, however, the fear of injustice from local prejudice is certainly sometimes justified. In these same States where the narrow provincial spirit is strong and local prejudices exist, there is deep fear of the abuse of judicial power and the legislation of the State is directed to minimizing the influence and control of the judge over the action and deliberation of the jury. . . . The tendency of such procedure is to leave to the unrestrained impulses of the jury the settlement of all the issues of the case. Though the injustice likely to result to corporations from this procedure is manifest, the people of a locality where local prejudice exists have come to think that they have a vested right to the chances of success which it gives them in a suit against such opponents. When, therefore, in controversies with corporations of other States, they are carried before a court in which the jury are not their friends and neighbors and in which the power is given to the judge to direct a verdict when the evidence for either party is so slight that a contrary verdict must be set aside, to comment on the evidence, to apply the law thereto, and to make plain, if need be, what the legal sophistries of counsel and their inaccurate statements of the evidence may have obscured, they feel that they are in a tribunal which they should avoid and which the corporations should naturally seek. The constant struggle of most corporations to avoid State tribunals in the sections of the country referred to, and to secure a Federal forum, even though it is followed by only limited success in the result of the litigation, is chiefly the cause for the popular impression in those States that the Federal courts are the friends of corporations and protectors of their abuses. . . .

On the whole, when the charges made against Federal courts of favoritism towards corporations are stripped of their rhetoric and epithet, and the specific instances upon which the charges are founded and reviewed, it appears that the action of the courts complained of was not only reasonable but rested on precedents established decades ago and fully acquiesced in since, and that the real ground of the complaint is that the constitutional and statutory jurisdiction of the Federal courts is of such a character that it is frequently invoked by corporations to avoid some of the manifest injustice which a justifiable hostility to the corrupt methods of many of them inclines legislatures and juries and others to inflict upon all of them.

[Document Source: William Howard Taft, "Recent Criticism of the Federal Judiciary," *Report of the 18th Annual Meeting of the American Bar Association* (1895), 247–49, 265.]

Proposals to Create Intermediate Appeals Courts

Proposals to roll back the federal jurisdiction based on diversity of citizenship granted by the 1875 Jurisdiction and Removal Act failed to pass both houses of Congress in the late 1870s and early 1880s. Instead, the worsening of delays in the federal courts led to proposals to reorganize the courts to accommodate the ever-growing number of cases.

The leading proposal to ease the workload of the Supreme Court was to create nine intermediate appellate courts, one in each of the judicial circuits. In order to decrease cases flowing to the Supreme Court, congressional Republicans proposed limiting appeals from these circuit courts of appeals to cases involving questions of federal law and to civil cases where the amount in dispute was greater than \$10,000. Most proposals for new appeals courts also included the appointment of new circuit judges, as many as two per circuit, to handle the increased appellate business.

Democrats proposed alternative court reorganization plans to compete with the plan for intermediate circuit courts of appeals. Democrats, distrustful of the growing influence of the federal courts, objected to creating new courts and appointing more judges. Instead, one popular plan called for splitting the Supreme Court into several divisions that would sit separately to hear appeals in particular categories.

ries of cases. Others proposed creating a single court of federal appeals to sit in Washington and exercise final jurisdiction over cases arising under diversity of citizenship.

Proposals for court reorganization sparked heated debate over what to do with the surge of civil cases brought into the federal courts based on diversity of citizenship and led to a reconsideration of the role of the Supreme Court at the head of the federal judicial system. With expanded jurisdiction bringing more litigants into the federal courts, did managing the workload of the Supreme Court mean further limiting the people's access to appellate review by the nation's highest court? If the Supreme Court's appellate jurisdiction was to be further limited, how should Congress decide which cases were the most important and worthy of the Court's energies? Supporters of creating new appeals courts argued that the Supreme Court should be dedicated to resolving only important disputes, defined as federal questions and civil cases involving large monetary claims. Critics of the new courts wanted to preserve the Supreme Court as the final arbiter of disputes brought into the federal courts. In addition, many worried that giving final jurisdiction over more cases to a number of geographically separated courts would destroy the uniformity and predictability of the law throughout the increasingly interconnected nation. If litigants could be brought into federal courts based on diversity of citizenship, they contended, then they should have access to appellate justice by the nation's highest court or another centralized court of high public esteem.

Representative George W. McCrary, Distance and Delay in Appeals, House of Representatives, Speech of February 17, 1876

The leading plan for addressing the growth of court business was to create intermediate courts of appeals throughout the country. Iowa Republican Congressman George W. McCrary—a future circuit court judge—sponsored legislation in 1876 to create an appeals court to sit in one city in each of the nation's nine judicial circuits. McCrary's bill also sought to limit appeals to the Supreme Court to civil cases where the amount in dispute was greater than \$10,000 and to cases involving the laws, treaties, or Constitution of the United States. McCrary's plan would have abolished the appellate jurisdiction of

the circuit courts and given the district and circuit courts concurrent jurisdiction at the trial level. The new three-judge appellate bench would be filled by existing judges, with any combination of the district judges, the circuit judge, and the Circuit Justice necessary to make a quorum. In addition, the bill proposed ending compulsory circuit court attendance by Supreme Court justices—a requirement that had already been reduced in 1869—so that they could devote the bulk of their time to the business of the Court.¹⁰

In his speech introducing the bill to the House of Representatives, McCrary emphasized that, while relieving the caseload of the Supreme Court, the proposed bill would increase access to appeals for litigants in the circuit courts. Congress had recently in the 1875 Jurisdiction and Removal Act limited appeals from the circuit courts to cases involving more than \$5,000 (it had previously been \$2,000). McCrary lamented that even those with cases large enough to qualify for appeal were forced to take their appeals to the distant Supreme Court, which was so overloaded with work that justice was delayed for years. New intermediate courts in each of the judicial circuits, McCrary argued, would bring appellate forums geographically closer to the people. The transfer of appellate jurisdiction from the circuit courts to the appeals courts would make review available to more litigants while at the same time freeing up the overworked circuit judges to process more trial work. Above all, McCrary celebrated his approach for accomplishing these goals without appointing more judges to the bench or increasing the expenses of the judicial branch.

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For a long time it has been apparent that something must be done to save the Supreme Court of the United States from being so completely overwhelmed with business as to render an appeal to it in many cases a practical denial of justice. That Court as it is organized to-day is able to transact but little more business than when it was first organized in 1798 [sic]. It is true that there are now upon the supreme bench nine justices, and that at the beginning there were but six; but, inasmuch as all the justices necessarily sit together in the hearing of every case, the only relief that the court has secured by the addition of these three justices is in the labor of preparing opinions after decisions have been reached. It is important

10. H.R. 1798, 44th Cong., 1st sess., *Congressional Record*, 1876, 4, pt. 2:1125.

to take into consideration the further fact that under the judiciary act of 1789 appeals to the Supreme Court were not permitted upon the facts in any case, since that act provided only for a writ of error for the review of the law. The additional labor imposed upon that court by the later acts giving appeals in equity, admiralty, and prize cases much more than equals the additional working force upon the bench; and hence the court would be less able to discharge its duties to-day than it was eighty years ago, even if in the meantime we had added nothing to our population, wealth, or territory. But the growth in the country in these and all other respects has been marvelous. . . .

There are then, Mr. Speaker, two very grave and serious evils growing out of the present condition of our judiciary. One is the very great distance from the places of the trial below to the only place where a trial can be had upon appeal; the other is the very great delay which necessarily follows every appeal or writ of error to the Supreme Court. I apprehend every gentleman will agree that it is one of the duties of the Government, since it requires its citizens to litigate in its courts, to afford a trial as near as may be to the residence of the citizen, and to afford a final decision as promptly as the circumstances will allow. Under existing circumstances, as I have already intimated, very many cases may arise in which the present condition of business in the Supreme Court and of the judicial business of the country will operate as a practical denial of justice. Causes are tried in the circuit courts of the United States very often by a single judge. In the hurry of a trial before a jury it is almost inevitable that errors will occur. Now, sir, suppose that a trial occurs in the city of San Francisco, or in the State of Oregon, involving, if you please, \$5,050. That is not a very large sum; but the loss of it by the error or the mistake of the judge may involve financial ruin to a great many litigants. In the haste of the trial of such a case, the litigant has in his opinion been deprived of that sum by the mistake or the error of a judge. What is his remedy? An appeal to the Supreme Court of the United States; a journey by himself or by his counsel a distance of more than three thousand miles to the city of Washington; a delay of four or five years before a trial can be had. I submit that in such a case there is a practical failure of justice. The expense of prosecuting such a trial is more than the

amount in controversy in nine cases out of ten, to say nothing of the delay.

Our present system, then, Mr. Speaker, fails in both these respects. It fails in giving to the litigant a court of appeals within reasonable distance and reasonably convenient to the place where he has his trial in the court below. It fails to give him a speedy final decision. Such is the condition of things to-day, and the evil, the difficulty, is constantly increasing. It seems, therefore, to be entirely clear that some remedy is imperatively demanded. . . .

If the views of the Committee on the Judiciary upon this subject shall be adopted, it will tend to relieve in a large degree the overcrowded dockets of many of the circuit courts. . . . We are entirely satisfied that the intermediate court of appeals which is provided for by this bill can be constituted from the judges now in office, now provided for by law, without the creation of a single new officer. At all events, sir, we propose to try the experiment. We will inaugurate the right system, and try faithfully to have justice administered under it by our present judicial force. It is certain that more and better work can be done by the present force under this bill than under the present law, and, if the experience of the future shall demonstrate the necessity for more force, it can be supplied by future legislation.

[Document Source: *Congressional Record*, 44th Cong., 1st sess., 1876, 4, pt. 2:1155–56.]

Editorial, Ensuring Access to Appellate Justice, *Central Law Journal*, August 27, 1875

Among the benefits that would accrue to litigants in a federal judicial system with intermediate courts of appeals was greater access to appellate justice and a check upon the authority of district judges. Under existing legislation concerning appeals, litigants in cases involving less than \$2,000 had no right of appeal from circuit courts. In addition, because of the overwhelming workload facing circuit judges and Supreme Court justices, most trials at circuit court were presided over by individual district judges. To many lawyers and legal observers, this placed too much authority in the hands of district judges and threatened to create “judicial despotism” at the trial level.

The editors of the *Central Law Journal*—an influential legal publication in the late nineteenth century that was often critical of the federal courts—argued that it was unjust that plaintiffs could be

forced into federal circuit courts and then denied a review of their case if they lost. The editorial argued that intermediate appellate courts would afford litigants the opportunity of having their trial outcomes reviewed by an impartial panel of judges with the time and resources necessary for a proper examination.

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There is, however, a feature of the system which at this day would seem palpably unjust, but which has become more so since the organization of the circuit court under the original [1789] act, by very material changes in its organization. It is this: the *minimum* sum which gives jurisdiction to the circuit court, under the act in actions at law and suits in equity, in the largest class of cases litigated in that court, is \$500, while the *minimum* which gives jurisdiction to the supreme court on appeal or writ of error, is \$2,000.¹¹ Thus depriving the suitor of an appeal or writ of error in all cases where the sum litigated ranges between these two amounts.

This provision . . . is quite unusual. It will be observed that one party litigant in every case is brought to litigate his case in the federal court involuntarily. . . .

Now we enquire, is it not fair and right—is it not incumbent upon the government, to furnish both parties with the means of obtaining not only a fair and impartial trial, but the same means of redress for erroneous rulings upon questions of law, by *nisi prius* judges, as are furnished by the state courts?

If, therefore, \$500 is the proper limit to justify the circuit court to try causes originally, the defeated party ought to have the right of review in all cases. If the supreme court is too august a body to be occupied in the consideration of cases involving such small amounts, or if such consideration is impracticable under the present organization of the court, then those cases too inconsiderable to justify the same, should be entirely excluded from the jurisdiction of the federal courts, or some other less important tribunal should be constituted to hear appeals and writs of error in such cases.

11. The amount was changed that year to \$5,000.

The inconvenience to parties litigant, growing out of the denial of the right of appeal or writ of error in cases where it *is* denied, has been greatly enhanced since the date of the [1789] judiciary act. Then the circuit court was composed of two judges of the supreme court, and the district judge, and no court could be held without the presence of one supreme judge; while in the circuit court as now constituted, the district judge alone can hold the circuit court, and as a matter of history, in those cases which are too insignificant to merit the revision of the supreme court upon appeal or writ of error, the *district* judge is the *sole* judge. . . .

The complaint is, it is unjust to compel parties litigant to be content with the final determination of important legal controversies, involving important pecuniary interests, *by a single judge* upon a trial at *nisi prius*. . . .

The spectacle is a novel one; we profess to be the freest people in the world; we constantly assert that our government protects the lives, liberty and property of our citizens better than any government in the world; and yet the federal government compels parties litigant in its courts . . . to accept the decision of a single judge at *nisi prius*, at a single trial, as the final determination of their rights, in all cases excepting in those where the amount in controversy exceeds the value of the entire possessions of nine out of ten of all the population. . . .

But assuming that the jurisdiction and construction of the courts now in existence shall continue as at present, with only such additions to the number of judges as are necessary to provide sufficient force to perform the work, it is very clear that an *intermediate* court is indispensable.

The advantages of such a court would be to furnish a prompt, easy and inexpensive mode of hearing cases upon appeal or error, free from the local prejudice to which *nisi prius* courts are subject, with the advantage of several judges, with the necessary time and means of careful examination, which would so frequently result in a final determination of causes, as to lighten the work of the supreme court, which of course would have a power of review by appeal or writ of error from or to the intermediate court, under certain limitations, as at present it has in cases tried and determined in the circuit court. . . .

Mr. McCorkle [a recent correspondent to the *Central Law Journal*] urges the organization of an intermediate court for the relief which it would afford to the supreme court docket. But its necessity may be more properly urged . . . on account of the necessity of some provision for the relief of those suitors who are forced into the Federal courts to litigate sums involving all they are worth, and are compelled to be content with a *single* trial before a *single* judge, and are denied the right of review, a right not denied the meanest citizen or subject of any other government where the English language is spoken, or the common law prevails.

[Document Source: "Our Federal Judiciary," *Central Law Journal*, August 27, 1875, 551–54.]

Senator Benjamin Jonas, Preserving Access to the Supreme Court, U.S. Senate, Speech of May 4, 1882

Representative George McCrary's 1876 plan for intermediate appeals courts was only an opening salvo in a public debate over reorganizing the courts that would last until 1891. Politicians and lawyers in the early 1880s offered a host of plans for reorganizing the courts, culminating in a contentious debate in the U.S. Senate during the forty-seventh Congress in 1882. The Senate Judiciary Committee, which had failed to report McCrary's House bill to create circuit courts of appeals in 1876, bowed to mounting pressure from the bar and reported a reorganization bill drafted and sponsored by Senator and former Supreme Court Justice David Davis of Illinois.¹² The Davis bill reintroduced the basic outlines of the McCrary plan, including nine circuit courts of appeals and minimum amounts-in-controversy for appeals to the Supreme Court. Gone, however, was McCrary's attempt to reorganize the system without adding new judges. Davis proposed appointing two additional judges in each circuit to help meet the demands of the growing federal caseload.

Supporters of intermediate appeals courts contended that the new courts would improve access to appellate justice, but opponents of the Davis bill countered that it threatened popular access to the Supreme Court. Southern Democrats, who preferred to keep diversity cases out of the federal courts in the first place, railed against

12. S. 42, 47th Cong., 1st sess. The bill, as passed by the Senate, is printed in full in *Annual Report of the Attorney General* (1885), 37–41.

proposals to limit appeals to the Supreme Court to cases involving more than \$10,000. Critics of the plan argued that limiting appeals based on the monetary value of a case threatened to turn the Supreme Court into a “rich man’s court.” Democrats argued that with the combination of restricted appellate jurisdiction and the appointment of new judges, Americans were being asked to support a growing and expensive judicial machinery to which they would have less access.

Southerners further charged that the monetary obstacles to the Supreme Court were part of a broader trend of the federal courts supporting the wealthy corporate and creditor classes at the expense of the poor. In a speech opposing the Davis bill, Louisiana Senator Benjamin Jonas lamented that individuals with cases below the \$10,000 limit could be brought into federal courts against their will by monied interests and then denied a hearing by the Supreme Court. For Jonas and others, the Supreme Court should not be cordoned off from the rest of the judicial system or become alienated from the mass of the American people in the name of reducing its workload.

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It is proposed to relieve the Supreme Court in this bill by increasing the appealable interest, by providing that no one shall carry a case to the Supreme Court of the United States unless the amount involved is \$10,000. A similar effort was made a few years ago, when the appealable amount was changed from \$2,000 to \$5,000. That caused a great deal of complaint. The people have important causes, men with small fortunes have interests that are as much entitled to consideration as the interests of men with large fortunes. In the country in which I live there are few men who have cases involving \$10,000, and yet the principles involved are frequently of vast consequence and entitled to be heard by the first court of the nation.

I ask whether it is in the interest of the people of this country that the Supreme Court should be converted into a tribunal only to hear the causes of those whose interests are large, and not to hear the causes of those whose interests are small, although the principle involved may be just as important in the one case as the other? If we go on with this system we may increase from year to year, it may be necessary to make the limit \$20,000 or \$25,000 or

\$50,000, and as the tendency in this country unfortunately is for a few large fortunes to accumulate vastly, and for other fortunes to be reduced, as every day there is a class of rich men in this country growing richer and richer, and the majority of the people growing poorer and poorer, the supreme tribunal may one of these days be left to try the case of Jay Gould *vs.* Vanderbilt, or of some great railroad corporation against another, while the interests of the citizens of this country, scattered throughout all the States of the Union, will be too small for their consideration, because the amount involved does not reach the appealable limit.

I say, Mr. President, we had better reduce their jurisdiction rather than increase the appealable interest. Preserve the right of the humblest citizen to go before that court. . . . Is it to be said that because the amount of interest involved in a case is not \$10,000 the people of this country who have vast and important interests, who have interests at least vast and important to them, which involve their homes, which involve all they have, which involve all their rights—that they shall not be heard before the Supreme Court?

These courts of appeal will be necessarily inferior courts, and in the opinion of many of the people incompetent courts; and shall they not be permitted to carry their causes beyond the courts of appeal and to the Supreme Court of the United States, because the amount involved, although it is their all, is not \$10,000?

I do not think such legislation will be popular with the people of this country. I do not think we can afford to legislate always for the benefit of the creditor class and against the debtor. I think the courts of the country should be open to all. I think the present amount fixed as a limit for appeals is high enough. I think the important interests which are involved among our poorer citizens should have a hearing in that august tribunal as well as the contests between millionaires and capitalists and great corporations. I think that in order to lighten the labors of that court, which I admit are excessive, we should take off some of this jurisdiction which is improperly conferred upon it, which is for the benefit of the creditor class, and for the extension of and preference given to which I can see no good and sufficient reason.

[Document Source: *Congressional Record*, 47th Cong., 1st sess., 1882, 13, pt. 4:3604–05.]

Justice William Strong, Limits on the Number of Appeals,
North American Review, May 1881

Supporters of circuit courts of appeals also defended placing monetary limits on diversity cases and decreasing access to the Supreme Court. They argued that the limits were necessary to relieve the Court of its burdensome workload. They also emphasized, however, that the proposal preserved appeals in those cases dealing with federal law, treaties, and the Constitution. In doing so, supporters of the Davis bill articulated a new vision of the Court that had begun to emerge along with the Reconstruction Amendments and the 1875 establishment of federal question jurisdiction in the federal courts—that the Supreme Court’s primary role was to establish national law and enforce federal rights.

In a detailed consideration of court reorganization published in the *North American Review*, recently retired Supreme Court Justice William Strong argued that, in civil cases brought into federal courts under diversity of citizenship, an appeal from the trial court to the proposed circuit courts of appeals would be equal to the reviews available in a state court. Ignoring the increased tendency of federal judges under the *Swift* doctrine to offer their own interpretation of the common law and differ with state case law, Strong argued that diversity cases were decided according to the same state law whether in state or federal court and thus litigants were unharmed by any lack of access to further appeals to the Supreme Court. Strong emphasized that the Court would have the discretion to hear cases if there were differences in legal construction between the circuits and that the Court would continue to hear all appeals in cases involving the laws, treaties, and Constitution of the United States. If anything, the removal of so many less important cases would allow the Court to fulfill its role as arbiter of national law much better.

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It is quite certain that, if adopted, it [the Davis bill] would bring speedy and permanent relief to the Supreme Court, without detracting at all from its power to perform all the functions for which it was created. The court would continue to be, as now, the final interpreter of the Constitution, treaties, and statutes of the United States, and the protector of all rights held under them. But the judgments of the intermediate courts would be final in a vast number of cases which now find their way directly into the Supreme Court, greatly encumbering its docket, though they present no questions

within exclusively Federal jurisdiction. At the same time no injustice would be done to suitors. By far the largest number of cases which are tried in the circuit courts come into those courts because the parties are citizens of different States, or one of them is an alien. They involve no questions which do not arise in similar cases brought in the State courts—no questions which are not to be determined by the law of the State in which each case is tried. The law is the same, whoever the parties may be, and whatever may be the tribunal in which the case is tried. There can be no sound reason why the parties should have greater rights in the Federal courts than they would have if their case had been tried in the State court. Ordinarily, a party in a State court, whose case has been adjudged against him, can have a review in but one court of errors. To him that is the end of the law. If a judgment or a decree has been pronounced against him in a court of primary jurisdiction, he may resort to a superior court for the correction of errors. If there the judgment be adverse to him, he is without further recourse. No one thinks of complaining that he cannot have a second review in a second court of errors.

Why should parties to suits in the circuit courts of the United States, who are there only because they are citizens of different States, or because one of them is an alien, and whose interests are unaffected by any Federal law, be entitled to more than one review of the original trial? What injustice is there in according to them the same rights which those enjoy who are litigants in State courts? If they may have a right to a review, in a court of errors, of an adverse decision of the court of original jurisdiction, it is all that litigants in State courts have, and presumably the judges of the intermediate Court of Appeals would, in learning and ability, be at least equal to the judges of the State courts. But if such cases should, in general, reach a final decision in an intermediate court, the Supreme Court would be relieved permanently of at least one-half of its business, and would be able to hear and determine, within a reasonable time, all the cases that could come into it. There would no longer be any complaint of a denial of justice. Every question respecting the force and effect of Congressional statutes, or respecting private rights declared or protected by Federal power, would be met and answered in due time; the embarrassments now so often felt in governmental operations would be removed, and certainty would

be given to the relations of the citizen to the Government. The new organization would leave to the Supreme Court the decision of all questions relating to the powers of the Federal Government, to the construction, validity, and effect of the treaties and statutes of the United States, and to the validity of State legislation, when in alleged conflict with the Constitution. Uniformity of decision in the several courts of appeal would also be secured by the provision that any case may be reviewed in the Supreme Court when certified to it by the court in which it had been decided, or when a writ of error or an appeal had been allowed by a justice of the Supreme Court. A door would also be left open for the consideration, in that court, of those questions of general interest that occasionally arise which it is desirable should be answered in the same way in all parts of the country.

[Document Source: William Strong, "Needs of the Supreme Court," *North American Review*, May 1881, 446–47.]

Senator Charles W. Jones, The Threat to Uniformity of Law, U.S. Senate, Speech of May 11, 1882

Another important concern voiced in debate over David Davis's court of appeals bill was its impact on the uniformity of law throughout the country. Critics of the plan argued that the nine new appeals courts were essentially taking on the role of the Supreme Court in being given final jurisdiction in a large number of cases. So many courts, some argued, would inevitably lead to unequal application of the law across the various circuits and a corresponding lack of predictability of law in the federal courts.

In a speech before the U.S. Senate, Florida Democrat Charles W. Jones argued that uniformity of the law was an indispensable element of the federal judiciary as defined by the Constitution. He pointed out that, unlike existing district and circuit courts, the new appeals courts would hand down decisions that had application beyond the immediate parties involved. He questioned whether a court lacking the public esteem of the Supreme Court could be charged with articulating legal decisions clothed with the power of precedent. Jones also said that he feared that the lack of uniformity across circuits would lead to unequal treatment of American citizens in the circuits and would further erode public regard for the federal courts.

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And how is this thing going to work? It is a novelty in its way. It may be said that the Constitution is imperfect. If that be true, we cannot amend it by act of Congress. What was it that gave rise to our Constitution? It was the discordance and conflicts in our laws, want of uniformity, the irregularity which distinguished the rules and regulations of the respective States in regard to subjects that ought to be controlled by uniform authority. It was the want of some steady, undeviating rule with respect to the regulation of commerce that gave rise to our present Constitution; and when it was brought into life it was expected that everything that had the force of law, whether emanating from the Legislature or from the highest court in the land, would have such uniformity of authority and operation that it would have the same effect in one State as it did in another; that it would be the same throughout the entire Union.

How is it going to be with this new judicial system? Here are nine courts of appeal to be established by this bill, and one Supreme Court sitting in Washington. In all cases under \$10,000 the judgments of these nine courts are to be absolutely conclusive. They are not courts of original jurisdiction, mark you, like the circuit or district court as at present organized, whose judgments in an ordinary controversy between man and man amount to nothing beyond the particular case or controversy that happens to be before it at the particular time. The judgment of a circuit court of the United States or of a district court of the United States at present amounts to nothing outside of the particular cause which it has before it. It is not the law of the district; it is not the law of the land; it amounts to no settled rule of property; it establishes nothing but the right of the particular party in the particular litigation. It is otherwise with respect to a judgment of our highest court; it establishes principles that are uniform and coextensive with the Union; its opinions are accepted as the law of the land, and they are respected by every court within the Federal jurisdiction as such.

But how will it be with these appellate tribunals proposed to be created in the nine circuits for the first time? They are not courts of original jurisdiction; they are not courts that will act as the circuit and district courts act now. They are to settle principles, to fix rules of property, to prescribe rules of decision that will affect the inter-

ests of the masses living within each one of these judicial circuits in all cases where the sum in controversy is under \$10,000.

I said that if the framers of the Constitution had one thing in view beyond another it was uniformity in the force of the laws that were to be enacted by the Congress of the United States, and by the highest judicial tribunal of the Union. Is it to be supposed that the judgments and decisions of these nine courts will be uniform throughout the Union? Is it possible that any two of them will ever agree upon any particular question that may come up before them? And here you have nine appellate courts sitting under the same authority, under the same Government, administering the same laws to persons entitled to the same privileges, establishing different rights, announcing different principles, bringing the whole system of the judiciary into confusion....

And now instead of attempting to cut down that jurisdiction, instead of beginning at the right end and bringing back this authority to the confines that originally bounded it, we are asked to pervert the entire scheme of the fathers of the Constitution and undertake to establish nine appellate courts instead of one. Sir, I want to stand by the Constitution as near as possible as it came from the hands of the fathers; and if it is possible to find a remedy for existing difficulties by conforming to the original scheme of the framers of the Constitution, I want to adopt that remedy, and I think it can be done. I do not want any nine appellate courts created throughout the Union that will turn out annually numbers of discordant opinions to unsettle everything throughout the land. I want "one supreme court," whose judgments upon all matters of an appellate character shall be uniform throughout the Union in everything that is worthy to be appealed; and I do not want a supreme court or a court of appeals in my circuit made up of the odds and ends of the bench below, circuit and district judges massed together, as is proposed by this bill.

[Document Source: *Congressional Record*, 47th Cong., 1st sess., 1882, 13, pt. 4:3830.]

Senator Eli Saulsbury, Partisanship and New Appellate Judges,
U.S. Senate, Speech of May 3, 1882

The most powerful criticism of David Davis's bill to create circuit courts of appeals was the charge that it represented an unwarranted

expansion of federal judicial power. For many southerners and westerners the creation of more courts was but a further step toward the centralization of power in the federal government. Southern Democrats, especially, resented federal court interference in southern elections and in defense of African American civil rights.¹³ This meant that debates over the federal judiciary involved heated partisan conflict as well, as Democrats feared that new courts and judgeships would further anchor the power of the Republican party in the courts and create judicial protection for their nationalizing and centralizing policies.

In the following excerpt of a speech before the U.S. Senate, Delaware Democrat Eli Saulsbury, who would himself be defeated by a Republican in 1888, pointed out that the overwhelming majority of judges in the federal system were Republicans and that the Davis bill would greatly add to their numbers. He predicted that the questions that would confront federal judges in the future would be political questions arising from the application of the Fourteenth Amendment. He asserted that even the most honest judges would be influenced by the party that appointed them and that he would not vote for new judgeships unless they were equally divided between the parties.

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I wish to be frank, and I will state here frankly one other objection that I have to the pending bill. So far as I know there is not today a single circuit judge in the United States, but one judge of the Supreme Court, and but very few district judges but what are members of the same political party, and if this bill passes an addition of eighteen judges of the same political faith will be placed to try the issues that will come up from the country before these courts. I do not believe, while that is the case, that the decisions of those courts can or ought to command the respect which the judges of the Federal judiciary, if divided between the political parties, ought to command....

...Whatever may be the virtues of the present Executive, I apprehend that he is as much of a partisan as other Presidents who have

13. On federal courts and elections, see, for example, Kermit L. Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821–1990* (Brooklyn, N.Y.: Carlson Publishing, 1991), 45–46. See also Kutler, *Judicial Power and Reconstruction Politics*, 148–53.

preceded him and will appoint from his own party these eighteen additional judges.

When such a court has to try quasi-political questions growing out of the amendments to the Constitution and the legislation of Congress soon after the war based upon the amendments of the Constitution, however honest they may be, I do not believe its members can avoid having their judgments to some extent affected by their preconceived notions upon the political questions which will necessarily come before them. Not believing that they can divest themselves of their prejudices, I honestly believe that the court in its composition ought to be divided between the great parties of the country.

While I would not have any judge carry his political prejudices upon the bench, yet knowing the infirmities of humanity, and knowing that it is done to a greater or less extent, I am unwilling to see the Federal judiciary increased unless there can be some partition of power on the bench between the respective parties of this country. I shall for this reason, as well as others, vote against this bill.

[Document Source: *Congressional Record*, 47th Cong., 1st sess., 1882, 13, pt. 4:3544–45.]

American Bar Association Special Committee on Relief of the United States Courts (Minority), Proposal to Divide the Supreme Court, Report of August 10, 1882

Many Democrats, concerned over the growth of federal judicial power, continued to press for repealing portions of the 1875 Jurisdiction and Removal Act as the best solution for dealing with the courts' burdensome caseload (see the previous section). Others, who either supported expanded federal jurisdiction or grudgingly accepted that repeal was unlikely, supported alternative court reorganization plans designed to help the Supreme Court process its business while avoiding great expansion of federal judicial machinery.

One of the more popular alternative plans called for dividing the Supreme Court into three or more groups (some versions included expanding the size of the Court from nine to as many as twenty-one justices) with each group assigned to hear appeals in a specific area of cases, such as admiralty, patents, or common-law suits. As with intermediate appeals courts, the rationale behind dividing the Supreme Court was to allow it to process the vast number of "minor"

legal controversies that came to the Court, especially those based on diversity of citizenship. There would be no appeal from these decisions as of right, but the Supreme Court could elect to hear a case before the full bench. The Court would also continue to sit en banc in all cases involving the laws, treaties, and Constitution of the United States.

The plan to divide the Supreme Court was presented to the House of Representatives by Democratic Congressman Van Manning of Mississippi in 1879 and 1881 and received approval from a number of prominent lawyers, including a contingent of the American Bar Association (ABA).¹⁴ When the ABA appointed a committee to consider the various court reorganization proposals before Congress, a minority of the committee—a group of three that included Republican New York lawyer and former Secretary of State William M. Evarts—supported the Manning plan.

Evarts and the others did not argue that federal jurisdiction should be reduced, or that the federal courts represented a dangerous imbalance to American federalism. Instead, Evarts and the other dissenters supported the Manning bill on the basis of efficiency and expediency. They believed the plan answered concerns about uniformity and predictability of law under the circuit courts of appeals proposal. They contended that raising the monetary limit for appeals to the Supreme Court would only slow down the flow of cases temporarily and that cutting off access to the Court would undermine the public's confidence in its decisions. Arguing that no Constitutional provision required all justices to hear every case before the Court, the minority report asserted that splitting up the work among the justices was the simplest way of allowing it to deal with its flood of business and ensure popular access and regard for the nation's "One Supreme Court."

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It has seemed to us, since it is universally agreed that appeals can be best heard, as they always have been, under our Constitution, by the Supreme Court at Washington, that if those judges find themselves now unable to discharge the business on their docket, the most obvious and simple remedy would be to enable them to discharge it; and this we believe can be done. No one familiar with the character of causes in that court . . . will fail to perceive, while

14. H.R. 3843, 46th Cong., 2d sess., 1879; H.R. 865, 47th Cong., 1st sess., 1881.

that many appeals find their way there which involve questions of great importance and serious doubt, a large proportion of the business consists of causes not presenting any special difficulty, or any questions either new or important. That this class of causes can be as well or even better heard and decided by a lesser number of judges than nine, is obvious to every lawyer of experience, and is shown in the proceedings of many state courts of last resort, whose members do not exceed five, or sometimes even three. . . .

All will agree that the original jurisdiction of the Supreme Court, conferred by the Constitution, should continue to be exercised by the whole court; that constitutional questions—those arising upon the construction of treaties with foreign nations—and difficult and important questions that may occur in causes of general jurisdiction, should also be heard and decided by the whole court. Beyond this, we cannot perceive that any great good is attained by requiring all the judges to participate personally in the disposition of every cause. . . .

. . . It appears to us that the grave objections which the plan of local [circuit appeals] courts encounters, far outweigh any advantages it may offer of convenience to counsel, or of diminution of expense to parties

The number of people in the United States who are possessed of property to that amount [\$10,000], is comparatively small; the number of those whose controversies in the courts of justice attain such a magnitude, is still smaller. To the great mass of litigants, controversies involving between \$5,000 and \$15,000 are very serious and important, not unfrequently putting in jeopardy all they possess. . . . The Supreme Court would thus be set aside, so far as its ordinary jurisdiction is concerned, for the benefit of wealthy men and great corporations. But the court was never intended for the use of the rich alone. It belongs to the people, in common with our other institutions, and should be made available to the people, to every possible extent. . . .

Nor can we regard without apprehension the probable effect upon the position of the court itself, of thus withdrawing from it so large a share of its general jurisdiction. As the final arbiter upon all questions of constitutional law, it is one of the main stays of our government. No such function was ever before confided to a judicial tribunal. It can only be maintained in the discharge of so

critical a duty, by being fast anchored in the public confidence and esteem. Such has been its good fortune hitherto, because it has been the Supreme Court in reality as well as in name. It has been the one national tribunal of last appeal, in which confidence has been strong, and to which resort has been secure; where the general law of the land has been habitually laid down. . . . If the one Supreme Court of the Constitution should be closed to ordinary access, and devoted by a high money limit principally to the service of the wealthy and the powerful; if the great body of those who transact the business of the country should be excluded from its doors, and compelled to accept for their part such humbler justice as the local tribunals may afford, it will not be safe to expect that the court will be able to preserve by its dignity the hold it has gained by its usefulness, or to escape by mere pecuniary elevation, from the consequences of popular estrangement. There would be grave danger that it might gradually become an object of public jealousy and aversion. If thereafter it should happen to be brought, in the determination of constitutional questions, into antagonism with popular feeling or party policy, its position would invite an attack, against which its means of defense would be small. . . .

That sort of centralization which accumulates in the general government the powers that properly belong to the states, may well enough be deprecated. But that centralization which brings the federal judiciary under the control of one supreme head, and thereby secures the unity of its law, and the impartiality, of its justice, is essential, in our judgment, to the existence of such a judiciary, whose powers run into all the states, and may reach all interests, and which is instituted largely for the very purpose of securing all citizens from the consequences of local prejudice, and local jurisprudence. The proposed [Davis] plan, as it seems to us, would result, not in preserving the "one Supreme Court," which the Constitution, with a far-seeing sagacity, provides for, but in the establishment, for all practical and ordinary purposes, of nine Supreme Courts, and as many more as the number of additional circuits that may, in the future growth of the country, be found necessary.

[Document Source: "Minority Report on the Relief of the United States Courts," *Report of the Fifth Annual Meeting of the American Bar Association* (1882), 367–81.]

American Bar Association Special Committee on Relief of the United States Courts (Majority), Objections to Dividing the Supreme Court, Report of August 10, 1882

Supporters of the circuit courts of appeals attacked the proposal for dividing the Supreme Court as both unwise and unconstitutional. The majority of the American Bar Association committee appointed to study court reorganization supported the Davis plan to create circuit appeals courts and argued that dividing work among the justices violated the Constitutional provision for “one Supreme Court.” While opponents of circuit appeals courts believed that altering the make up of the Supreme Court would preserve access to it and uniformity of law, the ABA majority report contended that dividing the Court would transform the “court of last resort” into multiple courts of last resort and undermine public confidence in the decisions of any of the divisions. In essence, a majority in one of the divisions would mean that two justices out of the nine would have the power to decide a case. In addition, they noted that any plans that did not add to the judicial force failed to solve the problems facing the inferior federal courts.

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It [the Davis bill] seeks to preserve for the Supreme Court the true function and dignity of a national court of last resort: whose exalted office is, not merely to furnish to disappointed suitors the opportunity of another hearing, but rather, in the interest of the people at large, and of the harmonious and orderly administration of justice throughout the land, to supervise and regulate the proceedings and correct the errors of all inferior courts, and thus secure to every citizen the uniform and equal protection of the laws, without denial or delay...

...It is something altogether different for Congress to provide by law that nine judges shall be appointed, of whom a part—whether three or four or five—shall sit as one body, exercising independently of their associates all the functions of a court, while other part or parts shall at the same time be independently exercising like powers. Here is no consultation, no combined or united action, no conclusion reached by the one court of which each of the nine is nominally a member; but, in everything except the name, the complete existence and active exercise of independent powers by separate and independent courts. Which of these two or three

independent bodies is the “one Supreme Court” prescribed by the Constitution—to which, as one court, each member of each of these independent bodies professedly belongs? Even conceding, for argument’s sake, that Congress might declare that five or four or three of the nine judges should constitute a quorum of the court, that would not help the argument. If such were the law, it would still mean, as already stated, simply that in the judgment of Congress such less number, duly assembled as a court, was sufficient for that purpose; but it would also still mean that the absentees were to be considered for the time being as forming no part of the court. Any other construction, as it seems to the undersigned, would merely nullify the express provision that there shall be “one Supreme Court”—which necessarily excludes the existence of more than one such court, or (which is the same thing) of more than one body at the same time exercising the functions of such court.

Nor is the difficulty obviated by providing that the judgment of each division shall be entered as the judgment of the court. No one of the judges can exercise judicial functions except by authority of law, and the law cannot clothe him with any such functions except consistently with the requirements of the Constitution. A law, therefore, which, under whatever device or arrangement, should in effect authorize any one or more of these judges to exercise judicial functions except as a constituent member of the one Supreme Court provided for by the Constitution, would violate the spirit and intent of the Constitution, and would be simply void. Nor would the difficulty be met by providing that the conclusions separately reached by divisions or committees of the court, being submitted to and approved by their remaining associates, should then be entered as the judgment of the court

Moreover, aside from the constitutional question, the undersigned are strongly of opinion that the adoption of such a plan would greatly impair the dignity of the court itself, by weakening the confidence of the community in its decisions, and by producing widespread dissatisfaction. In fact, in case of dissent, which ... would certainly occur from time to time—two judges only out of nine would finally decide the merits of a cause. It is no answer to this to say that provision is made for a rehearing by the full bench, if the court shall think proper. The law must be tested by what it provides for, not by what it permits. And the denial to the parties in

a cause of any right of rehearing after an adverse decision by two judges out of three, is in effect a provision that two judges shall, so far as the parties are concerned, be the Supreme Court; other two judges being at the same time the Supreme Court in respect of other causes simultaneously argued, and other two in respect of other causes still. . . .

It has been urged that the addition of so large a number of circuit judges as proposed by Judge Davis . . . would involve great additional expense. The obvious answer is, that the present judicial force in the circuits is utterly inadequate to do the work thrown upon the courts; and that whatever expenditure is needed to provide adequate judicial machinery for the actual and increasing wants of the people, so far from being a needless expense, is the only true economy. If there be any one direction in which a false economy would be mischievous, it is in the refusal or failure to provide, for duties so important and affecting interests so vast, a sufficient number of competent men to whom not only the honor but the compensation tendered should be a real equivalent for the professional emoluments which they must surrender in exchange.

[Document Source: John W. Stevenson, Charles S. Bradley, Rufus King, Alex. R. Lawton, Henry Hitchcock, "Majority Report on the Relief of the United States Courts," *Report of the Fifth Annual Meeting of the American Bar Association* (1882), 351–58.]

Senator John T. Morgan, Support for a National Court of Appeals, U.S. Senate, Speech of May 2, 1882

Lawyers and members of Congress who were critical of both the plan to create circuit courts of appeals and the proposal to divide the Supreme Court of the United States offered support for a third alternative: creating a single Court of Federal Appeals. In two separate proposals, lawyer William A. Maury—who would go on to become assistant attorney general under President Benjamin Harrison—and a committee of the Philadelphia Bar Association recommended establishing a single National Court of Appeals.¹⁵ Maury recommend-

15. William A. Maury, *The Supreme Court of the United States: A Discussion of its Wants and the Remedy for Them* (Washington, D.C.: William H. Morrison, 1881). Maury's bill is also printed in full as S. 420, 47th Cong., 1st sess., *Congressional Record*, 1882, 13, pt. 4:3501. The Philadelphia Bar Association proposal is reprinted in *Report of the Sixth Annual Meeting of the American Bar Association* (1883), 313.

ed the new court sit in Washington while the Philadelphia Bar called for the court to hold sessions in a number of major cities throughout the country. (Ninth Circuit Judge Lorenzo Sawyer also drafted a bill creating a court of appeals in Washington, but his plan was an amalgam of all three popular plans and also included circuit appeals courts and dividing the Supreme Court.¹⁶) Under Maury's plan, the new appeals court would hear all appeals in cases arising under diversity of citizenship while the Supreme Court would continue to hear appeals involving federal questions.

Maury's plan received the endorsement of a number of politicians, notably Alabama's Democratic Senator John T. Morgan. Morgan was an outspoken critic of federal judicial power and preferred, above any court reorganization plan, to strip the federal courts of much of their jurisdiction. In a speech introducing Maury's bill into Congress, Morgan explained that he supported the creation of a single appeals court because it preserved the integrity of the Supreme Court, ensured a uniformity of law throughout the country, and required much less expansion of federal judicial machinery than circuit courts of appeals.

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It is true that the Supreme Court of the United States is one supreme court, and any measure by which it may be undertaken to divide that Supreme Court into different sections will be, in my judgment, an unconstitutional invasion of the unity and authority of that great tribunal.

I know that a number of distinguished jurists in the United States differ with me in this opinion; still I cannot reason myself out of the conviction that the Supreme Court is one of the co-ordinate departments of this Government fixed in the Constitution and that we have no right to legislate in reference to that department, except to the extent that is provided in the Constitution itself, for the qualification or modification of its powers or in reference to the manner of their exercise.

I am, therefore, entirely in harmony with the views of the Senator from Illinois [Davis] on that branch of the proposition, and the bill

16. Sawyer's plan can be found in RG 46: Petitions to Senate Committee on the Judiciary, SEN 47A-E11, January 16, 1882, National Archives & Records Administration, Washington, D.C.

of Mr. Maury is also in harmony with those views. I would regret to see the day when we would divide the courts into sections and require three or four judges to sit upon one class of cases and three or four upon another class of cases, and to have their decision entered upon the record of the court. No judge ought ever to be compelled to give his sanction to a decision in any cause unless he is entirely familiar with it and unless he participates in the judgment; and he must participate just as fully as any other judge does in hearing the cause. That is the elementary and indispensable requisite of a correct judicial decision to be made by a court consisting of more than one judge. Each judge on the bench must consider the cause for himself, and the parties litigant before that court as well as the country at large have the right to the wisdom, the industry, the careful investigation, and the conscience of every judge trying a cause upon every question which is made in the case. A judge may concur with the majority, or he may dissent, but still it is the right of the parties litigant before the court to have the judgment of every judge upon every question that comes before it, and nothing can be said to be a perfect administration which does not go to that extent. . . .

I therefore heartily concur with the honorable Senator from Illinois [Davis] in his project of having an intermediate court of appeals, but I think he has too many intermediate courts of appeal. I think that we shall have much the same difficulty as now, in kind if not in degree, in having nine organizations in the United States as courts of appeal. We have too many now. It is proposed to add nine others, and these other nine will all be in the exercise of exactly the same jurisdiction. We shall have eight chances to one of inextricable confusion in the decisions of these courts, to increase year after year as we progress with this system.

We have one Supreme Court, whose adjudications are an honor to the American people, of which they may be justly proud. I will not deny that on some occasions that court even has been influenced to make decisions which perhaps will not stand the test of future investigation. That court has sometimes found itself compelled to overrule some of its own decisions. It has always done so boldly and freely, and with a view to the ultimate security of justice according to law; but if that court had been divided into sections, one sitting in Maine, one in California, and one in Florida,

if they had been considering the questions apart from each other, deprived of the advantage of conferring upon great and difficult questions which have been presented to it for consideration in the past, we should have had confusion and trouble instead of harmony and strength in its decisions.

I cannot bring my mind to believe that nine courts of federal appeal intermediate between the Supreme Court and the circuit and district courts of the United States would ever agree in their lines of decision, even upon great and important topics, in such manner as would put questions at rest. I think we have a plan in this bill which will result in greater confusion than we now have and in the mere addition to the contradiction and contrariety of decisions which are now a burden upon the jurisprudence of the United States....

...The precise issue upon that branch of the bill is whether we shall have nine courts, with the danger of leading to this confusion in our judicial system, or whether we shall have one intermediate court, located here or where it may be more convenient.

I am in favor of one court. I am in favor of Mr. Maury's proposition in this respect, because it provides for the appointment of ten judges instead of eighteen. We would relieve ourselves to the extent of eight judges by taking a court located at Washington or located anywhere that you please, instead of a court of eighteen judges to be appointed in addition to those who are upon the bench now.

[Document Source: *Congressional Record*, 47th Cong., 1st sess., 1882, 13, pt. 4:3503–3504.]

Establishing the Circuit Courts of Appeals

The House and Senate debated the issues surrounding court jurisdiction and reorganization throughout the early to mid-1880s without resolution. The Republican-dominated Senate passed the Davis circuit courts of appeals bill in 1882 but the Democratic controlled House Judiciary Committee failed to report it or any of the other proposals for court reorganization. The House Committee, led by Representative David Culberson of Texas, continued to press instead for limiting federal jurisdiction and passed a bill in a number of sessions only to see it bottled up by the Senate Judiciary Committee.

The prospects for court reorganization improved greatly after Congress passed the Judiciary Act of 1887, which limited federal jurisdiction. The 1887 act did not appreciably limit the flow of cases to the Supreme Court and the Court continued to fall behind in its work. At the start of the 1887 term, the Supreme Court's appellate docket had 1,427 cases, of which only 414 were disposed and the remainder carried over to the next term.¹⁷ Attorney General Augustus Garland included in each of his annual reports during President Grover Cleveland's first term urgent pleas for Congress to act to relieve the courts. Between 1888 and 1891, Congress considered new proposals for establishing circuit courts of appeals, this time with the Republicans in control of the House of Representatives and the Senate.

Debate continued to focus on the preferred way to relieve congestion in the Supreme Court. How could Congress limit Supreme Court appeals without drawing arbitrary distinctions over who could access the nation's highest court? What effect would nine new appeals courts have on uniformity of law throughout the country if appeals could no longer be brought to the Supreme Court in all cases?

While relieving the Supreme Court was the primary focus of legislation, the fate of the remainder of the federal judicial system also continued to generate debate. For some lawmakers, the addition of new courts of appeals called for a consolidation of the district and circuit courts in order to bring about more efficiency in the lower courts. Others feared, however, that consolidating the business of the lower courts in addition to creating new appeals courts was a recipe for the continued expansion of the federal judicial system. The 1891 legislation that finally created the Circuit Courts of Appeals represented important compromises on all of these points. The question of consolidating the dual trial courts reemerged in the 1890s, as did concerns that the addition of the new appeals courts did not go nearly far enough in providing the necessary judicial force for a rapidly growing nation.

17. *Annual Report of the Attorney General* (1888), p. iii.

Representative William Holman, Fear of a Growing Federal Judiciary, House of Representatives, Speech of March 24, 1888

The passage of the Judiciary Act of 1887 opened the way for a new consideration of proposals for intermediate appellate courts. In 1888, David Culberson, who had fought to reduce federal jurisdiction for almost a decade, sponsored a bill with Democrat John H. Rogers of Arkansas—who would be appointed by President Grover Cleveland as a district judge in 1896—to consolidate all original jurisdiction in the district courts and abolish the circuit courts as they then existed.¹⁸ The bill, following recommendations by Attorney General Augustus Garland, transformed the existing circuit courts into exclusively appellate courts, appointed one additional judge per circuit, and stipulated that circuit court would be held by two circuit judges and a Supreme Court justice in each district.

When the Republicans took control of the House for the Fifty-first Congress, the House Judiciary Committee in 1890 reported a new bill drafted by Rogers that still abolished the circuit courts as trial courts but instead created a single circuit court of appeals in each circuit.¹⁹ In addition, the bill relieved the Supreme Court justices of any participation in the new circuit appeals courts and called for the appointment of two new judges per circuit. The Rogers bill envisioned a true three-tiered court system that, according to the House Committee report, “secures the absolute independence . . . of the three classes of courts, to wit, district, circuit, and Supreme.”²⁰

The threat of an ever-growing federal judicial force continued to trouble a number of Democrats. In a speech in opposition to the 1888 Rogers bill, Representative William Holman of Indiana argued that consolidating original jurisdiction in the district courts would ultimately overwhelm them. He contended that Congress would have to create new district courts and appoint an unprecedented number of additional district judges for them to handle the increase in business. Holman saw such a growth in the judicial force as a continued threat to the viability of state courts.

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18. H.R. 8190, 50th Cong., 1st sess., *Congressional Record*, 1888, 19, pt. 3:2371.

19. H.R. 9014, 51st Cong., 1st sess., *Congressional Record*, 1890, 21, pt. 4:3402.

20. “Jurisdiction of United States Courts,” House Judiciary Committee, H. Rpt. 1295, 51st Cong., 1st sess., April 7, 1890, p. 4.

Mr. Chairman, there are two modes by which the large accumulation of commercial business in the Supreme Court of the United States, which is the occasion for the proposed legislation, can be reduced. One is by reducing the jurisdiction of the Federal courts and thus reduce the number of causes in the Federal courts, and the other is by creating an intermediate appellate tribunal between the Supreme Court of the United States and the trial courts, nisi prius courts, of the Federal system. Which of these two shall be taken? If you adopt the latter, that of intermediate appellate tribunals, such as are proposed here—intermediate appellate courts, the plan proposed by this bill—you accomplish what I trust this House does not propose to do, an unexampled increase in the number of judges in the Federal judicial system. Unexampled, I say, and I think I use that term advisedly.

I call attention to the fact that if you confer on these district courts, in addition to the jurisdiction they now possess, the jurisdiction now possessed by the circuit courts, you will substantially double the business of those courts.

I predict, if you pass this bill, inside of five years, as an inevitable result, you will have to double the number of your district courts and double the number of your district judges. That is inevitable and patent. I am astonished that a fact so apparent and manifest has not been met by this committee by an increase not only of circuit, but also of the district judges. Why does not the committee provide for a large increase of the number of district judges at once, as the business thrown on these courts is enormously increased by this bill? Taking my own State, and judging from the business before the district and circuit courts at the present time, and from the additional business that will be thrown on the district courts by this bill, I am confident before the adjournment of the present Congress the Representatives from that State will find it necessary to consider the propriety of dividing the State into two districts. It will be found to be the same in the other States of the Union. Unless the House is prepared to go to the extent of enlarging the Federal system and the number of its judges beyond anything contemplated in our past history, gentlemen will hesitate to pass this bill....

To enlarge the Federal judicial system on one side diminishes the importance of your State courts and restricts them, and in a

corresponding degree augments the importance of the Federal judiciary, and at the same time oppresses your people. I think this is a departure from what was contemplated by our fathers in providing for the organization of the Federal judiciary.

[Document Source: *Congressional Record*, 50th Cong., 1st sess., 1888, 19, pt. 3:2380–81.]

Representative David Culberson, Support for Ending Appeals to the Supreme Court in Diversity Cases, House of Representatives, Speech of April 15, 1890

One of the outstanding disputes over court reorganization in the 1880s was how to delimit which cases would reach final decision in the circuit courts of appeals and which could be appealed to the Supreme Court. The first proposals for appeals courts—the McCrary and Davis bills—set an amount-in-controversy minimum on appeals to the Supreme Court at \$10,000. This provision led to charges that the Supreme Court would become a “rich man’s court.”

The bill drafted by Representative John H. Rogers met these criticisms by cutting off all appeals as of right from the circuit appeals courts in cases based on diversity of citizenship. In a speech before Congress in support of the Rogers bill, David Culberson argued that by limiting Supreme Court jurisdiction based on the classification of cases rather than monetary value, the plan avoided favoring wealthy litigants. He also emphasized that the Supreme Court could grant certiorari to hear cases in important legal disputes or where there was a difference of opinion between the circuits. In addition, litigants would maintain their rights to appeal in all cases involving federal questions, which would preserve the uniformity of federal law throughout the country and allow the Supreme Court to continue to fulfill its role as the arbiter of federal and constitutional law.

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Mr. Speaker, if it should be a matter of objection that the judgment of the district court in cases of which it acquires jurisdiction by reason of citizenship only . . . can not be reviewed by the Supreme Court under the provisions of the bill, it would seem a sufficient answer to reply that, as the physical capacity of the judges of the court as now constituted (and a larger number of judges would not add to its efficiency for the dispatch of business) is inadequate to the labor of reviewing every judgment and decree of the inferi-

or courts, some exceptions must be made, and some character of cases denied a review.

Is it wise to establish a money value to the right of review? Such a rule now ordinarily prevails. Why should a case involving \$5,000 or more be favored with the right of review and a case of less value be denied that right?

As a matter of abstract justice such a system is indefensible and can only be tolerated from the necessity of reducing the business of the court. Do gentlemen desire to move a step nearer the result of converting this great constitutional tribunal, wisely established as the final interpreter and arbiter of the Constitution and the laws of the United States, into a rich man's court by raising the limit of \$3,000 on the right of review? Either this shameful perversion of the right of review must be consummated or some other plan must be adopted to relieve the court.

The plan adopted in this bill seems in all respects wise, just, and proper. Since it is impossible for the court to review the judgments and decrees in all cases of the inferior courts, the exceptions based on money values are discarded as violative of the genius and spirit of free institutions, and the exceptions and limitations in the right of review are based, not on the amount of money involved, but on the nature and character of the question involved in the litigation.

As the Supreme Court is the Federal head of the judicial department of the Government, it would appear illogical and improper to exclude from it questions of a Federal character and open its doors to the admission of questions which may be determined by the application of the general rules of law. The bill, therefore, makes the exceptions and limitation to the appellate power of the court dependent upon the nature of the question involved.

But the Supreme Court, by virtue of the appellate jurisdiction reserved under the exceptions to the final appellate jurisdiction of the circuit courts and the supreme court of the District of Columbia, will retain, as far as practicable, a supervisory control over all questions that may possibly arise in cases within the judicial power of the United States, to the end that uniformity of decision may be enforced throughout the entire judicial system of the United States.

[Document Source: *Congressional Record*, 51st Cong., 1st sess., 1890, 21, pt. 4:3405.]

Senator William Evarts, The Case for the Circuit Court of Appeals Bill, U.S. Senate, Speech of September 19, 1890

In 1890, the House of Representatives passed the Rogers bill to create circuit courts of appeals with an overwhelming majority, 131 to 13, but the debate over the character of court reorganization only continued in the Senate. In the Senate, William Evarts (R-NY) offered a substitute bill that reached a successful compromise in the appellate structure for the new appeals courts. Evarts, a lawyer and Republican politician with a long record of government service, including stints as attorney general and secretary of state, had been part of the 1882 American Bar Association group that favored dividing the Supreme Court. By 1890, Evarts had come to support intermediate courts of appeals but in a manner that preserved, as much as possible, the existing judicial organization.

In his plan for circuit appeals courts, Evarts preserved the circuit courts as trial courts alongside the district courts. To limit the flow of cases to the Supreme Court, Evarts provided that all cases arising out of diversity of citizenship would be final in the new appeals courts, except where certiorari was granted by the Supreme Court or when an appellate court certified a question for consideration by the Supreme Court. To address worries about confusion over the interpretation of national law, the plan provided that litigants in cases involving federal questions (and a number of other categories) would have the right of a direct appeal from the trial courts to the Supreme Court. Evarts also responded to pressure from those who complained of a growing judicial force by providing for only one additional judge in each circuit and preserving the circuit duties of the Supreme Court justices. The circuit courts of appeals would comprise a shifting combination of district judges, circuit judges, and Supreme Court justices. Finally, Evarts' plan maintained the connection of appellate judges with trials by keeping circuit judges responsible for circuit courts.

In a speech before Congress, Evarts emphasized the extent to which his plan preserved the existing structure of the federal court system while improving the efficiency of the courts. Evarts criticized the Rogers bill for allowing cases that must ultimately be decided by the Supreme Court—cases of national law—to pass through the inferior circuit courts of appeals. Allowing direct appeals to the Supreme Court, he argued, was the only way of ensuring speed, uniformity, and predictability of the law. Evarts also believed these measures improved administration of justice while preserving the prestige and authority of the Supreme Court.

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Mr. President, there are no real faults, as it seems to me, of great magnitude in the present system of the administration of justice by the courts of the United States in the first instance and then by direct appeal to the Supreme Court of the United States, except the inability of the Supreme Court to discharge its duty of hearing and determining. Therefore, the great point for us to meet is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in the great functions of its politico-legal relation to affairs; I mean the establishment of the supervision of laws in the sense of constitutionality and other questions of a public nature, and that there should be provided an intermediate court of dignity and character and furnished with a sufficient number of judges to dispose of the appellate jurisdiction thus created....

The next question was how we should divide the appellate recourse so as to operate in reduction of the burden of the docket of the Supreme Court and also maintain as well as might be the necessary conditions of a just uniformity of decision. One of the first objections to an interappellate court took the form that there would be these diverse tribunals in geographical distribution over the great district of country in these political divisions, and that therefore all that we had secured heretofore by a uniformity of conclusions of any court upon great public questions by the appeals centering at once in the highest court here would be endangered. The method of the House [Rogers] bill does not meet this difficulty at all.... It is vague and uncertain....

The House bill, as well as all discussions on this subject, has contemplated the necessity of constitutional questions affecting either the laws of the United States or the treaties of the United States or the laws of the States that are deemed to be in conflict with the Federal Constitution and also with certain other subjects of national importance, such as prize cases being brought to the Supreme Court. The House bill carries all these things up through these interappellate courts, and leaves all these subjects therefore exposed to two difficulties: first, that of being first heard in these

courts and, secondly, of the necessity of their going to the Supreme Court if the suitors choose to carry them there.

But that is not the only mischief of this scheme of the House of Representatives, for it leaves to these tribunals distributed all over the country the opportunity of original determination on all these constitutional and public questions when there are two stages for consideration, and when they must be finally resolved in the Supreme Court of the United States, and when diversities may arise in decisions upon these general and central propositions of the jurisprudence and of the jurisdiction by various determinations in these different circuits.

An attempt has been made in discussion to provide for facility with which these doubting and divided judgments in these inter-appellate courts might be carried up, but no scheme short of that proposed now by the Judiciary Committee of the Senate will accomplish any great useful purpose.

The first thing that engaged our attention was to discriminate what causes ought, irrespective of amount and from their very nature, to have access to the Supreme Court of the United States, and when we had determined that list the first determination seemed quite natural to us that they should go directly up to the Supreme Court as they now go, and that thus we should avoid all the difficulty even of momentary diversities of judgment on these great questions in the courts of the new establishment in the different circuits. We also felt that it was entirely unnecessary, and therefore it was unnecessarily burdensome, that these questions in the interest of suitors and their advisers should be delayed and weighed down with the expense of an appeal to the intermediate court when almost necessarily these questions would go to the Supreme Court in the interest of suitors and in the interest of unity of jurisprudence and jurisdiction....

Now, what is our provision to guard against diversity of judgment in these different courts—I mean in regard to those litigations that are to receive their final decision in these inter-appellate courts? Simply that the court itself may, in any case before it that it deems it necessary or useful to be advised by the Supreme Court on any question or proposition of law, send up these questions to the Supreme Court....

Mr. President, another guard against the occurring diversity of judgments or of there being a careless or inadvertent disposition of important litigation by these courts ... is that the Supreme Court shall have a right, in any of these cases that are thus made final, by certiorari to take up to itself for final determination this or that case, and in that way the scheme of the committee does firmly and peremptorily make a finality [sic] on such subjects as we think in their nature admit of finality, and at the same time leaves flexibility, elasticity, and openness for supervision by the Supreme Court. . . .

I have heard it said by persons in great authority that under this scheme, after this accumulation is once worked off, as we hope it may be by some extraordinary effort on the part of the court so as to bring about practically the benefits, a session of five months here might dispose of the docket, and that therefore these justices might be liberated for doing a share of judiciary duty in the courts of the first instance.

I do not know whether all the Senators will agree, but for myself I regard it as a great misfortune that judges in banc are also not brought in contact with the profession and the suitors and the people in the courts of first instance as frequently as possible. Now, I will imagine—for perhaps I can not call it more than imagination—that these circuit judges, who are to compose this tribunal in each of the circuit courts in their appellate function, will, as I think, be able to dispose of the annual litigation in three or four months, at such distribution of terms as they may think fit, and they would be left to take the very important part that they now take, and can not be spared, in my judgment, in the court of first instance in equity cases and in matters that belong to first hearings of all important matters.

I do not desire to see a severance between these appellate judges, which the scheme of the House operates between the judges of that court and the jurisdiction in the first instance of the litigation that the circuit judges now discharge.

[Document Source: *Congressional Record*, 51st Cong., 1st sess., 1890, 21, pt. 10:10220–22.]

Senator Joseph Dolph, Doubts About the Relief Provided by Appeals Courts, U.S. Senate, Speech of September 19, 1890

The compromise measure crafted by Senator William Evarts received overwhelming support in the Senate. The bill passed the Senate by a vote of 44–6 and was approved by the House of Representatives by a vote of 107–62. After years of congressional debate, the president, on March 3, 1891, signed into law the most far-reaching change to the federal judicial system since the aborted Judiciary Act of 1801.

Still, there were a number of dissenters. Senators George Edmunds (R-VT) and George Vest (D-MO) continued to support a plan for dividing the Supreme Court and restraining the growth of the court system. Others criticized the plan for not expanding the capacity of the courts enough. Some politicians and lawyers argued that inevitably the courts would have to be refashioned once again in the near future to meet the demands of the nation's ever-growing population, economy, and volume of litigation.

During debate in the Senate, Republican Joseph Dolph of Oregon foreshadowed the next stage of debate over the organization of the federal courts. Dolph predicted that the Evarts bill would ultimately fail to bring efficiency and integrity to the federal courts because it did not appoint enough judges to handle the business of the courts. Most importantly, he lamented that the Evarts bill did not eradicate the confusion of having two courts of original jurisdiction. Dolph favored consolidating the district and circuit courts as part of the creation of what he saw as a true system of courts—each tier of judges devoted to their portion of the litigation process and independent of the others. The simplified structure, he argued, would lead to speedier administration of justice and a clear path—new districts and new circuits—to growing the system in the future.

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To force a litigant into the Federal courts to-day to await the long-delayed decision of the court of last resort is equivalent to a denial of justice. What is the plain, imperative duty of Congress in the premises? It is to provide adequate judicial machinery for the prompt transaction of the business of the Federal courts. If this is not done, these courts, instead of answering the great and beneficial purpose of their creation and affording speedy and impartial justice to litigants, will become, if they have not already become, by reason of the inadequacy of the judicial system and the long delay to which litigants are subjected, instruments of oppression

and wrong, the means of denying justice to meritorious litigants in many instances forced into them for the purpose of delay.

There is no consideration of economy . . . involved in this question of providing for the relief of these courts that is worthy of consideration. The question whether there shall be one judge or two judges in each circuit or whether there shall be one or two additional circuits is worthy of consideration here only in connection with what will best promote the efficiency and usefulness of the courts.

If a great nation of 64,000,000 people, with almost unlimited wealth and unbounded resources, can not afford a sufficient judicial establishment to answer the demands made upon it, it had better abdicate and turn over its judicial jurisdiction to the States. We want no cheap judicial system. We want a system which is adequate to the business of to-day and sufficient to meet the demands of the future. We want a system under which every court and every judge of all the courts will have ample time to perform thoroughly and well all the duties required of them, and under which all the judges shall receive ample compensation for the labor performed by them. . . .

. . . The necessity for relief to the circuit courts is quite as urgent as the necessity for relief to the Supreme Court. If the bill passed by the House should become a law, I have no doubt the judicial force, with the appointment of additional district judges in a few of the most important districts, would be adequate to meet the demands upon it; but if the bill reported by the majority of the Committee on the Judiciary of the Senate is to be adopted, there will be imperatively demanded for the relief of the circuit courts the creation of additional circuits. . . .

From such an examination as I have been able to give the matter, I think the House bill is better in many respects than the substitute proposed by the majority of the Senate committee. In my judgment it is the only measure which will afford adequate relief to the circuit courts. Not the least meritorious of its provisions is the one by which it is proposed to transfer the original jurisdiction now exercised by the circuit courts to the district courts. This would not greatly add to the labors of the district judges, as they now hold the circuit courts in the absence of the circuit judges and of a justice

of the Supreme Court and in conjunction with them when present, except when appeals from the district court are heard.

...The consolidation of the circuit and district courts would simplify matters. There would be but one clerk, one set of records, one seal, whereas there are now two. Relieving the circuit judges from nisi prius duty would enable the circuit courts of appeals to remain in session the year round, if necessary, to perform thoroughly and well all the duties required of them....

The system proposed by the House is simple and easily understood. It clearly defines the jurisdiction of the several courts provided for. It maintains the natural order and precedence of the courts and judges; the course of justice would be prompt and uniform, while the system is sufficiently comprehensive and elastic to provide for the wants of the future. Under it, if there were found to be too much business in a district court to be transacted by the district judges the remedy would be plain, to create another district or appoint an additional judge for the district. If the dockets of the circuit courts were still overburdened the remedy would be equally plain; it would be to create another circuit....

In my judgment it [the bill] would not afford adequate relief to the circuit courts. It is complicated. It requires duties of the district judges as members of the court of appeals which if performed would require them to neglect their duties as district judges. It requires of the circuit judges nisi prius duties which if well performed would leave them no time to act as members of the circuit court of appeals, and it requires of them duties as members of the circuit court of appeals which if well performed in my judgment would leave them no time for their duties as nisi prius judges. It would be impossible to arrange the terms of the district courts, the circuit courts, and the circuit court of appeals so that they will not greatly interfere with each other....

If the majority of the Senate prefer the measure reported as a substitute for the House bill by the majority of the Senate Judiciary Committee, I shall support it upon the theory that "half a loaf is better than no bread," but feeling at the same time that the action of the Senate is unwise and short-sighted.

[Document Source: *Congressional Record*, 51st Cong., 1st sess., 1890, 21, pt. 10:10227-30.]

Consolidating the Circuit and District Courts

Senator Evarts' Circuit Court of Appeals Act of 1891 was a compromise measure that blended the new intermediate appeals courts with the existing district and circuit courts. Under the new system, circuit judges sat on both the circuit courts of appeals and the original circuit courts. In practice, the large amount of appellate work in most appeals courts meant that circuit judges spent little time hearing trials in the circuit courts. District judges continued to hold the vast majority of circuit court sessions on their own and, in many cases, were also called on to sit on the appeals courts. Supreme Court justices also rarely sat in circuit appeals courts. Judges, lawmakers, and members of the American Bar Association began pushing in the mid-1890s to simplify federal court organization by consolidating the district and circuit courts into a single court of original jurisdiction.

At the urging of Republican Senator George Hoar of Massachusetts in 1899, the task of writing the law to consolidate the district and circuit courts was assigned by Congress to the Committee on Revision of Federal Laws. The Committee completed its work in 1910 and presented Congress with a massive bill that codified all existing statutes related to the judiciary and revised them in order to abolish the circuit courts.²¹ During the debate over the Code bill, which was passed in March 1911, critics of corporate diversity jurisdiction offered new amendments to limit federal jurisdictions and repeated many of the arguments that had taken place in the 1880s. Measures to make corporations citizens of the states in which they did business and to raise the amount-in-controversy to enter federal courts from \$2,000 to \$5,000 passed the House of Representatives but were excised from the bill by the Senate before passage. Critics of jurisdiction had to settle for raising the amount in controversy necessary to enter federal courts to \$3,000.

Debate over the Code bill focused on the consolidation of the trial courts and the evolving role of the circuit judge in the federal court system. Proponents of greater simplicity in the courts wanted to create a true three-tiered system in which circuit judges dedicated all of their energies to appellate work and district judges were the sole judges at the first instance. Some members of the bar, however, argued that such

21. Frankfurter and Landis, *The Business of the Supreme Court*, 128–30.

a change would remove circuit judges too far from the American people, insulating the judges in their experiences and depriving litigants of the service of the nation's best judges. In addition, elite lawyers who represented railroads and other interstate businesses lamented that district judges would not have the same powers across district and state lines that circuit judges had in the circuit courts.

Walter B. Hill and Thomas Dent, *The Need to Clarify Judges' Roles*, American Bar Association Annual Meeting, Report of August 24, 1894

In the debates over the circuit courts of appeals bills in 1890, representatives of the American Bar Association submitted to Congress their own reorganization plan that included consolidation of the district and circuit courts. In 1894, the ABA's Committee on Judicial Administration took up the question of how to improve the new system and called for implementing the ABA's original vision. The Committee on Judicial Administration was represented by Walter B. Hill and Thomas Dent. Hill was a prominent Georgia attorney known for compiling that state's legal code. Dent was a notable Chicago attorney who served as president of the Illinois State Bar Association in the late 1880s.

For Hill and Dent, the shuffling of district and circuit court judges between the lower federal courts and the appeals courts led to unclear lines of authority in the judicial system. They believed that district judges lost prestige when they did much of the same work of circuit judges—and sat on circuit courts of appeals with them—but could be overruled by circuit judges sitting alongside them in circuit court.

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Granting the great benefits that have resulted from the Act of March 3d, 1891, are there not changes in the Act still to be desired? We think there are....

...The bill referred to [preferred by the ABA over the Evarts bill] transferred all the circuit court jurisdiction to the district courts, making the circuit courts appellate courts only—relieving the Supreme Court Judges of their circuit duties—thus introducing some harmony into the relations of the judges and courts constituting the Federal Judiciary.... The orbits in which the Federal Judges move with reference to each other—District Judges with power

to hold Circuit Courts—Circuit Judges and Circuit Justices—need more accurate definition in the present system. In a letter to one of your committee, a distinguished Federal judge uses strong but not unwarranted language, emphasizing this need. The district judges already perform circuit duty, and it is hardly proper to treat them as inferior to the circuit judges in rank or power [when sitting on the circuit court together]. The spectacle of the circuit justice summarily “turning down” the district or circuit judge, or the circuit judge “turning down” the district judge, as has sometimes happened, is not edifying; neither is the spectacle of two judges sitting together and the judgment being entered in accordance with the opinion of the ranking judge....

The present conditions tend to the degradation of the district judgeship and the impairment of public respect for the incumbents of the office. They permit, if they do not create, unseemly conflicts and raise unpleasant issues as to judicial rank and precedence.

[Document Source: Walter B. Hill and Thomas Dent, Report of Committee on Judicial Administration and Remedial Procedure, *Report of the Seventeenth Annual Meeting of the American Bar Association* (1894), 340–42.]

Edmund Wetmore, Support for Consolidation, American Bar Association Annual Meeting, Remarks of August 19, 1898

In 1897, Massachusetts Republican Senator George Hoar, chairman of the Senate Judiciary Committee, submitted a telegram to the ABA during its annual conference asking that the Association create a committee “to consider the present constitution of the U.S. Circuit and District Courts, whether they may not properly be consolidated or the present very singular distribution of jurisdiction otherwise improved.”²² The resulting Committee on Federal Courts submitted its report to the ABA membership at its 1898 conference and delivered a draft bill to Hoar the following year. The committee, headed by ABA President Edmund Wetmore, recommended consolidating the district and circuit courts into a single trial court. The committee also proposed that the senior circuit judge have the authority to assign district judges to other districts throughout the circuit, so as to help overburdened districts meet the demands of their caseload without having to appoint additional judges. Wetmore and the com-

22. *Report of the Twentieth Annual Meeting of the American Bar Association* (1897), 60.

mittee wanted to give the Chief Justice of the United States the power to assign circuit judges to serve in circuits throughout the country and the senior circuit judge the power to assign circuit judges to sit in district courts. Wetmore argued that these two provisions together would prevent appellate judges from becoming too far removed from the American people and at the same time would develop a more national outlook, contributing to greater uniformity in circuit appeals court decisions.

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The first object [of the ABA draft bill] was to consolidate the district and circuit courts. Upon that point, so far as we know, there has been unanimous accord. It is generally agreed that to maintain the two separate organizations is unnecessary, and that simplification is desirable—that instead of two courts we should have one. That is the basis of the change proposed, and if carried out, it makes it necessary to make some other changes in the law...

Further, there is a congestion of business which is gradually increasing in many of the districts of the United States. The United States Circuit Courts of Appeals—are not, as far as we are able to learn, crowded or in arrears with their calendars, but the work thrown on the judges at *nisi prius* is becoming excessive. It is highly desirable in many districts that there should be an increase in the force of judges. That is very difficult to obtain, and, as stated in our report, it was the opinion of the Committee that the procuring the appointment of an extra judge in any particular district, where the need was most felt, might better be left to local effort; but for the purpose of applying as general a remedy as we could, we provided that district court judges could be assigned to sit in the different districts from those which were their home districts, our idea being that, in that way, it would be possible to distribute the work, and that it would aid in relieving those who were overworked, and, furthermore, that it was desirable to put that appointing power in some single hand above all the judges, so that one person might be responsible for it, in order that it might be in practice the more readily exercised. It also became evident to us, and I think it must be evident to all, that our present system of Circuit Courts of Appeals has come to stay. A large part of the appeals that were formerly heard by the Supreme Court of the United States are now heard in these

Circuit Courts of Appeals. As was inevitable, and as is becoming evident, these courts, sitting in widely separate parts of the country, almost necessarily take upon themselves somewhat of a local character. It was the consideration of that fact that induced us to put in the report the provision permitting the appointment of a Circuit judge to sit outside of his own circuit, in the Appellate Courts, so that judges of the different circuits should intermingle, the idea being that that would tend somewhat to correct the tendency I have spoken of and give a more national character to the decisions of the Circuit Courts of Appeals.

[Document Source: *Report of the Twenty-First Meeting of the American Bar Association* (1898), 48–50.]

Representative Reuben O. Moon, Simplifying the Federal Court System, House of Representatives, Speech of December 7, 1910

The movement to abolish the circuit courts gained support from judges and lawyers in 1899, but the change would have to wait for another decade. After receiving the ABA-drafted bill to consolidate all original jurisdiction in the district courts, Senator George Hoar (R-MA), chair of the Judiciary Committee, reasoned that the end of the circuit courts would require small changes to the many laws that governed the courts and moved to have the changes referred to the Commission for the Revision of the Penal Laws. Congress approved Hoar's request to enlarge the work of the Commission, whose mission would soon expand to codifying all federal statutes. The Commission did not complete its work until 1909 and the legislation for the Judicial Code was not introduced in Congress until 1910.²³

In introducing the Judicial Code bill, House Judiciary Chairman Reuben O. Moon (R-PA) stressed that in reality the circuit courts had largely become obsolete and only contributed to confusion and complexity for litigants at the trial level. Moon quoted Justice Department statistics showing that in 1908, circuit judges sat in circuit courts only 11 percent of the time they were in session, while in 22 states the circuit judge never sat in the circuit court. He argued that consolidating original jurisdiction in a single trial court would simplify justice for the American people and give the federal system a logical organization and conform to a true three-tiered system.

23. Frankfurter and Landis, *Business of the Supreme Court*, 130–31.

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The new courts of appeals have become great courts, useful and effective. They exercise final jurisdiction in a very large number of cases with entire satisfaction to the whole country. But the defect of that act in continuing the original jurisdiction of the circuit court has grown more and more obvious year by year. . . .

As has been seen, by acts of Congress, in each of the 276 places in which the courts must be held, there is a provision for holding both the circuit and district court and in each of these 276 places are maintained the organization and machinery of these two respective courts, both of which are courts possessing only original jurisdiction.

The jurisdiction conferred by acts of Congress upon these courts is, in a large majority of cases, concurrent, and in a comparatively few cases is exclusive jurisdiction conferred upon them. This jurisdiction differs very little in character and is distinguished by no controlling principle. They both have jurisdiction of civil and criminal cases, the only distinction being that the circuit court has exclusive jurisdiction in capital cases. In some cases the line of demarcation is simply the amount involved in the litigation; in some cases there exists a mere arbitrary division, giving the admiralty and maritime jurisdiction exclusively to the district courts, and matters relating to revenue to the circuit courts; and during the past 25 years few, if any, acts of Congress have been passed that conferred jurisdiction upon courts in which the same jurisdiction has not been conferred upon both the circuit and the district courts. The chief original distinction between the circuit and district court as created by the act of 1798 [sic] was that the circuit court was then invested with a large appellate jurisdiction from the decisions of the district court, and when the act of 1891 took away from the circuit court this appellate jurisdiction there no longer existed any reason in law or in principle for its continuation.

It is true that the circuit court is an historic court. It occupied a unique and useful position in the original judicial scheme. It played a conspicuous and honorable part in the introduction and upbuilding of the Federal system in the Nation. It afforded in those early days a notable and inspiring illustration to the citizens of the State of the parental care of the new Nation in sending among the

people of the States the most notable judges of the land to administer justice to them. But the glory of its early days necessarily rapidly declined. The act of 1793, which withdrew one of the Justices from the circuit, weakened its importance. The act of 1869, which created the circuit court judge and made the district judge alone competent to hold a circuit court, and practically withdrew both Supreme Court Justices, pointed to its rapid decadence. The act of March 3, 1891, which took from it all of its appellate jurisdiction and relegated it to a court of limited scope and powers already exercised by the district court, completed its final overthrow and made the House bill of 1890, which provided for its entire extinction from the judicial system, a matter of prime necessity. . . .

The reorganization of the courts, therefore, as provided by this bill will substitute for the present cumbersome, impracticable, confusing, and expensive judicial system a simple, concrete, elastic, and logical one; will eliminate a court of original jurisdiction wholly unnecessary and in practical operation long since fallen into disuse. It will not displace a single judge or change the present general practice of the courts. It will simplify the proceedings by consolidating jurisdictions and by having all cases in courts of first instance and all pleadings filed therein brought and filed in the district court, and will preserve the same plan of judicature originally designed by the framers of the Constitution and adopted by most of the States, to wit, one court of original jurisdiction, an intermediate court of appellate jurisdiction—final in many cases—and the Supreme Court as the court of last resort.

[Document Source: *Congressional Record*, 61st Cong., 3d sess., 1910, 46, pt. 1:87–88.]

Representative Richard W. Parker, Plea to Keep Circuit Judges in Trial Courts, House of Representatives, Speech of December 14, 1910

The creation of Circuit Courts of Appeals in 1891 altered not just the relationship between the Supreme Court and the American people, but between circuit judges and the people. Senator William Evarts secured support of his reorganization plan because of his provisions for keeping the circuit judges in trial courts. A fierce critic of federal judicial power such as Senator John T. Morgan of Alabama, for example, could support the Evarts bill because it provided that circuit judges would continue to try cases before juries and “intermingle

with the people.” The proposal to consolidate the circuit and district courts and dedicate circuit judges to appellate work only reignited in some lawmakers a reverence for that connection between circuit judges and the people.

The 1911 Judicial Code bill provided that circuit judges could be assigned by the senior circuit judge to sit in a district court, but for Representative Richard W. Parker (R-NJ), this was not the same as circuit judges having the authority to sit in any trial court in the circuit. For Parker, circuit judges fulfilled a unique role—one rooted in Anglo-American judicial tradition—in which the people could expect the contribution of elite judges at the trial level. He argued that circuit judges ensured equal access to quality jurisprudence and contributed to greater uniformity throughout the federal judicial system.

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Now, Mr. Speaker, I desire to call to the attention of this House the fact that there are two judicial systems in the world. One is the English system, and the other is the continental system. By the continental system the trial of a case is always sent to a court of first instance, to a local court, to a single local man. It may be a great case, which goes through the whole state in its conditions and ramifications, and these great cases must first be tried before local and, perhaps, little men. What is more, if the plaintiff thinks he can get a better chance from one particular local judge, he goes to him. We have in our present system something of that bad practice. . . . The great case must go to the single local man, and after the decision there is an appeal on the whole case, and after that another appeal, and sometimes a third and a fourth appeal. . . .

That is the continental system of centralized government, of courts in a department of justice, the system of having the great men above sit only on appeals. The other great system is that of England, that we have inherited with the common law, under which the judges of the great courts at Westminster go on circuit throughout the whole country. They have commissioners associated with them, but the great judge is there to bring justice home to the people and administer the law as he has learned it in the great court. We adopted that plan in the United States.

The circuit court of the United States in the beginning was a circuit court held in each district by one Justice of the Supreme Court and a district court judge. There were at first two Justices

of the Supreme Court, and then they brought it down to one, and then from time to time created other circuit judges, so that it is now unnecessary for the Supreme Court Justices to go to the circuit, but still the Justice of the Supreme Court may come if a case be of sufficient importance, and great equity cases are almost always heard before the circuit judges rather than by the district judge of the particular district. We all know that. And even at this day I have been told, within recent years, by Justices of the Supreme Court that they appreciated the privilege and education which come to a judge sitting here in Washington of going to his circuit and finding out something about how the work is being done in that circuit, and perhaps bettering it from time to time by his influence, his presence, and his suggestions. It is the American system as well as the English system. We want to preserve it and not to destroy it. The protests that come from the bar are not in favor of spending too much on clerks. The bar are not in favor of the name of the circuit court or the name of the district court. They are in favor of the great principle that in case of necessity in any district the judges of the highest court should be able, without the petitions of lawyers or any discredit thrown upon the district judge, to go to that circuit to see what business there is, to open the court, and to determine for themselves then and there whether the cases pending are of sufficient importance for them to stay there to consider them. They do not always have time to do it now, but that is due to the multitude of appeals. Shall we multiply appeals tenfold by allowing no man to sit below except the local judge? The way to avoid appeals is to have the best men sit below, to bring justice home to the Nation; and if there be any means by which the judicial system of this country will become unpopular and by which there will be danger of a revolt against the Supreme Court of the United States and our circuit courts of appeals, it will be by confining them to mere appellate business, away from the people, for whom they are sworn to do justice.

[Document Source: *Congressional Record*, 61st Cong., 3d sess., 1910, 46, pt. 1:303.]

Lawyers' Memorial to Congress, Call to Preserve the Power of Circuit Judges, December 1910

In 1899, when the ABA Committee on Federal Courts supported consolidating the district and circuit courts, it did so as part of a broader plan for simplifying the courts and preserving flexibility in the assignment of judges. In 1910, a collection of powerful ABA members, including notable New York Attorney Joseph H. Choate, rejected the Code bill as a radical measure that would undermine the effectiveness of the courts.

In a memorial submitted to Congress by a group of ABA lawyers, Choate and others protested that relegating circuit judges to the appeals courts would destroy what had been the particular strength of their office: the ability to exercise equity jurisdiction across district and state lines. These representatives of the nation's largest interstate railroad corporations valued the authority of federal circuit judges to issue injunctions and appoint receivers in bankruptcy for their clients, whose property often stretched across multiple judicial districts.²⁴ Lawyers who represented manufacturing interests also hoped to preserve the power of circuit judges to protect their clients' patents from infringement over a wide territory. The Code bill provided for relief of district judges by allowing circuit judges to be dispatched to districts by the senior circuit judge, but this did not allow them to exercise their former power over the entire circuit.

The final version of the 1911 Code addressed these objections in Section 56, which allowed a district judge to issue an order binding on the entire property of a litigant, pending notification sent to other districts and approval from a circuit judge within 30 days.

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The circuit court as a court of broad geographical jurisdiction, running over entire circuits comprising many States, will be abolished by the new plan; and with the abolishment will expire the existing power of the circuit judges to make orders and decrees, to grant injunctions in insolvency, patent, or other causes, and to give other and vitally necessary relief operative in any part of a large circuit. If a district judge is absent, ill, or inaccessible, no circuit judge can be applied to for an order, and no relief can be obtained

24. See Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865–1917* (Baltimore: Johns Hopkins University Press, 1994), 47–72.

except by the cumbersome and, at times, wholly inadequate method of designating another district judge to act. By substituting judges of small geographical districts for circuit judges, the new plan will fail to afford relief in important equity matters. . . .

It is true that the existing circuit courts have no wider geographical jurisdiction than the district courts as to the service of process and as to parties; but the point to be observed is that the circuit judges have power everywhere in their circuits, and this is the power which the proposed new legislation will destroy. As the plan contemplates and is with the purpose of devoting the circuit judges exclusively to appellate work, the loss of power referred to necessarily results.

The great controlling and fundamental reason for the original creation, and subsequent continuance, of the circuit courts is the wide scope of territory covered by the power conferred upon the judges of these courts. While each separate court exists within each judicial district, the circuit judges are clothed with jurisdiction to exercise the great powers of these courts throughout their several circuits. The importance of this wide territorial jurisdiction has immeasurably increased by reason of the consolidation of the great commercial organizations of the day. For example, take one of the great railroad systems: By reason of the extensive territorial jurisdiction of the United States circuit judges it is possible, where unfortunate necessity exists, to conserve and protect these great properties through the instrumentality of a court receivership by the signature at one time and place of a circuit judge, whose jurisdiction may extend from the Savannah to the Rio Grande, or from the Mississippi to the Rockies.

By coordinate action of two such judges the territory from the Lakes to the Gulf is covered, and four of them span the continent from ocean to ocean. If coordinate procedure was necessary throughout any of the territory named under the system proposed, it would require the harmonious action of such a large number of district judges as to be most cumbersome. In view of the jealousy of power and prestige sometimes lodged in the human breast, though it be the "breast of the court," it is easy to imagine such harmonious action becoming impossible. This situation seems to have escaped the observation of the committee on revision, or if they observed it they are silent on the subject. One is justified in

the conclusion that they failed to observe it, because the committee reports a new section inserted with the avowed purpose of making the new plan as elastic as the present system, providing that the circuit judges under the new law may be designated to perform the work of district judges "under exactly the same principles and regulations as district judges now perform the work of circuit court judges."

This interchange of service fails entirely to accomplish the purpose hereinbefore indicated, for the manifest reason that a circuit judge, under the proposed new law, when sitting in a district court would be limited to the exercise of the same power and restricted to the same territory as the district judge for whom he acts as a substitute. The proposed revision contains no provision for the exercise of original equity jurisdiction covering any territory larger than the particular district in which the bill is presented. Lawyers of large practice on the equity side of the United States circuit courts will, at a glance, recognize the fundamental and calamitous change involved in the abolition of the original jurisdiction exercised by the present circuit courts.

The necessity of having one United States circuit judge, with jurisdiction over a number of districts, so that the same judge can act in the districts in a number of States, is very apparent to any lawyer who has ever been concerned in the administration in equity of a railroad receivership embracing a large railroad system, or of a building and loan association, or other like corporation, with estates scattered throughout a number of States. The United States Supreme Court has laid down very recently the doctrine that a receiver appointed in one district, under equity jurisprudence, possesses no powers, even of suit, outside of the district of his appointment. In the matter of a receivership the necessity of consulting a number of district judges of variant views would almost paralyze the administration of property under a Federal court receivership, and yet to undertake to administer them under the State courts is practically impossible....

...The proposed district court will be so confined by geographical limitation as to be utterly powerless to afford relief or remedy in much of the most important litigation now conducted successfully and satisfactorily to all interests in the circuit court. It is quite inaccurate to say that the change is one of consolidation and of

names only. The change is radical in taking away the breadth of the existing jurisdiction of the circuit judges, which is of vital consequence not only to the Government, but for the protection of great property interests, patent rights, and many other matters.

[Document Source: *Congressional Record*, 61st Cong., 3d sess., 1910, 46, pt. 1:299–300.]

Popular Politics and Judicial Power

In the decades following the 1891 creation of the circuit courts of appeals, debates over the power of the federal judiciary grew more contentious as lawyers, judges, politicians, and progressive reformers argued over the relationship between law and politics in the federal judiciary.

The debate over judicial power in the early twentieth century centered on the fundamental problem of drawing a line between policy and law—between the legislative function and the judicial function in a representative government. Beginning in the late 1880s, a series of Supreme Court decisions designated the federal courts as the primary arbiter of the permissible use of government authority. While the Court recognized that state governments possessed so-called police powers to protect the health, safety, and morals of the general public, it decided, based on a broad reading of the Fourteenth Amendment, that individuals possessed fundamental property rights under the Constitution that the courts were bound to enforce against government action. Under the leadership of Justices Stephen J. Field and David Brewer, the Supreme Court also established a commitment to equal protection under the law. Federal judges contended that it was part of the judicial function to determine whether legislation was a legitimate exercise of government power in the public interest or an unwarranted infringement on the rights of individuals to life, liberty, and property. The courts struck down those laws that judges identified as “class legislation”—laws that did not act on the public as a whole but for the benefit of a specific group. Judges who supported this use of court power saw the judiciary as a bulwark of federally protected legal rights against the abuse of power by volatile political majorities. This view saw the judges as educated in legal principles and guided by reason, and thus made them guardians of a legal constitutional order superior to the transitory legislation of elected lawmakers.²⁵

25. Owen Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, The Oliver Wendell Holmes Devise History of the Supreme Court, vol. VIII (New York: Macmillan Publishing, 1993), 51–221; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1994).

While judges described these decisions as enforcing the rule of law, progressive critics of the courts instead saw federal courts as taking sides in highly contentious political contests. Labor leaders and middle-class reformers argued that the judicial commitment to the “rule of law” masked an institutional allegiance to the interests of corporations and the wealthy elite. They accused federal judges of obstructing the will of legislative majorities and thwarting democratic government in areas that concerned public policy, not abstract legal rights. Critics charged judges with “usurping” the legislative function of Congress and destroying the separation of powers as established by the Constitution. State lawmakers also railed against federal judges for treading on the sovereignty of state governments and for encroaching on state governments’ ability to adopt regulations that reflected the will of local voters and addressed pressing social and economic problems.²⁶

Between the 1890s and 1920s, progressive reformers advocated greater popular influence in representative government—including referendums, ballot initiatives, and recall of elected officials—and sought to apply these innovations to state and federal courts. Calls for judicial elections, mechanisms for recalling judges, and popular referenda on court decisions of major constitutional importance led to public debate over just how the judiciary was to relate to popular will. Progressives and labor leaders who believed that the federal courts had shed their independence to defend society’s powerful interests saw greater democracy as the solution. Other legal thinkers who believed that judges were captured by the formalistic legal philosophy of the nineteenth century hoped that judges could be persuaded to see the social consequences of the law and defer to the determinations of legislatures.

Judges and members of the national bar—represented by the American Bar Association (ABA)—defended the independence of the judiciary from these attacks. The courts, they argued, were not beholden to a constituency nor to the ever-changing views of political majorities. Judges had a duty to uphold the fundamental law against the popularly elected branches and, in doing so, to protect the people at large and the foundations of representative government. Both sup-

26. William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton: Princeton University Press, 1994).

porters and critics of judicial power believed that their prescriptions were the best path to preserving the integrity and public esteem of the federal judiciary.

The Evolving Role of the Federal Judiciary

Justice Stephen J. Field, The Fourteenth Amendment and the Duty of Federal Courts, Speech of February 4, 1890

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, adopted during Reconstruction, opened the door to a fundamental recasting of the role of the federal courts in American society. The Fourteenth Amendment's broad language prohibited any state from depriving "any person" of "life, liberty, or property, without the due process of law" and guaranteed all persons "equal protection of the laws." By the late 1880s, the Supreme Court of the United States had begun relying on this language to limit the authority of the states to regulate economic activity in the name of the public interest. While the federal courts did not strike down nearly as many laws as they upheld, judges placed themselves as the arbiter of which laws were legitimate exercises of the state police powers to regulate the health and safety of society and which were an unwarranted infringement on individual freedom and property.

In an 1890 address celebrating one hundred years since the creation of the federal judiciary, Supreme Court Justice Stephen J. Field described what he saw as the vital role of the Court since the passage of the Reconstruction amendments. He described the federal courts as the people's defense against unlimited legislative power—the preserver of the Constitution as superior to legislature-made law.

Field echoed his 1873 dissent in the *Slaughterhouse*²⁷ cases—he argued that the Fourteenth Amendment was not limited to former slaves and that the Supreme Court was duty-bound to protect the rights and property of all Americans. Field emphasized that laws must act on all citizens equally and that individual rights must be enforced, especially in the face of growing material inequality and social unrest. The judicial power, as Field and other justices like David Brewer argued, was dedicated to enforcing the rule of law in society.

27. 83 U.S. 36 (1873).

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The power of the court to pass upon the conformity with the constitution of an act of Congress, or of a State, and thus to declare its validity or invalidity, or limit its application, follows from the nature of the constitution itself, as the supreme law of the land,—the separation of the three departments of government into legislative, executive and judicial,—the order of the constitution, each independent in its sphere, and the specific restraints upon the exercise of legislative powers contained in that instrument. In all other countries . . . the judgment of the legislature as to the compatibility of a law passed by it with the constitution of the country has been considered as superior to the judgment of the courts. But under the constitution of the United States, the Supreme Court is independent of other departments in all judicial matters, and the compatibility between the constitution and a statute, whether of Congress or of a State, is a judicial and not a political question, and therefore is to be determined by the court whenever a litigant asserts a right or claim under the disputed act for judicial decision. . . .

The limitations upon legislative power, arising from the nature of the constitution and its specific restraints in favor of private rights, cannot be disregarded without conceding that the legislature can change at will the form of our government from one of limited to one of unlimited powers. Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State. Otherwise the limitations upon legislative power expressed in the constitution or implied by it must be considered as vain attempts to control a power which is in its nature uncontrollable.

This unique power . . . is therefore not only not a disturbing or dangerous force, but is a necessary consequence of our form of government. Its exercise is necessary to keep the administration of the government, both of the United States and of the States, in all their branches, within the limits assigned to them by the constitution of the United States, and thus secure justice to the people

against the unrestrained legislative will of either—the reign of law against the sway of arbitrary power. . . .

Whilst the [Thirteenth, Fourteenth, and Fifteenth] constitutional amendments have not changed the structure of our dual form of government, but are additions to the previous amendments, and are to be considered in connection with them and the original constitution as one instrument, they have removed from existence an institution which was felt by wise statesmen to be inconsistent with the great declarations of right upon which our government is founded; and they have vastly enlarged the subjects of Federal jurisdiction. . . . As has often been said, it was intended to make every one born in this country a free man and to give him a right to pursue the ordinary vocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. The right to labor as he may think proper without injury to others is an element of that freedom which is his birthright. . . .

Furthermore, I hardly need say, that, to retain the respect and confidence conceded in the past, the court, whilst cautiously abstaining from assuming powers granted by the constitution to other departments of the government, must unhesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the constitution upon the Federal and State governments, but also all the guarantees it contains of the private rights of the citizen, both of person and of property. As population and wealth increase—as the inequalities in the conditions of men become more and more marked and disturbing—as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means—as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations—it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee of the constitution. Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure the rights of persons are unsafe. Protection to the one goes

with protection to the other; and there can be neither prosperity nor progress where either is uncertain.

[Document Source: Stephen J. Field, “The Centenary of the Supreme Court of the United States,” *American Law Review* 24 (May/June 1890), 360–67.]

Proposals to Alter Judicial Tenure

In response to controversial decisions of the Supreme Court of the United States, some members of Congress throughout the late nineteenth and early twentieth centuries proposed abolishing tenure during good behavior. In 1882, Democratic Senator James George of Mississippi introduced an amendment calling for federal judges to be elected by citizens of districts or circuits to serve fourteen-year terms. Between 1897 and 1907, Representative Samuel Cooper of Texas submitted five separate resolutions for a constitutional amendment empowering Congress to set terms for election and term limits for judges. In 1899, North Carolina populist Marion Butler introduced an amendment to have district judges elected to eight-year terms. Texas Representative Gordon Russell—a future district court judge—introduced four constitutional amendments to require election of federal judges and to limit the tenure of Supreme Court justices to twelve years, circuit judges to eight years, and district judges to six years. Proposed amendments altering judicial tenure continued to be offered in Congress during the 1910s and 1920s, with nearly sixty amendments introduced between the end of the Civil War and the beginning of the Great Depression. None of the proposals resulted in changes to tenure for judges, but they did generate public debate about the relationship between federal judges and American democracy.

James B. Weaver, *Attack on Tenure During Good Behavior, A Call to Action*, 1891

The Supreme Court generated controversy by the early 1890s after it handed down a series of decisions narrowly construing the power of state governments to regulate economic activity. In the 1886 case of *Wabash v. Illinois*, the Court ruled that state regulation prohibiting railroads from charging less for a long haul than a short haul was unconstitutional when applied to trips that extended outside the state’s

borders.²⁸ The Court ruled that such rates were the subject of interstate commerce and could only be regulated by Congress. In 1890, in the case of *Chicago, Milwaukee and St. Paul Railway v. Minnesota*, the Court ruled that a Minnesota law creating a railroad commission was unconstitutional because it did not give railroads procedural remedies for challenging rates.²⁹ The Court ruled that when setting rates, regulators had to ensure that rates would guarantee a fair return on investment, otherwise the rate amounted to a government deprivation of private property without due process. Future cases in the 1890s involving railroad rate regulation would enshrine this right to a fair return as a substantive constitutional right. Most importantly, the courts held that whether a rate was unreasonable or not was ultimately an issue for the courts to decide.³⁰

In response to this expansion of federal court power and the Supreme Court's nullification of state railroad regulation, the Populist political movement—with its focus on fighting monopoly power in railroads and industry—turned its anger on the federal courts. In his 1891 book *A Call to Action*, Populist Party presidential candidate James B. Weaver targeted tenure during good behavior and lashed out at the “tyranny” of judges who he saw as effectively having tenure for life. While supporters of tenure during good behavior argued that security in office was necessary for judges to counter popular political excesses, Weaver countered that the people required safeguards against judges who would serve corporate interests at the expense of the public.

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Why should the American judiciary of to-day be exempted from elective control or hold their position for life? The idea was adopted in the old world, not because it was free from objection, but because it was less objectionable than any other under the peculiar circumstances by which they were environed. The conditions which called for these so-called safeguards have vanished even there; but the evils inherent in the system still remain both here and abroad to curse mankind and imperil the safety of society. It is not probable that any representative body of men, chosen by the people of the United States to-day, would seriously enter-

28. 118 U.S. 557 (1886).

29. 134 U.S. 418 (1890).

30. Fiss, *Troubled Beginnings*, 185–221.

tain a proposition to grant to our Supreme Court the powers now claimed by that tribunal. Nor would they for a moment think of appointing the judges for life. The growth of plutocratic spirit, the rapid rise of corporate influence, and the varied experiences of a Century under our Constitution, would imperatively forbid it. Power must of course be confided to human hands, but it is constantly subject to abuse. Those who exercise it should always be under the restraint of those from whom it was derived. Elective control is the only safeguard of liberty. If the history of the republics of the earth has in store for our race a single lesson of value, it is this.

The learned Chancellor Kent, in his great work on American law, attempts to justify the mode by which we select our Federal Judiciary and the tenure by which they hold their seats, by resorting to the following bit of casuistry: "But all plans of Government which suppose the people will always act with wisdom and integrity are plainly eutopian [sic] and contrary to uniform experience. Governments must be formed for man as he is, and not as he would be if he were free from vice!" It does not seem to have occurred to the learned jurist that it is equally contrary to experience and fully as eutopian [sic] to suppose that our judges appointed for life will always act with wisdom and prudence. It is quite as important that Government should be formed for the judge as he is and not for the judge as he would be if he were free from the vices and passions incident to human nature. Besides, the people must touch their Government at some point; and is it not probable that they would act with as much wisdom and prudence in selecting their Judiciary, were they permitted to do so, as they now do in selecting those with whom the appointing power is to reside?

Our Federal Judicial system is remarkable and anomalous. It is lifted above both State and Federal governments, and is not responsible to either except in matters of personal misbehavior, or malfeasance in office, to an extent that would render the individual judges liable to impeachment. Their method of appointment, freedom from responsibility, life tenure of office, exemption from the ordinary struggles common to human nature in the battle for bread, their arbitrary and extraordinary power, tend, in this day and age, to separate them entirely from the great body of the people and to impart growth and vigor to all the dangerous elements of human nature.

The Executive never consults popular sentiment in making his nominations. In practice it is rarely ever known who is to be chosen until the official notification is sent in to the Senate. When that body and the Executive are in political accord, confirmation, as a rule, follows quickly. When once confirmed, the wisdom of the appointment can never be reviewed. A member of this Court, appointed at the age of forty-five and serving until he is seventy, will witness twelve complete changes in the House of Representatives, four in the Senate, and six in the Executive. A whole generation may live, suffer and pass from the stage of action before the wrong inflicted by a bad appointment can be corrected, unless the legislative arm shall interpose. How strange that just at the point where we lodge the greatest power we should sever all connection with the people, who are the embodiment of Sovereignty and the fountain of all authority. . . . It is quite as important that popular liberty and the peace of society shall be protected from the inconsiderate, incompetent, rash and tyrannical tendencies inherent in our Court of Last resort, as it is that we should establish safeguards against the encroachments and infidelity of any other class of public servants.

[Document Source: James B. Weaver, *A Call to Action* (Des Moines, Iowa, 1891), 69–71.]

House Judiciary Committee, Debate Over Judicial Term Limits, Reports of February 1894

If some reformers and politicians were angered by federal court intervention in state regulation, others criticized federal judges for not doing enough to stem the growth of federal power. Southern Democrats, like William C. Oates of Alabama, responded to the courts' failure to declare unconstitutional federal railroad charters and the legal tender acts (making paper money legal tender in private exchange) by proposing to place term limits on federal judges. Oates and his allies on the House Judiciary Committee issued a report in 1894 in support of a bill to limit judicial terms to ten years. Oates and the Committee argued that while most judges were of high character, something needed to be done to assure the people that judges were not beholden to corporations or any political party.

A minority of the House Judiciary Committee, led by Republican William A. Stone of Pennsylvania, charged the Democrats with compromising the independence of the judiciary in the name of

overturning policies that they disapproved. They argued that the executive branch would obtain too much power over the courts under a system of term limits and that judges without life tenure would strive for popularity in their decisions, bringing the taint of party politics onto the bench. The search for popularity would, the minority argued, undermine the importance of precedent in deciding cases and throw doubt onto the status of the law, thus harming popular respect for the courts. The Democrats, Stone and his Republican colleagues advised, would do better to repeal the laws with which they disagreed than to place blame on federal judges and threaten the integrity of the judiciary.

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The framers of the Constitution gave life tenure to the judges of the courts of the United States with a view to secure their independence and impartiality, and thus in their opinion to secure to the people and the Government an exact and unbiased, nonpolitical judiciary. More than one hundred years of experience have shown that this purpose of the framers has not been fully realized. Some of the judges are active participants in politics, and sometimes seem to be biased in their judgments, whether from interest or prejudice we are unable to say. We are proud to state that a majority of them are excellent men of high character, and discharge their duties with great fidelity and ability, while on the other hand some have shown very little or no aptitude for judicial work, carelessness, bias or prejudice in some classes of cases tried by them. Some others seem to feel that they are so far removed from responsibility to anyone that they do things from which they would entirely abstain were they more responsible.

The standard for the selection of judges by the President has not always been as high and nonpartisan as it should have been, but this is not attributable to the fact that the term is for life or for good behavior. It is, however, one of the evils which is visited upon the people because there is no end to the judge's term, and hence, whether he be an ignorant, a prejudiced, or unnecessarily harsh judge he must be endured while he lives or until he is placed on the retired list and pensioned with his full salary the remainder of his life....

It is a matter of public notoriety that within a great many States of the Union Federal judges have become very unpopular with the people. They are frequently suspected of having no sympathy with the latter, and of exhibiting partiality towards corporations and personal favorites. If possible such impressions should be completely eradicated from the public mind. The purity and perpetuity of our institutions are as much, if not more, dependent upon the judiciary than any other branch of our governments, State and Federal. The course of our judges should be so high and impartial as to command the respect not only of the suitors but of all the people in every locality in which they hold their courts....

We believe that the most effectual way to remove the dissatisfaction and restore confidence to the people in our judiciary is by changing the life tenure to that of a term of years....

The system of appointing judges to hold offices during good behavior, or for life, is of ancient origin, and was supposed to be necessary to make the judges independent of the King and his subjects.

The progress in arts, sciences, and civilization has been so great during the last century as to supercede [sic] the old machines and old methods and to substitute the new and superior ones. Quite as wonderful progress has also been made in the science and methods of government, and it has been entirely in the direction of a higher development, recognition, and security of human rights. As the masses of people grow in intelligence kingly, monarchical, and one-man power, by whatever name called, wanes and is discontinued, which is in accord with the laws of nations and of God.

Responsibility of governments to the governed is the fundamental principle to be observed and followed in all departments of government. Our Chief Executive's term is but for four years' duration, our Senators six, our Representatives two, and our judges are for life. Why should their terms of office be without limit? Are they so much more important factors in the solution of the problems of government than either of the others? And if they are, is it the best way to obtain their greatest assistance and most conservative and wise decisions? We think not. If it be necessary thus to free a man from coercion or intimidation it would seem equally unwise to attempt by a life tenure to give him free rein to temptation, passion, and prejudice....

We believe that our laws would be better and more carefully executed, more respected and revered by the people, if, instead of the life tenure, the Federal judges were appointed for a term of ten years by the President and confirmed by the Senate, as now.

[Document Source: House of Representatives, Committee on the Judiciary, *Term of Office of Judges of U.S. Courts*, House Report 466, 53d Cong., 2d sess., February 20, 1894.]

The charge made by the committee that the judges “are so far removed from responsibility to anyone that they do things from which they would entirely abstain were they responsible,” deserves a passing notice. In other words, the proposition is to take away all freedom from the judges and make them responsible to some one. Then they would not exercise their own untrammelled judgment, but they would execute the will of the person to whom they are responsible. It is submitted that in this argument is found one of the principle reasons why the tenure of office should not be changed.

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...Judges should not be condemned by the people for the upholding as lawful and constitutional what the people themselves decreed, through their representatives in Congress and their Executive. No one has ever seriously questioned the validity of these acts of Congress except the party in the minority at the time of their passage, and now that that minority party is in full power and able to repeal these laws it dare not do it. Its representatives in Congress could not justify their repeal before their own party. It is no use for any individual, or a handful of individuals here and there, to stand up and proclaim that these laws are unconstitutional. One party is committed to them. It passed them....

...The judges perform a very different part in the machinery of our Government from either the legislative or the executive branch. The very existence of our Government depends upon the stability of the decisions of our courts, recognizing judicial precedents. If our courts were as changeable as our legislature what would be our national security? ...

This amendment, if adopted, will, in our judgment, be very detrimental, not only to the independence and efficiency of our judi-

ciary, but will injuriously effect every department of our Government.

The executive, legislative, and judicial departments are so constituted as to be independent of each other. This amendment would make the judiciary dependent upon the executive. . . .

If you make the judge dependent on the favor of the Executive for a reappointment, you are expecting too much in presuming that all men who may be called upon to fill these important positions will at all times be independent and uninfluenced by the Executive.

This amendment would belittle the judiciary and lessen its dignity. Instances are numerous throughout the States where judges, dependent upon public favor for reelection, have repeatedly refused to do their duty to the disgrace of the high office which they hold.

There is another equally dangerous reason why this amendment should not be adopted. The judges of the courts holding office for ten years would strive for popularity, and might improve their opportunity to make popular decisions with a view of becoming candidates for office and we would have what now is unknown in this country—the whole Federal judiciary actively engaged in party politics. It must be obvious to every one that this would destroy the dignity of the judiciary and the confidence of the people in its adjudications.

[Document Source: House of Representatives, Committee on the Judiciary, *Term of Office of U.S. Judges*, 53d Cong., 2d sess., House Report 466, Part 2, February 26, 1894.]

Walter Clark, Call for the Election of Federal Judges, *The Arena*, November 1904

North Carolina Supreme Court Justice Walter Clark was perhaps the most persistent critic of the federal courts in the early twentieth century and campaigned for years to require the election of federal judges.³¹ In an article published in *The Arena* in 1904, Clark contended that the framers instituted life tenure out of fear of democratic government. He warned that the courts represented a dangerous combination of centralized authority and insulation from the public.

31. Ross, *Muted Fury*, 49–50, 96–97, 163–64.

Furthermore, he charged that lawyers who were able to earn appointments to the bench represented the nation's wealthy corporate interests prior to becoming judges and could be expected to maintain that perspective as a judge. Clark proposed popular election and term limits as the best way to change the character of those on the bench and encourage a legal perspective that considered the effect of the law on ordinary Americans.

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When the Constitution of the United States was adopted at Philadelphia . . . a representative democracy was an experiment, and there was a frankly expressed fear of committing power to the masses. . . .

This state of things was naturally reflected in the Federal Constitution, which still, after the lapse of nearly a century and a quarter, and the demonstrated capacity of the people for self-government, presents in the full blaze of the twentieth century the distrust of popular government which, before its trial, was natural in the men of the eighteenth century. The unnatural thing is, not its adoption in 1787, but the retention, unchanged, of the non-elective features of the Constitution in 1904. . . .

Had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision, long ere this, under the tenure of a term of years new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. . . .

Such vast power cannot safely be deposited in the hands of any body of men without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the Judiciary hold for life, and though popular sentiment should change the entire personnel of the other two great departments of government, a whole

generation must pass away before the people could get control of the Judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments,—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions, unless corruption were shown....

A greater power, however, is claimed and has been often asserted by the judges in this country. Subject to no supervision or revisal from any source, it is absolute power. If the Federal judges were elective, and for a term of years, as State judges have become, there would be the corrective force of public opinion, which could select judges at the expiration of such term more considerate of the policy in public matters which is approved by the statutes enacted; while in all private litigation elective judges would be altogether as efficient as if appointed for life....

But by far the more serious defect and danger in the Constitution is the appointment of judges for life, subject to confirmation by the Senate. So far as corporate wealth can exert influence, either upon the President or the Senate, no judge can take his seat upon the Federal bench without the approval of allied plutocracy. It is not charged that such judges are corruptly influenced. But they go upon the bench knowing what influence procured their appointment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims. Having attempted as lawyers to persuade courts to view debated questions from the stand-point of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in Federal decisions has been pronounced. Then, too, incumbents of seats upon the Federal Circuit and District bench cannot be oblivious to the influence which procures promotion; and how fatal to confirmation by the plutocratic majority in the Senate is the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

[Document Source: Walter Clark, "The Election of Federal Judges by the People," *The Arena*, November 1904, 457–60.]

Senator Robert L. Owen, Proposal for Recall of Federal Judges,
Speech of December 31, 1911

More widely discussed than calls for an elective judiciary were proposals to subject judges to popular or legislative recall. The movement for judicial recall was primarily a state-level phenomenon, where most judges already obtained their positions through popular election. The issue became the subject of heated debate in Congress in 1911, however, when the territory of Arizona applied for statehood with a constitution that included recall of state and local judges.³² Although approved by Congress, President Taft vetoed it with a stern message stating that the recall provision “seems so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it.”

In 1912, Democratic Oklahoma Senator Robert Owen sparked more debate when he proposed giving Congress the power to remove federal judges from office by a majority vote of both Houses. Owen presented his plan for judicial recall as an alternative to impeachment for removing judges who were infirm or otherwise incapable of performing their duties. Owen made clear, however, that he also desired to strike at what he saw as the unchecked power of the judiciary. In his speech before the Bar Association of Muskogee, Oklahoma, introducing his plan, Owen emphasized that the President and senators in charge of judicial appointments were themselves far removed from popular influence. He argued that the recall power in the hands of Congress would weaken alleged judicial allegiance toward the privileged and bring greater justice to workers and farmers.

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The Federal judges ...are not nominated by the people because of the confidence of the people in them, as are State judges. They are not elected by the people because of the confidence of the people in them, as are our State judges. They are nominated by a President of the United States, who himself is not nominated by the people, but is nominated by delegates of the third and fourth degree of delegated power in national convention, who come with delegated power from State conventions; the State conventions be-

32. *Id.* at 110–14.

ing composed of delegates delegated from county conventions; the county conventions being composed of delegates delegated from ward, township, or precinct caucuses or the most part not safeguarded by law. The ward caucus as a rule in the United States is controlled by a ward boss, who seizes the powers of the unorganized, unprotected people of the ward and delegates it to a ward henchman. The precinct delegates sent to the county convention send machine delegates of the second degree to the state convention, which often sends machine delegates of the third or fourth degree to the national convention, where these delegated delegates of delegated delegates, resting on this uncertain foundation, nominate as President a citizen who is four degrees removed from the people, and when this President nominates a Federal judge for life this Federal judge is five degrees removed from the people and subject to no review or control by the people. The consequence is we have established a Federal judicial oligarchy in this nation, as Thomas Jefferson forecast and prophesied in his letter to Jarvis in 1820. No wonder the Federal judges, thus uncontrolled, undertook by judicial decision to magnify their offices....

The Federal judiciary has, in my opinion, become the bulwark of privilege and ought to be made immediately subject to legislative recall by the representatives of the people for the safety of the people and for the stability of the property of the masses—of the producers of the Nation.

[Document Source: Robert L. Owen, *Judicial Recall*, Address Before the Bar Association of Muskogee, Oklahoma, 62d Cong., 2d sess., S. Doc. 249, 1912, 6–8.]

James Manahan, Support of Recall of Judges, Minnesota State Bar Association, Speech of July 19, 1911

Lawyers and politicians who favored the recall of federal judges emphasized that they were not attacking the independence of judges but responding to the fact that judges already lacked true independence. Progressives argued that giving the people more influence over sitting judges would create a rival power to that of urban machine politicians and wealthy businessmen.

James Manahan, a Minnesota attorney and politician, was vocal in his support of judicial recall. He had been a Democrat and a William Jennings Bryan supporter in 1908, but left the party to become

a Republican and a Robert M. La Follette supporter in 1912.³³ Manahan was elected to congress for the 1913–1915 term. In a speech in favor of Owen's recall proposal, Manahan argued that those who worried about judges bowing to public opinion were overlooking the influence that big business and urban political machines had over judges. He believed that judges who decided cases according to justice had no reason to fear the public, contending instead that the recall would break the hold of powerful interests over the courts and bring greater public respect and support to the courts.

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The very essence of despotism is irresponsible power to make or unmake laws at will. . . . When judges appointed for life can destroy laws enacted by Congress and make laws that Congress refused to make, and the people remain helpless while the judges live, it is no longer self-government. It is despotism. . . . Judges should be independent of every power on earth except the sovereignty that creates them. . . .

It is urged that the recall of judges would subject the judiciary to the clamor of the mob, that we must have a fearless judiciary. The man who believes the people are a mob does not believe in republican form of government. . . .

A fearless judge would never fear the people. A cowardly judge would fear the people less than he would the political boss and big business men who made him. If we could under our system have fearless judges there probably would not be any necessity for a recall, but when the recall in effect, by virtue of the power of political bosses and great interests in this country, appears to compel subserviency on the part of a judge, there is reason for an antidote, and the only antidote that I know to the influence of the boss and big business is the power of the people, the power of sovereignty. Of course the courts should be free and fearless; fearless of bosses, which they are not; free from the persuasion of politicians and the bunco of business men, which most emphatically they are not, even in Federal business. . . .

33. James Manahan's biography can be found at <http://www.mnhs.org/library/findaids/00461.xml>.

The closer they [judges] are to the people the more the people will love and respect them. The fate of a judge, the status of a judge, the respect of a judge, would be elevated infinitely in every respect the closer you put him to the people he serves.

[Document Source: James Manahan, *The Recall of Judges*, Address Before Minnesota State Bar Association, 62d Cong., 2d sess., S. Doc. 941, 1912, 10–13.]

William Howard Taft, Defense of Tenure During Good Behavior, American Bar Association Annual Meeting, Speech of September 2, 1913

The movement for judicial recall, especially after Senator Owen raised the possibility of recalling federal judges, sparked a renewed defense of judicial tenure during good behavior and the integrity of the federal bench. No one was more forceful in defending federal judges than former-President William Howard Taft. In a speech to the American Bar Association in 1913, Taft surveyed the state of judicial selection and tenure in the United States and urged that a secure tenure was invaluable for ensuring that the courts protected the rights of individuals from popular majorities. He argued that for judges who truly abused the public trust, impeachment was the appropriate method, but, responding to the criticisms by Senator Owen, Taft acknowledged that the impeachment process could be made more efficient so as to make it a more effective mode of discipline.

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The first requisite of the judiciary is independence of those branches through the aggression of which the rights of the individual may be impaired. The choice of the judges must always rest either in a majority of the electorate of the people, or in a popular agent whom that majority selects, and so must be directly or indirectly in control of the party to be charged in such controversies with the infringement of individual rights. How, therefore, can we secure a tribunal impartial in recognizing such infringements and courageous enough to nullify them? It is only by hedging around the tenure of the judges after their selection with an immunity from the control of a temporary majority in the electorate and from the influence of a partisan executive or legislature.

Our forefathers who made the Federal Constitution had this idea in their minds as clear as the noonday sun, and it is to be regretted that in some of their descendants and of the successors in their political trust this sound conception has been clouded. They provided that the salaries of the judges should not be reduced during their terms of office, and that they should hold office during good behavior, and that they should only be removed from office through impeachment by the House of Representatives and a trial by the Senate. The inability of Congress or of the Executive, after judges have been appointed and confirmed, to affect their tenure has given to the federal judiciary an independence that has made it a bulwark of the liberty of the individual. . . . Nothing but the life tenure of the federal judiciary, its independence and its power of usefulness have made it possible, with such inadequate salaries, to secure judges of a high average in learning, ability and character.

When judges were only agents of the King to do his work, it was logical that they should hold office at his pleasure. Now, when there is a recrudescence of the idea that the judge is a mere agent of the sovereign to enforce his views as the only standards of justice and right, we naturally recur to the theory that judges should hold their office at the will of the present sovereign, to wit, the controlling majority or minority of the electorate. The judicial recall is a case of atavism and is a retrogression to the same sort of tenure that existed in the time of James I, Charles I, Charles II and James II, until its abuses led to the act of settlement securing to judges a tenure during their good behavior. . . .

But it is said, "When you get a bad judge you cannot get rid of him under the life system." That is true unless he shows his unworthiness in such a way as to permit his removal by impeachment. Under the authoritative construction by the highest court of impeachment, the Senate of the United States, a high misdemeanor for which a judge may be removed is misconduct involving bad faith or wantonness or recklessness in his judicial action or in the use of his judicial influence for ulterior purpose. . . .

The procedure in impeachment is faulty, because it takes up the time of the Senate in long-drawn-out trials. This fact is apt to discourage resort to the remedy and has lessened its proper admonitory and disciplinary influence. . . . A change in the mode of

impeachment ...so as to reduce materially the time required of the Senate in the proceeding would be of the greatest advantage....

It has been proposed that instead of impeachment, judges should be removed by a joint resolution of the House and the Senate, in analogy to the method of removing judges in England through an address of both Houses to the King. This provision occurs in the Constitution of Massachusetts and in that of some other states, but it is very clear that this can only be justly done after full defense, hearing and argument.... In the only case of actual removal of a judge by this method [in England] a hearing was had before both Houses of Parliament quite as full, quite as time-consuming and quite as judicial as in the proceeding by impeachment. Advocates of the preposterous innovation of judicial recall have relied upon the method of removal of judges as a precedent, but the reference only shows a failure on the part of those who make it to understand what the removal by address was....

...The federal judges are still appointed for life, and it will be a sad day for our country if a change be made either in their mode of selection or the character of their tenure. These are what enable the federal courts to secure the liberty of the individual and to preserve just popular judgment.

[Document Source: William Howard Taft, "The Selection and Tenure of Judges," *Report of the 36th Annual Meeting of the American Bar Association* (1913), 420–26.]

"Government by Injunction": Labor

One of the most contentious and longest lasting battles over federal judicial power in the early twentieth century surrounded the increased use of injunctions against labor unions. In the late nineteenth century, labor unions grew rapidly in size and strength, with national organizations like the American Federation of Labor linking local organizations across the country. State and federal courts regularly intervened in labor disputes in the name of protecting employers' property, the flow of interstate commerce, and the maintenance of social order. As the labor movement grew into a powerful political force in the early twentieth century, the question of the federal judiciary's role in suppressing labor union activity became the subject of regular debate in Congress.

The widespread use of injunctions in labor disputes was largely unprecedented before the mid-1880s. Up until that time, strikes were not illegal per se, but labor leaders could face charges of criminal conspiracy in connection with boycotts and strike activity that involved violence, threats, and other forms of coercion against employers or nonunion employees.³⁴ Beginning in the 1880s, labor organizations had to contend less with criminal conspiracy prosecutions and more with the equity powers of state and federal courts applied through restraining orders and injunctions against workers and union leaders. Judges traditionally enjoined action on the part of an individual or group in order to protect an individual's property when "irremediable damage" was threatened and there was no remedy available at law. Injunctions were also limited in that they traditionally were not issued to enjoin criminal acts that could be prosecuted at trial.

The increased use of injunctions against labor organizations emerged from expanded federal government intervention in interstate commerce and an expanded definition of property rights by federal courts. Federal courts charged with managing railroad property under federal receivership issued injunctions to prevent workers from striking and interfering with operation of the railroad. After the passage of the Sherman Antitrust Act in 1890, which outlawed "combinations in restraint of trade," the federal government obtained injunctions against strikers who allegedly threatened interstate commerce more broadly. In the most polarizing injunction case of the era, the Supreme Court upheld a federal court injunction against Eugene Debs and leaders of the American Railway Union restraining their activity in support of the 1894 Pullman strikes.³⁵ Subsequently, federal courts granted injunctions at the behest of manufacturers to stop labor organizations from establishing the "closed shop" or so-called secondary boycotts, in which unions urged not just the public to abstain from buying from a

34. Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880–1930," *Texas Law Review* 66, no. 5 (April 1988): 919–65; Victoria C. Hattam, "Courts and the Question of Class: Judicial Regulation of Labor Under the Common Law Doctrine of Criminal Conspiracy," in Christopher L. Tomlins and Andrew J. King, eds., *Labor Law in America* (Baltimore: Johns Hopkins University Press, 1992), 44–70.

35. In his opinion, Justice Brewer upheld the injunction not based on the Sherman Act, but based on the federal government's constitutional power to protect interstate commerce and its property in the movement of the mail.

nonunion company, but threatened negative publicity for retailers and wholesalers that dealt in the manufacturer's goods. Judges reasoned that an employer's ability to carry on his or her business was a property right that the courts were bound to protect. Any activity that led to work stoppages for goals beyond higher wages, intimidated other workers, or interfered with an employer's ability to carry on business could be the subject of a restraining order or injunction. The number of court injunctions grew even more in the 1920s as judges enjoined striking workers from breaking—and union organizers from encouraging the breaking of—so-called yellow dog contracts, in which workers pledged not to join a union as a condition of employment.

For over three decades, labor leaders and progressive members of Congress pushed for a new statute to alter the procedure for issuing injunctions and to limit their application in the case of labor disputes. Labor leaders alleged that this “government by injunction” involved numerous abuses against the rights of workers to organize and counter the power of employers. Federal judges used sweeping injunctions to prohibit broad groups of workers from assembling and publicizing labor disputes, which labor leaders argued infringed on their constitutional rights to free speech. Critics of the courts contended that criminal prosecution was adequate when actual property was damaged by any individual and that by enjoining activities like demonstrations and publicity campaigns, judges were effectively taking activities that were lawful when an individual did them and making them unlawful when done in the context of a labor dispute. Labor leaders argued that if workers committed unlawful acts, the courts could punish them through jury trials in the criminal justice system. Instead, judges could cite workers who disobeyed injunctions for contempt of court and sentence them without a jury.

Employers defended the court's injunction powers as their only protection from labor combinations that could cripple their ability to operate. Lawyers for the American Anti-Boycott Association—a group of manufacturers devoted to maintaining the open shop in their businesses—argued that union attempts to prevent employers from hiring non-union workers were inherently coercive and legitimately subject to the restraining power of the courts. The lawyers claimed that any attempts by Congress to exempt labor activities from injunctions was

“class legislation” and an attack on the ability of the federal courts to protect the constitutional rights of all Americans.³⁶

Over the course of the early twentieth century, Congress considered numerous proposals from union leaders to restrain federal equity powers. Labor leaders proposed legislation that banned injunctions against certain labor union practices, like picketing, and mandated new procedures for issuing injunctions, like advanced notice and hearing provisions and trial by jury for contempt of court charges. Labor union lawyers also proposed legislation to change the legal definition of *conspiracy* and *property* to explicitly exempt labor organizations and union activities from equity jurisdiction. The judiciary committees of the House and Senate held extensive hearings on anti-injunction bills between 1902 and 1912 before finally adopting new procedural rules as part of the Clayton Antitrust Act in 1914. The Supreme Court construed that statute narrowly, however, and federal courts issued injunctions against labor organizations in unprecedented numbers during the 1920s. By the start of the 1930s, the debate over anti-injunction legislation had grown into a larger struggle over the authority of the legislative and judicial branches to establish labor policy in the United States. Not until 1932 did Congress pass new legislation, popularly known as the Norris-LaGuardia Act, that drastically limited the discretion of federal judges to intervene in labor disputes.³⁷

John P. Altgeld, Denouncing “Government by Injunction,” Speech of September 5, 1897

The Supreme Court decision in the 1895 case of *In re Debs* sparked an outpouring of protest against “government by injunction,” especially the ability of the courts to sentence laborers to jail for contempt of court without a jury. The Democratic Party, in its 1896 platform, denounced the “arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States” and objected “to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners.” In 1897, Congress con-

36. Daniel R. Ernst, *Lawyers Against Labor* (Urbana and Chicago: University of Illinois Press, 1995).

37. William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991), 59–128; Fiss, *Troubled Beginnings*, 53–74.

sidered a number of proposals to establish a separate category of contempt when a judge's orders were disobeyed outside of a courtroom. In these cases of "indirect contempt," the question of whether an individual had disobeyed a court order would be a question of fact submitted to a jury.³⁸

Among the most vocal critics of federal court injunctions was John P. Altgeld, who had been governor of Illinois during the Pullman strike and vigorously protested President Grover Cleveland's use of federal troops to quell the unrest in Chicago. For Altgeld, the injunction was a symptom of what he saw as the federal courts' support for corporate business at the expense of workers' rights. In an 1897 speech, Altgeld provocatively compared a judge's injunction to "ukase," or the imperial decrees issued by Russian tsars.

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The corporations discovered years ago that to control the construction of the law was even more important than to control the making of it, as the Federal judges hold office for life, are independent of the people, and surrounded by moneyed influence. The corporations have constantly labored to secure the appointment to the Federal bench of men whom they believed would be their friends—that is, men who by nature, education, and environment would be in sympathy with them, and they now fly to these courts like the ancient murderers fled to cities of refuge. They do not buy these courts, because it is unnecessary....

Nearly all efforts to curb corporations or to bring great offenders to justice have been failures....

Not content with the law as they found it, the Federal courts, in their eagerness to serve the corporations, have usurped the functions belonging to the legislative and executive branches of the Government, and have invented a new form of tyranny called "Government by injunction"....

Government by injunction operates this way: When a judge wants to do something not authorized by law, he simply makes a law to suit himself. That is, he sits down in his chamber and issues a kind of ukase, which he calls an injunction against the people of an entire community, or of a whole State, forbidding whatever he

38. House Report 2471, "Contempts of Court," on S. 2984, 54th Cong., 2d sess., January 8, 1897.

sees fit to forbid, and commanding whatever he sees fit to command, and which the law does not command, for when the law forbids or commands a thing, no injunction is necessary. Having thus issued his ukase, the same judge has men arrested and sometimes dragged 50 or 100 miles away from their homes to his court on a charge of violating the injunction—that is, contempt of the court. And the men after lying in prisons a while are tried—not by a jury, as is required by the Constitution, when a man is charged with a crime—but they are tried by the same judge whose dignity they are charged with having offended, and they are then sentenced to prison at the mere pleasure of this judge, who is at once legislator, judge, and executioner. . . .

It is not necessary for me to say to you that republican institutions and government by injunction can not both exist in the same country. They are exactly opposite in character, and one or the other must die.

[Document Source: *Congressional Record*, 62d Cong., 2d sess., 1912, 48, pt. 12:257–58.]

Editorial, Defense of Injunctions, *Detroit Free Press*, October 8, 1897

Many lawyers countered the heated attacks on judges' injunction powers by emphasizing that the injunction was a remedy with deep roots in the law and was an important bulwark for the preservation of individual right to property. In the following editorial from the *Detroit Free Press* (republished in the *Washington Post*) in 1897, the editors labeled as "demagogues" those who criticized the courts' use of injunctions. For them, any proposal to limit the injunctive power was an attempt to politicize the courts. While conceding that some judges may have used the power excessively in recent years, the editors feared that generating disdain for the courts was but a first step toward lowering the public esteem of the law in general. The editors believed that injunctions were an indispensable tool for the federal courts to protect individual constitutional rights. Furthermore, the editors argued, the judiciary was still the weakest branch of the government and warnings that the courts were usurping power of the executive were alarmist, unfounded, and meant only to undermine public respect for the courts.

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Demagogues who want to make the American people believe that the power of injunction vested in our courts is an evil thing that ought to be abolished are taking every chance that offers to denounce what they are pleased to call "government by injunction." We use the term demagogue advisedly, because no one but a demagogue would try to bring odium upon a process of law that has in it so much inherent value.

Of course, it is possible for the courts to abuse this power. In fact, certain Judges have of late years shown a propensity to resort to it somewhat too freely. There is a likelihood that some, though we believe not many, wearers of judicial robes have shown partiality for corporations and have issued restraining orders that savored strongly of favoritism. Especially during labor troubles has the use of the injunction been made odious. Men have been enjoined from striking, from assembling and from marching along the highways, and thinking they are simply exercising their rights in so doing they look upon such interference by the courts as arbitrary and tyrannical. It needs but some demagogue to come along and tell them that their rights are being invaded by the courts to create a prejudice not only against this particular legal process, but against all law.

A great political party took up this hue and cry a year ago and by denouncing "government by injunction" set an example for all political conventions of the party ever since to follow, until it has come to be a matter of course for every silver or Populist or labor convention and orator to denounce "government by injunction."

And yet, the power of injunction properly exercised is a necessary and salutary one. To impair its true function would be to impair the rights of the humblest citizen. Every man, however poor and inconsequential, may invoke the protection of this instrument of the law when his rights are threatened. Abridge the power of the courts to enjoin whenever justice requires its exercise and individual rights would be equally affected.

We do not suppose, however, that the party leaders who are making all this fuss about government by injunction are in favor of an absolute removal of the power from courts. By the term "government" they would imply that the judiciary of the country is trying to usurp executive power, and that our liberties are in danger of being seized by the courts. Of course, such an idea is preposterous to any one who has given the least attention to the nature of our institutions.

The truth is the judiciary is the weakest of the three branches of our government. In the very nature of things it has no inherent power to enforce its decrees, but must depend first of all upon the justice and equity of its proceedings, upon the moral respect for law residing in the people, and lastly upon the co-operation of the executive branch to enforce its decisions. The courts are, therefore, in themselves not in the least danger of trying to govern this country, and all talk about government by injunction is arrant nonsense.

[Document Source: "Government By Injunction," reprinted in *Washington Post*, October 9, 1897, p. 6.]

James M. Beck, Opposition to Changing Definition of *Conspiracy*, Testimony Before House Judiciary Committee, February 24, 1904

Beginning in 1900, American labor leaders, their attorneys, and sympathetic members of Congress began a campaign to limit the use of injunctions against labor unions, a campaign that would last more than three decades. The first bill supported by the American Federation of Labor was introduced by Senator George Hoar (and a few years later by Representative Charles Grosvenor of Ohio) to modify the statutory definition of conspiracy. The Hoar-Grosvenor bill would have prohibited the courts from deeming labor agreements and any acts committed by labor unions in relation to a trade dispute as criminal conspiracies or as constituting a restraint of trade. The bill also prohibited courts from indicting individuals for criminal conspiracy or issuing injunctions against them if the acts contracted to be done would be considered lawful when done by an individual.

At hearings on the Hoar-Grosvenor bill, lawyers representing the nation's manufacturers assailed anti-injunction legislation as "class legislation" designed to protect labor unions at the expense of the rights of businessmen. Before the House Judiciary Committee in 1904, James M. Beck—a practicing attorney and former assistant attorney general who would also go on to serve as solicitor general under Warren G. Harding, and as a member of Congress representing Pennsylvania—denounced the bill as an attack on the integrity of the judiciary.

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If you were going to deprive every court of a remedy because some few judges may have abused it, or which in some of its fea-

tures may need correction, why the courts would be tied hand and foot with respect to almost every salutary remedy used by them in the administration of justice between man and man; and, therefore, if you think that some injunction cases should provide for a jury trial in cases where alleged contempts have been committed, such trial to be either in the discretion of a court or without it, turn your attention that way; or if your writs should be returnable forthwith or within forty-eight hours, legislate in that manner; but why should you pass a piece of legislation which not only puts the brand [of] partiality upon the judiciary of your country, and which not merely paralyzes the hands of the courts in protecting life and property, but which goes further, according to the letter of this statute, and validates acts of two or more persons done in furtherance of a trade dispute, because they are, forsooth, in furtherance of a trade dispute....

I am not here merely to represent certain employers of labor; I am here to speak for the majority of American workmen, who intend to do as they please and will not let [AFL President] Mr. Gompers or [United Mine Worker President] Mr. Mitchell prescribe the conditions under which their labor shall be farmed out. If you throw this sop, it simply means they will come back for greater favors, and, what is more to the point, it will mean that you will sow in this country, if you pass this bill, the most dangerous of all sentiments—the sentiment of contempt for the judiciary. The majority of the workmen do not believe these stories about the tyranny of judges; they know better. But if you pass this bill, you members of the bar, and therefore officers of the court, you will have put a brand upon the judiciary of this country. You will have said they are faithless to their sacred obligation to do justice to all men without fear, favor, or affection, because if this bill does not mean that the courts have been tyrannous, then it does not mean anything; and you can not pass the bill without placing a stigma upon the judiciary, which will weaken its moral influence and impair its ability to work effectively.

[Document Source: House of Representatives, Committee on the Judiciary, *Anti-Injunction Bill, Hearings on H.R. 89*, 58th Cong., 1st sess., 1904, 73.]

President Theodore Roosevelt, Support for New Injunction Procedures, Annual Message to Congress, December 3, 1906

Labor leaders cited a number of abuses in the use of injunctions by federal judges and sought legislation that would require more procedural guidelines to limit the reach of injunctions. Among the complaints was that some federal judges issued “blanket” orders that targeted large populations of workers without proper notice and prohibited a broad variety of activities on the part of striking workers. In many cases, workers were unaware that injunctions had been issued or that they were included in the provisions, and yet they could be punished for contempt of court for violating the orders.

Beginning in 1906, Congress considered a series of bills to alter the procedure by which judges could issue injunctions. Proposed bills required hearings prior to the issuing of temporary injunctions, specification of individuals subject to judicial orders, and sufficient notice of equity proceedings. Bills also required judges to specify what property was being protected by the injunction and required complainants to establish that such property faced irreparable injury if not protected by the court.

After 1906, and especially during the presidential campaign of 1908, both political parties expressed support for legislation that would meet these procedural issues raised by labor leaders. In his 1906 message to Congress, President Theodore Roosevelt mixed a defense of the courts and their equity powers with support for a statute that would safeguard workers from abuses under federal injunctions. Roosevelt rejected any steps to abolish injunctions or to exempt labor organizations from their reach, citing the role of the courts in protecting property and maintaining social order. During the remainder of his term in office, Roosevelt continued to defend the courts from criticism by labor organizations while supporting moderate corrective measures, a path that his successor, William Howard Taft, followed as well.

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In my last message I suggested the enactment of a law in connection with the issuance of injunctions, attention having been sharply drawn to the matter by the demand that the right of applying injunctions in labor cases should be wholly abolished. It is at least doubtful whether a law abolishing altogether the use of injunctions in such cases would stand the test of the courts; in which case of course the legislation would be ineffective. More-

over, I believe it would be wrong altogether to prohibit the use of injunctions. It is criminal to permit sympathy for criminals to weaken our hands in upholding the law; and if men seek to destroy life or property by mob violence there should be no impairment of the power of the courts to deal with them in the most summary and effective way possible. But so far as possible the abuse of the power should be provided against by some such law as I advocated last year.

In this matter of injunctions there is lodged in the hands of the judiciary a necessary power which is nevertheless subject to the possibility of grave abuse. It is a power that should be exercised with extreme care and should be subject to the jealous scrutiny of all men, and condemnation should be meted out as much to the judge who fails to use it boldly when necessary as to the judge who uses it wantonly or oppressively. Of course a judge strong enough to be fit for his office will enjoin any resort to violence or intimidation, especially by conspiracy, no matter what his opinion may be of the rights of the original quarrel. There must be no hesitation in dealing with disorder. But there must likewise be no such abuse of the injunctive power as is implied in forbidding laboring men to strive for their own betterment in peaceful and lawful ways; nor must the injunction be used merely to aid some big corporation in carrying out schemes for its own aggrandizement. It must be remembered that a preliminary injunction in a labor case, if granted without adequate proof (even when authority can be found to support the conclusions of law on which it is founded), may often settle the dispute between the parties; and therefore if improperly granted may do irreparable wrong. Yet there are many judges who assume a matter-of-course granting of a preliminary injunction to be the ordinary and proper judicial disposition of such cases; and there have undoubtedly been flagrant wrongs committed by judges in connection with labor disputes even within the last few years, although I think much less often than in former years. Such judges by their unwise action immensely strengthen the hands of those who are striving entirely to do away with the power of injunction; and therefore such careless use of the injunctive process tends to threaten its very existence, for if the American people ever become convinced that this process is habitually abused, whether in

matters affecting labor or in matters affecting corporations, it will be well-nigh impossible to prevent its abolition.

[Document Source: *Congressional Record*, 59th Cong., 2d sess., 1906, 41, pt. 1:22–36.]

Thomas Spelling, Limiting Definition of *Property*, Testimony Before House Judiciary Committee, February 5, 1908

While labor leaders welcomed procedural changes that limited the reach of injunctions, they argued throughout the first decade of the twentieth century that Congress needed to address more fundamental elements of “government by injunction.” Lawyer Thomas Spelling, who represented the American Federation of Labor, drafted a bill, which was introduced in Congress by Representative George Pearre (R-MD) (and by union leader turned congressman William B. Wilson (D-PA) after Pearre left Congress), that instructed the courts that the right to conduct business could not constitute a property right for the purposes of equity jurisdiction.

The question of what the courts defined as a property right was key to the growth of the injunction in labor actions. Judges recognized the right of workers to organize and strike in their own self-interest—to bargain for higher wages or improved working conditions. At issue in most injunctions in this period were union activities to achieve the so-called closed shop and boycotts that targeted not just employers who refused to recognize unions but wholesalers and retailers that dealt in their products—what was known as the “secondary boycott.” To employers and many federal judges, these activities were malicious conspiracies designed to harm a businessman’s ability to operate—or, as the courts defined it, a person’s property right in his business.

The AFL, led by Samuel Gompers, argued that business operations and labor disputes were personal—issues arising between individuals—not property relations. Andrew Furuseth, the president of the Seamen’s Union, argued repeatedly to congressional committees that the equity jurisdiction granted to the federal courts in the Constitution was limited to that authority as it had been practiced in English courts, which at the time only exercised equity to stop threats to physical property. Based on this reasoning, all injunctions that sought to protect the “right to conduct business” were illegitimate. In his testimony in support of the Pearre bill in 1908, Spelling cited this expansion of the definition of property as the core of what he described as judicial “usurpation.” He cited injunctions that protected the right to do business as a form of judicial class legislation that protected businessmen at the expense of the rights of workers.

The Pearre-Wilson bills generated heated criticism from Republicans—President Roosevelt called its supporters “extreme reactionaries”—and did not pass Congress despite several attempts between 1908 and 1912.

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Now, gentlemen, I call your attention to the growth of this usurpation from the germ upon which it first feeds. From one abstraction called property to another called property is but a short step. The courts annex one area of constitutionally forbidden ground, and then, with less trepidation, they join to that other foreign territory to which they have no better title. The proposition that an employer has a vested interest in the labor market of the country, in the unemployed labor, is corollary to this proposition that the right to do business is property. So that the injunction is so framed that it forbids the defendants not only from any kind or phase of interference in the operations of the plaintiff by any means, lawful and privileged or otherwise, but it forbids interference with his privilege of hiring any unemployed or unattached labor that can be found in the country. . . .

...The title to protection for such right [to continue in business], though admitted in some of the cases to be a mere personal right, and hence clearly beyond the jurisdiction, appears very plausible upon a statement of it; but when carefully weighed and scrutinized, it is seen to be a most obnoxious form of paternalism. It is class legislation enacted, not by the legislative department, but by the judiciary. And this should be a sufficient answer to those who object to a remedy on the ground that our bill is legislation in the interest of a class. Nor is this right asserted by the judges simply that of continuing to do business, but of a right to continue it under all conditions and circumstances, exclusive of the rights of others, and though the exercise of it may mean the subordination and destruction of the rights belonging to others than the plaintiffs. . . .

The courts, supposedly the representatives of the Government and handmaids of public justice, are thus guaranteeing to a certain class immunity against the ordinary vicissitudes and hazards of business. And they are doing this in a country of supposed equals, and in order to do it are robbing thousands and millions of men of their liberties. They are meantime establishing a preferred class, a

business despotism, and exempting it from some of the difficulties and opposing forces which they would have to encounter if recognition were given to the principle of equality before the law and impartiality in the administration of justice.

Employing capital is thus exempted, and labor correspondingly discriminated against. It appears that the courts have unconsciously imbibed the spirit of commercialism, and when led by that spirit are no longer able to attach importance to the simple ordinary rights of the citizen. They act as if they considered it the chief purpose of government to promote and encourage the accumulation of wealth in the hands of those in possession of the machinery of production and trade. In the presence of that purpose all conflicting interests must yield. The interests and personal rights of thousands and millions must give way whenever the conflict in court happens to come between the interests of what are designated as “business men” and those of “wage-earners.” The failure of an individual business man, or even an interruption of his operations, is considered a misfortune of direst import as compared to the paralysis of the arms and tongues of any number of men having smaller interests, though those interests be equally dear, or even vital, to the possessors.

[Document Source: House of Representatives, Committee on the Judiciary, *Hearings on the So-called Anti-injunction bills, and all labor bills*, 60th Cong., 1st sess., 1908, 13, 26.]

Representative Reuben O. Moon, Rejection of Anti-Injunction Bill as Unconstitutional, House of Representatives, Speech of May 13, 1912

At each stage of the debate over injunctions between 1900 and 1932, lawyers for the American Anti-Boycott Association and their allies in Congress argued that anti-injunction legislation was a violation of the Constitution. They drew a distinction between the jurisdiction that was conferred upon the inferior courts by Congress and the “judicial power” derived from Article III of the Constitution, inherent to all federal courts once established.

In a speech against the Clayton anti-injunction bill in 1912, Representative Reuben O. Moon (R-PA), who had in 1910 sponsored a bill outlining moderate changes to injunction procedures, argued that Congress had no authority under the Constitution to limit the exercise of the courts’ equity powers.

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No more serious and dangerous error has been advanced in modern times than the proposition that the judicial power of the United States courts is a creation of the Congress, that the functions and power of our courts have their origin in or derive their vitality from the legislative branch of the Government. . . . Mr. Speaker, no man who is familiar with the Constitution of the United States and who is familiar with the historical facts that led to the adoption of that Constitution can for a moment doubt the error of that contention. . . .

The judicial power of our courts comes . . . from the Constitution of the United States and not from Congress. It derives its existence and its authority from the same source from which comes our legislative power. It is coordinate with and in all respects of equal potentiality to that power; and while the Constitution of the United States creates but one court and leaves to Congress the power to ordain such inferior courts as may be necessary for the operation of the Government, it is a fundamental principle of legal construction, established through a long line of judicial decisions and accepted as axiomatic, that these courts, when created and ordained, derive their judicial power from the Constitution and not from any act of Congress creating them. And therefore, Mr. Speaker, if it be found in the discussion of this bill that it seeks . . . to strike down a part of the judicial powers of the courts vested by the Constitution, the legislation proposed by this bill is entirely beyond our power to enact. . . .

The alleged scope of the bill is therefore to regulate the granting of injunctions. The power to grant injunctions is inherent in courts of equitable jurisdiction. The power is not possessed by all courts, but is an incident only of chancery jurisdiction and can be exercised only by courts clothed with that power or by legislative authorization. It is power possessed by the courts of the United States and is derived from the Constitution of the United States . . . by section 2 of Article III. . . .

This inherent power of the Federal courts to protect all of the citizens of the United States in the enjoyment of all of the rights secured to them by the Constitution is therefore not bestowed by

Congress, but is derived from the same high source that Congress derives its power to exercise the function of legislation.

Injunction is and always has been an extraordinary remedy to protect constitutional rights from invasion; it is preventive rather than remedial, and it can only be employed by the courts or the judges when it is necessary to prevent irreparable injury and when the complainant has no adequate remedy at law.

... When these conditions do exist, and when they are made known to the court or a judge by a proper presentation of facts, then the Federal power conferred upon our Federal courts by the Constitution of the United States in equity clothes them with a fundamental, organic, and inalienable power of protection which it is not within the power of Congress to destroy.

[Document Source: *Congressional Record*, 62d Cong., 2d sess., 1912, 48, pt. 7:6416–17.]

Representative Fiorella LaGuardia, *Wresting Control of Labor Policy from the Courts*, House of Representatives, Speech of March 8, 1932

In 1914, Congress passed the Clayton Antitrust Act, which included a number of provisions designed to exempt labor unions from federal injunctions. Leaders of the American Federation of Labor celebrated the Clayton Act as a major victory for the rights of workers to organize—Samuel Gompers hailed the law as labor’s “Magna Carta.” Section 20 of the act stated that no injunctions could be granted in any case between an employer and employees “growing out of” a dispute concerning terms of employment “unless necessary to prevent irreparable injury to property, or to a property right.” The section also listed specific acts engaged in by groups that could not be enjoined, including ceasing to perform work, persuading others “by peaceful means” to do so, ceasing to patronize a party in a labor dispute, or persuading others to do the same. Finally, the act held that where an individual faced contempt charges for disobeying a court order somewhere other than inside the courtroom, the accused could demand a jury trial.

Labor’s victory in the Clayton Act turned out to be temporary, however. In the 1921 case of *Duplex Printing v. Deering*, the Supreme Court narrowly interpreted the Clayton Act and stripped the unions of the bulk of protections that they thought they had won. The Court held that the Clayton Act simply codified the existing

procedures of equity jurisdiction and did nothing that would allow unions to strike for the closed shop or engage in secondary boycotts. The *Duplex* decision left labor unions in the same position that they had been in prior to the Clayton Act, and the number of injunctions issued against labor unions rose dramatically during the 1920s.

When Congress once again took up the question of anti-injunction legislation beginning in 1928, lawmakers framed the discussion as a contest between the judiciary and the legislature over determination of labor policy. In 1930, Senator George Norris (R-NE) turned to lawyers Felix Frankfurter and Donald Richberg and economist Edwin E. Witte to draft a new bill, which was co-sponsored by Representative Fiorella LaGuardia (R-NY) in the House. The Norris-LaGuardia Act, passed in 1932, was the most far-reaching Congressional intervention into court equity jurisdiction to date. Like the Clayton Act, the law specifically prohibited injunctions in a host of activities related to labor disputes, and contained more elaborate procedural hurdles for judges to meet before issuing an injunction in a labor dispute, including requiring judges to find that unlawful acts were threatened and would be committed in the absence of an injunction and that greater injury would be inflicted on the complainant if no injunction was issued than on the defendant if it was.

The Norris-LaGuardia Act also included a sweeping statement of public policy that committed the federal government to support of workers' right to act collectively and match the market power of American corporate employers. The preamble to the statute instructed that no restraining orders or injunctions "be issued contrary to the public policy declared" in the act. In debate in Congress, LaGuardia stressed that such statutory language was necessary in order to ensure proper construction by federal judges. The implication was that Congress had already addressed these issues in the Clayton Act but had been undermined by judges who misconstrued or ignored the intent of Congress. The Norris-LaGuardia Act did not just limit the power of federal judges to issue injunctions, but declared Congress's intent to marginalize the courts in American industrial relations.

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Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would

not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill. The trouble is that a few—and I am glad to say a few—Federal judges seeking to curry favor, social or other, trying to play up to men they considered financially powerful, were willing to disregard a sacred trust, mete out one-sided justice, take the employer side of a labor dispute, and act as a strike-breaking agency. That, gentlemen, is the reason, the history, and the necessity of my bill. . . .

All this bill does is to reassert and reiterate and write in plain language the intent of Congress, taken from the decisions of the courts themselves. The gentleman from Pennsylvania [James Beck] objects to a declaration of policy written into a statute. I submit that under our form of government all declarations of policy should be laid down by the elected representatives of the American people and not by a politically appointed Federal judge.

[Document Source: *Congressional Record*, 72 Cong., 1st sess., 1932, 75, pt. 5:5478–79.]

“Government by Injunction”: State Commissions

Beginning in the 1890s, federal judges sparked more criticism of court equity powers by increasingly granting injunctions on behalf of railroad and other public utility corporations to block rates set by state regulatory commissions. Federal court review of state commission orders reflected the growing willingness of federal judges to protect the property rights of business under the Fourteenth Amendment. The suspension of state regulations by federal injunction raised important questions about the power of the federal courts to infringe on the authority of state courts and the sovereignty of state governments and led to a protracted campaign to limit district court jurisdiction over the orders of state commissions.

Starting in the late 1860s, state legislatures, in response to agrarian protests, passed statutes to control the rates charged by railroads and other businesses engaged in transporting and storing farm produce. In the 1877 case *Munn v. Illinois*, the Supreme Court ruled that the federal courts could not review rates set by a legislature, deeming

rate setting as within the police power of the states to regulate public welfare.³⁹ By the end of the 1880s, a number of states had established regulatory commissions tasked with setting fair rates of railroads, gas and electric, and telegraph and telephone companies. In 1890, the Supreme Court ruled in the case of *Chicago, Milwaukee & St. Paul Railway v. Minnesota* that rates set by commissions, as opposed to legislatures, were properly subject of judicial review. Companies alleged that commission rates were so low as to be an unconstitutional confiscation of property and petitioned federal courts to intervene under the Fourteenth Amendment and the courts' federal question jurisdiction established in the 1875 Judiciary Act. The Supreme Court, in a series of cases in the 1890s, ruled that to set rates so low that owners of utilities could not earn a "fair return" on their investment was unconstitutional and that federal injunctions were an appropriate remedy to protect the property rights of companies from the states.

The federal courts and the companies who turned to them faced the challenge, however, that the Eleventh Amendment prohibited citizens from suing states in federal court. In the 1898 case of *Smyth v. Ames*, Justice Peckham held that a suit to enjoin enforcement of an unconstitutional rate was not a suit against the state but a suit against a state official—a state official enforcing an illegal or unconstitutional law was deemed to not be acting on behalf of the state government.⁴⁰ When the Court in 1908 reinforced and extended this principle further in *Ex Parte Young*, progressives loudly protested that the federal courts were using their injunctive powers to infringe on the sovereignty of the states.⁴¹

In the wake of *Ex Parte Young*, Congress considered a number of proposals to limit the power of federal courts to enjoin enforcement of commission regulations, including revoking equity powers in those cases entirely. Members of Congress who supported such limitations argued that state courts were capable of reviewing commission orders and that corporations could still press their Constitutional rights in an appeal to the Supreme Court from the highest court of a state. Congress did not at first go so far as to strip federal judges of the injunction entirely. Instead, it adopted a law in 1910 that required a three-judge

39. 94 U.S. 113 (1877).

40. 171 U.S. 361 (1898).

41. 209 U.S. 123 (1908).

panel, including at least two circuit judges, to enjoin the enforcement of a state regulation. State utilities commissioners continued to push for an outright ban on federal injunctions against state officials and sought a requirement that corporations wishing to challenge the constitutionality of a regulation exhaust their remedies in state court before turning to federal courts. As with the labor injunction, it was a legislative campaign that lasted decades and only reached fruition in the 1930s, when Congress in 1934 passed a statute that revoked federal court jurisdiction in cases involving disputes over utilities rates.

Senator Lee Overman, Three-Judge Panels for Temporary Injunctions, U.S. Senate, Speech of April 17, 1908

Even before the Supreme Court issued its decision in *Ex Parte Young* in 1908, Senator Lee Overman of North Carolina introduced a bill to prohibit federal injunctions against state officers. When his bill faced opposition in the Senate Judiciary Committee, Overman offered a substitute bill that merely changed the procedure by which federal judges enjoined the enforcement of a state law.⁴² Overman's bill required any corporation petitioning for an injunction to submit it to a circuit judge and required the judge to convene with two more judges, at least one of which had to be a circuit judge as well. Such three-judge panels were already utilized to hear challenges under the Sherman Antitrust Act and appeals of decisions from the Interstate Commerce Commission. The bill also required that the panel of judges could not hear testimony and rule on a petition for an injunction until five days notice had been given to the governor, attorney general, and any other defendant in the petition.

Overman argued that the procedural change was necessary in order to check the power of individual district judges to thwart the intentions of state voters, lawmakers, and regulators in *ex parte* proceedings without advance notice. He believed that the participation of three judges, especially circuit judges, would give greater weight to the injunctions issued by federal courts and perhaps assuage the outrage felt by voters.

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42. Michael E. Solimine, "Congress, *Ex Parte Young*, and the Fate of the Three-Judge District Court," *University of Pittsburgh Law Review* 70, no. 1 (Fall 2008): 101–54.

We think, sir, that if this could be done it would allay much intense feeling in the States. As was said by Mr. Justice Harlan, in his dissenting opinion in the Minnesota case [*Ex Parte Young*], we have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of the State passed by the legislature of his own State, and thereby suspending for a time the laws of the State. . . . That being so, there being great feeling among the people of the States by reason of the fact that one Federal judge has tied the hands of a sovereign State and enjoined in this the manner the great officer who is charged with the enforcement of the laws of the State, causing almost a revolution, . . . if this [bill] is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great judges say that the statute is unconstitutional, the officers of the State will be less inclined to resist the orders and decrees of our Federal courts. The people and the courts of the State are more inclined to abide by the decision of three judges than they would of one subordinate inferior Federal judge who simply upon petition or upon a hearing should tie the hands of a State officer from proceeding with the enforcement of the laws of his sovereign State.

[Document Source: *Congressional Record*, 60th Cong., 1st sess., 1908, 42, pt. 5:4847.]

James A. Emery, Defense of Injunction Authority, Testimony Before a Subcommittee of Senate Judiciary Committee, January 27, 1910

Though the Senate did not pass Senator Overman's bill requiring three-judge panels for issuing temporary injunctions against state officers in 1908, Overman succeeded in appending his measure to a 1910 statute that strengthened the powers of the Interstate Commerce Commission (the Mann-Elkins Act). The three-judge panel was codified as Section 266 in the Judicial Code adopted in 1911.

Though Overman's three-judge panel was only a procedural reform and did not ban injunctions against state officials outright, the change still generated heated criticism. James A. Emery, who represented the National Association of Manufacturers before Congress throughout the early twentieth century, testified at numerous hearings against anti-injunction measures. In testimony in 1910 against the Overman bill, Emery praised the federal injunctive power as Americans' best protection against the overweening power of state

governments. He argued that if a judge issued an injunction that upon appeal appeared to be unwarranted, all that the state suffered was a delay in implementing its policy. Should that injunction not be issued or be postponed by onerous procedural requirements, however, individuals and corporations would suffer losses that could not be repaired through legal processes after the fact. For Emery, the federal courts' power to prevent injury before it was suffered was indispensable to individual rights.

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It must be evident that if it is necessary to perpetuate the power to invalidate the unconstitutional acts of the State, it must be equally necessary to preserve in their fullness the remedies essential to protect the citizen in his liberty and property against the enforcement of the invalid acts of the State. Without the preservation of a practical remedy by injunction, the State is easily the most dangerous of all trespassers with which the citizen can come in contact when its officers undertake to enforce its invalid acts. And, sir, constitutional guaranties are for the protection of minorities and individuals in the face of majorities who, by their very power, exhibit their ability to take care of themselves. . . .

Now, sir, in a few cases where the judge may err in the issuance of his restraining order, what is the result? The injunction is dissolved on appeal and the State proceeds to enforce its law. . . . The execution of the law has merely been delayed. The very legal proceedings had have made easier its future enforcement because of the judicial interpretation. On the contrary, if criminal or civil provisions of invalid legislation are enforced and property seized or persons imprisoned and then the act of the State is invalidated, the sovereign State can not be sued for the recovery of property or moneys improperly taken and the damage to injured individuals can not be recovered. . . . As for those persons who may have suffered imprisonment, neither the State nor individuals can restore to them the value of their lost liberty and besmirched reputation. The very range and variety of the State's activities are the best reason for retaining these equitable remedies against the errors of the State, the practical value of which experience has so keenly demonstrated. . . .

What volumes could be written upon the splendid protection which federal courts have given against state legislation invading the most sacred privileges of the citizen under the stimulus of feeling aroused by local conditions creating prejudice against a class or a condition and drafting into legislation the excesses of local opinion against which constitutional safeguards were provided with such prophetic foresight....

Finally, sir, let me ask you to consider that the right of equitable relief is just as sacred as the right of legal relief, that prevention of injury is more important than compensation for it, and that the attack upon person and property by the officer of a State possessing no valid authority for his action but having behind him the tremendous machinery of a sovereign power, is a far more serious assailant than any man or combination of men against whose assaults you intend to retain for the citizen the full equity power of intervention as it at present exists.

[Document Source: U.S. Senate, Subcommittee of the Committee on the Judiciary, *Federal Injunctions, Hearings on S. 3724*, 61st Cong., 2d sess., January 27, 1910, 49–51.]

Senator Hiram Johnson, Proposal to End Utilities' Access to Federal Courts, U.S. Senate, Speech of February 5, 1934

The three-judge panel adopted in 1910 did not end the controversy over federal injunctions against state officers and commissions. State regulators continued to pressure their representatives in Congress to revoke entirely the authority of federal courts to enjoin state commission rates and orders. A subcommittee of the Senate Judiciary Committee held hearings on an anti-injunction bill in 1912 that would have prevented federal judges from issuing any injunction—temporary or permanent—against any state law or commission order based on its unconstitutionality.⁴³

The debate over federal jurisdiction in state rate cases continued into the 1920s and 1930s. New Jersey Republican Isaac Bacharach

43. S. 4366, 62d Cong., 2d sess. (1912). Congress did adopt an amendment to Section 266 of the Judicial Code in 1913 that allowed state commissions to block federal jurisdiction if officials commenced suit in state court and the state court issued a stay in implementing the commission's rate (36 Stat. 1013 (1913)). In effect, utilities would no longer be able to argue that they suffered by having to abide by the allegedly confiscatory rate while litigation proceeded in state courts. The change had limited impact, however, because of procedural confusion.

introduced an anti-injunction bill specifically targeting utilities rates in 1922 after the largest railroad in his state successfully challenged a commission rate in federal court and New York's Fiorella LaGuardia introduced a bill of his own a number of times beginning in 1924 in response to high profile challenges to rates in New York's subway and telephone services.⁴⁴ In 1932, in the midst of the Great Depression, Senator Hiram Johnson (R-CA) introduced yet another bill to prevent utilities from challenging commission rates in federal district courts.⁴⁵

Senator Hiram Johnson's bill was reported favorably by the Senate Judiciary Committee in early 1934 and passed the full Senate. When introducing his bill, Johnson did not focus on federal jurisdiction as an infringement on state sovereignty, as previous supporters had, but as an unfair advantage to utility companies over state commissions. Johnson lamented that utilities could begin their litigation in a state court but, after long proceedings, remove the case to federal court when it appeared that they would lose. The federal courts issued injunctions against state enforcement and began a new trial, starting anew the arduous process of fact-gathering rather than relying on the record established by the state commission. Critics argued that this led to exorbitant costs and delays for state regulators and, ultimately, utilities customers. Johnson stressed that in closing off federal courts, utilities suffered no loss of their rights, since they had the opportunity to appeal constitutional issues from the highest court of a state to the Supreme Court.

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The design of the measure is to correct what has become an intolerable evil. Those who are familiar at all with the various commissions which the States have set up for the regulation of public utilities and the determination of their rates will realize from their experience that the process is interminable where not only the State courts may be resorted to by the public utility which questions the decision of the State regulatory commission, but the United States courts may be resorted to as well.

The bill takes no substantive right away from the public utility corporations. It enables, of course, the public utility corporation to

44. S. 10212, 67th Cong., 2d sess. (1922); H.R. 95, 70th Cong., 1st sess. (1928).

45. S. 3243, 72d Cong., 1st sess. (1932).

pursue its remedy through all the courts of the States and ultimately through the United States Supreme Court itself, but it seeks to put the public utility as a litigant in the same category that citizens of the States would be put under like circumstances. . . .

There is no reason in law, in equity, in justice, in governmental policy, indeed, in saying that two bites at the cherry, as it were—two sources of litigation—shall be open at the sweet will of the public utility, where but one is given to the ordinary citizen, and that a public utility may go on with its litigation in a State court until it thinks it may be defeated, and then go into a United States court, obtain its injunction there, refer the case to a master of its selection, who will go over the same ground that the public-utility commission has gone over and upon that evidence, that has once been taken, again take as it sees fit, through those who have little knowledge of the subject, the same evidence, and then substitute its will in the Federal court for the will of the State court and the will of the people, who are represented by their public-utility commission. . . .

It is the policy of the Federal court, when these cases relating to rates and the like come before it, not only to try the case *de novo*, not only to do that which already once has been done by the State at tremendous expense and at the utmost effort, but to substitute its judgment on questions of fact that have been determined, and determined in accordance with the law.

We deprive the utilities of no legitimate legal right by this bill. They may go through every step, as they do, with the commission's trial; they may go through the courts with every step, as they do, in the States that are concerned, and have every right that is guaranteed to a litigant in those States. They may go to the Supreme Court of the United States then, by direct appeal or otherwise. They have the opportunity, thus, in the first instance before the fact-finding commission to have the trial held; in the second instance, before the court, to determine the matters that are in issue; and, in the last instance, to go to the Court of last resort in the United States to pass upon any question which may infringe their rights.

[Document Source: *Congressional Record*, 73d Cong., 2d sess., 1934, 78, pt. 1:1915–16.]

Edward W. Everett, Opposition to Barring Utilities' Access to Federal Courts, Testimony Before a Subcommittee of Senate Judiciary Committee, May 26, 1933

The Johnson bill was the only proposal to be reported out of committee and, while very popular in Congress, led to an in-depth debate about the relationship between the federal and state courts in reviewing the orders of utilities commissions. Railroad attorneys and their allies in Congress vigorously protested any proposal to keep utility companies out of the federal courts. They argued that the state courts were improper tribunals for protecting the constitutional rights of utility companies. Overlooking the fact that state courts had exclusive jurisdiction over federal questions up until the 1875 Jurisdiction and Removal Act, they argued that only federal courts were independent enough to interpret the constitutionality of state laws and commission orders. The American Bar Association's Edward W. Everett, who headed the organization's Committee on Jurisprudence and Law Reform, testified to the Senate Judiciary Committee in 1933 that elected state judges could not be trusted to separate themselves from the political machine and popular demand that led to the adoption of confiscatory rates.

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The viciousness of eliminating Federal jurisdiction . . . is shown by the fact that a representative of a utility who is affected by the rate-fixing power of a State commission would be required to submit his claims of the unreasonableness and unfairness of the rate, to the judge of a State court. In most States, judges are elected by popular vote and frequently under a primary system of nomination. It is futile to say that he would not be influenced by the fact that his own State commission had entered the order and that he would not be expected to sustain the act of that commission. One of the principal purposes to be accomplished by the commissions is to secure for the public consumers the smallest and lowest rate possible. If the members of the commission are subject to the approval of popular vote for their retention in office, then any one who appreciates human psychology would realize that the popular demand would be for lower rates for gas, electricity, water, transportation rates, etc., and that if the Governor of a State appoints the members of the administrative board or commission, he would naturally be influenced by the desire of the public for

the lowest rates. Frequently there might be involved in the election of the Governor, through whom the administrative body is appointed, or the very judges who are entrusted with the decision as to the reasonableness of rates, a platform promise, upon which they were elected, to reduce rates. Any judge of human nature would realize that the administrative bodies or the commissioners or the Governors and judges of a community affected by rates fixed would be unable, unless an exceptional character, to resist the demand of the public, to whom they are responsible for their selections, for lower rates of public utilities.

[Document Source: U.S. Senate, Subcommittee of the Committee on the Judiciary, *Limiting Jurisdiction of Federal Courts*, Hearings on S. 752, 73d Cong., 1st sess., May 26, 1933, 6–7.]

Representative Clarence Hancock, Call to Preserve the Integrity of the Federal Courts, House of Representatives, Speech of May 9, 1934

Though the Johnson bill would pass the House by an overwhelming margin of 201 to 19, the House Judiciary Committee initially reported favorably a substitute bill introduced by Lawrence Lewis (D-CO). The Lewis bill addressed the issue of jurisdiction over rate cases more narrowly than the Johnson bill. The bill prohibited utilities from beginning litigation in state court and later transferring to federal court and also required that federal courts rely on the factual record of state commissions in rate cases.

The debate over the Johnson and Lewis bills took place at a time when Congress was considering a number of proposals to limit federal court jurisdiction, including abolishing diversity jurisdiction for corporations. Members of Congress like Lewis and James Beck (R-PA) railed against the Johnson bill as an opening salvo in a broader movement to abolish the inferior federal courts. In his speech in favor of the Lewis bill, New York Republican Clarence Hancock argued that the complaints about delay and expense in adjudicating rates could be addressed with procedural reforms rather than categorically preventing a particular class of litigants from entering federal court. He attempted to convince his colleagues that the question of federal jurisdiction was not a technical issue involving utilities rates but about the integrity of the federal courts and their fundamental role in protecting constitutional rights.

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Under the Lewis bill, the rulings of a State regulatory body may be judicially reviewed either in a State court or a Federal court, but not in both. The company must make an election and be bound by it. If the case is brought in Federal court, it shall be determined on a transcript of the record of the proceedings before the State commission, except that additional competent and material evidence may be taken upon the application of any party to the action if that party was improperly denied an opportunity to present it to the commission.

That is all there is to the Lewis bill and it is enough to prevent effectively the annoying delays and extravagances which are possible and sometimes occasioned under the present law. No one can logically defend a bill that goes any further. . . .

The Johnson bill would take away from one class of citizens the rights all others enjoy. It would deny to public-service corporations all access to the Federal courts for protection against orders of State bodies repugnant to the Federal Constitution. That proposition is shocking to Americans, and there are still many millions of them, who have a deep and abiding respect for the Constitution and the rights and safeguards of American citizens under it.

As Members of the Congress of the United States it is our duty, and should be our pride, to preserve the integrity of the Constitution of the United States and to uphold the dignity and authority of the Federal courts which were created by Congress to protect the constitutional rights of the citizens of the United States.

I will not impose on you by discussing the constitutional aspects of the Johnson bill. Others have done so more ably than I can hope to do. Permit me simply to point out that the Johnson bill deprives a class of citizens of the equal protection of the law; that it denies them the refuge of the Federal courts when deprived of property without due process of law; that it violates the universally accepted doctrine that the jurisdiction of the United States courts must be as broad as the rights and duties created under the Federal Constitution and the Federal laws.

People ask, "Are not the State courts as capable of enforcing constitutional guarantees as the United States district courts?" That is begging the question. The real question is, Shall the Federal courts be divested of their property [sic] functions, shall they be deprived

of jurisdiction which has been theirs since their creation, almost as long established as the Constitution itself?

I may say that I do not regard the judiciary of my own State as inferior in character or ability to the Federal judges. Neither do I believe from any observation I have been able to make that public utilities need to fear harsh, arbitrary or unjust treatment at the hands of the Public Service Commission of New York. I think their rights are fully protected by that body.

Why do we have a written Constitution? What is its purpose? Is it not to protect the people of the country from hasty, capricious, unconsidered acts of governmental bodies in times when waves of popular emotion or hysteria throw us temporarily off balance? ...

The Lewis bill is a temperate, moderate, intelligent piece of legislation. It will accomplish the purposes which are universally desired. The Johnson bill will also accomplish those purposes, but in doing so it will weaken and in part destroy constitutional guaranties and safeguards. No sound reason or justification has been advanced or can be advanced in defense of its drastic provisions.

[Document Source: *Congressional Record*, 73d Cong., 2d sess., 1934, 78, pt. 8:8420–21.]

Proposals to Limit Judicial Review

Between the 1890s and 1920s, the Supreme Court of the United States exercised its power to declare congressional and state statutes unconstitutional to an unprecedented extent and sparked periodic debate over limiting judicial review. In addition to the Court's famous defense of "liberty of contract" in cases striking down state labor regulations, the Court invalidated a number of congressional laws, including the first federal income tax, a law making railroads liable for worker injury, a law banning the use of so-called yellow dog contracts as a condition of employment, and a federal ban on child labor. The Supreme Court also set off a storm of protest in 1911 when, while not declaring the Sherman Antitrust Act unconstitutional, the Court narrowed the act's application severely when it held that only "unreasonable" restraints of trade could be prosecuted under the act.

These controversial decisions led to proposals to limit or abolish the power of federal courts to declare Congressional legislation uncon-

stitutional. At the center of debate over these proposals was the question of who had legitimate authority to interpret the meaning of the Constitution. Lawyers and lawmakers who considered judicial review to be usurpation of legislative authority proposed giving the people the power directly to override judicial construction of the Constitution through popular referenda. Others believed judges should defer to the people's representatives and proposed giving Congress the power to override judicial decisions or even to recall federal judges. Some members of Congress called for statutes to require a supermajority of the Supreme Court to invalidate a law while others proposed making judicial review an impeachable offense.

In each period of agitation against judicial review, prominent judges and legal scholars spoke out to defend the authority of the federal courts to void Congressional acts. They argued that the judiciary's role as the arbiter of constitutionally permissible government action was the essence of American republican government. Judges, court defenders argued, were the system's vital check on political majorities and legislative oppression. Any measures that diluted that authority threatened the public esteem upon which the courts' legitimacy depended. Despite heated exchanges over judicial review, none of the proposals to weaken or circumscribe this exercise of judicial authority succeeded.

Theodore Roosevelt, "Recall" of Judicial Decisions, *Outlook*, August 8, 1914

In 1911, Theodore Roosevelt, who left the White House in 1909, broke politically with President William Howard Taft and launched a public campaign for the Republican nomination for President in 1912. Roosevelt weighed in on the debates over judicial power and tried to strike a middle ground between those stalwart defenders of the courts and those willing to institute a recall of judges. His solution was to allow the voters to override the courts when it came to important constitutional questions, a practice popularly known as "decision recall." Roosevelt's proposal reflected his own growing support for greater democratic control over the tools of government and a belief that powerful political and business organizations had to be made to serve the people. Although decision recall was only publicly discussed as a change to state judiciaries, Roosevelt touted the idea as part of his Bull Moose Party presidential campaign in

1912 and privately confided that he hoped some version of the decision recall could be implemented in federal decisions.⁴⁶

In an article in *Outlook*, Roosevelt explained that Americans were subject to what he termed “judge-made law” and should have the right to review decisions that in effect produced “judge-made constitutions.” If the Constitution represented the fundamental law of the entire people, then, Roosevelt argued, the people should be able to contribute to its interpretation, rather than leave it in the hands of insulated unaccountable judges. He emphasized that popular review of decisions should apply only to those broad constructions of government policy and constitutional interpretation, issues that affected everyone and could be evaluated by all.

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My contention is that we are not concerned with the question whether Mr. Taft and his followers are right or wrong in holding that the judge-made laws . . . are “the best laws we have.” We are greatly concerned, however, with the question as to whether we have or have not the right to decide these questions for ourselves instead of having them decided for us by men whose decisions we regard as unjust. We hold that the people themselves should be given the right to say finally and conclusively whether they do or do not agree with these decisions, and whether these decisions are or are not to stand as the law of the land—not the law adopted by the people themselves, but the law imposed on them from without and against their protests.

This is all that is meant by the somewhat misleading term “recall of judicial decisions.” What we aim to accomplish would be better expressed by the phrase “the right of the people to review judge-made law.” This of course includes the right of the people to review judge-made constitutions, which is what all constitutions must become if their meaning is to be determined with practical finality by judicial decisions. The constitutions are now in almost all cases adopted by popular vote. A constitution is merely the highest expression of the law. Constitution-making is the highest form of law-making. It is emphatically the act of the people themselves. But if the power is, not theoretically but in actual practice, granted to

46. Ross, *Muted Fury*, 130–54.

a small group of men, however well-meaning, to put any interpretation they please upon what the people have done, it amounts in practice to taking away the right of the people to make their own constitutions and their own laws.

In practice, the people can control their legislative bodies. The legislator is elected for a short time, and he can be speedily replaced if he misrepresents his constituents. Moreover, wherever the people find that they are thus misrepresented by the legislators, they can, by the adoption of the initiative and referendum, take the remedy into their own hands. Now, all that those of us who are discontented with the reactionary or Bourbon decisions . . . desire to do is to give the people the same right to make their own laws so far as the judges are concerned that they now have so far as the legislators are concerned. I am really advocating only that the people be actually, and not merely theoretically, given the right which the eminent judges above quoted say is theirs and cannot lawfully or with propriety be taken from them. I am not speaking of any ordinary decision in the course of the administration of justice between man and man. I am not speaking of judicial decisions properly so-called at all. I am speaking of the function, assumed by the American court almost alone among the courts of civilized nations, to enact laws; for this is precisely what the courts have done in such cases as those mentioned above, even though the enactment take what is seemingly a merely prohibitory form.

If the lawmaking power is not responsible to the people for whom the laws are made, then our American system of government is a failure. The courts are as emphatically the servants of the people in this matter as are the legislators themselves. Unquestionably the court must pay no heed to the wishes of the people in doing justice as between man and man, precisely as the legislative and executive officers must pay no heed to the wishes of the people or any other consideration when the question is one in which violence or corruption or any other immorality is involved. The public servant must serve his own conscience or he cannot serve the public, and this is true of judicial precisely as it is true of legislative and executive officers. But in matters of policy the public servant must also represent the people or else our representative government is a sham. It is for the people themselves to make their own laws. It is not only their right but their duty to insist that their

views in lawmaking shall obtain, and not the antagonistic views of their servants, whether these servants be on the bench, in the legislature, or in executive office. If the legislature takes one view of the powers defined by the Constitution and the court takes another view, then it should be the right of the people to decide between their two sets of servants and say which view is correct. I ask for the necessary Constitutional amendment which will give the people the power lawfully to exercise this right.

I care nothing for the methods of obtaining this result so long as the result is lawfully obtained, and I care less than nothing for the terminology used in describing the methods. Whether the process is styled "a quick method of amending the Constitution" or "the exercise of the right of the people in a specific case to pass on the interpretation of the Constitution" is to my mind of no consequence. The fundamental question is that the people shall have the right to make their own laws, and to declare what these laws are, if their judgment differs from that of their servants in public life. The right should be exercised with self-control and caution. It should be exercised sparingly. But it should exist and should be available for exercise. The highest right of a free people is the right to make their own laws; and this right does not exist if, under the pretense of interpretation, an outside body can nullify the laws. Whether in such cases the nullifying body calls itself a legislature or a court or an executive is not of the slightest consequence. Whether we are dealing with a legislature-made law or with a judge-made law is not of the slightest consequence. A free people must have power over its own laws. It must have power to review legislature-made law; therefore it should have power to review judge-made law.

[Document Source: Theodore Roosevelt, "The Right of the People to Review Judge-Made Law," *Outlook*, August 8, 1914, 847–48.]

Senator George Sutherland, Defense of Judicial Review, Speech of December 13, 1913

Proposals for recall of judicial decisions led to a flood of defenses of judicial independence from some of the nation's most established politicians and judges. They argued that the movement to subject judges or their decisions to popular approval represented a funda-

mental misunderstanding of the role that the judiciary was to play in republican government.

Senator and future Supreme Court Justice George Sutherland of Utah was a staunch defender of judicial independence throughout his political and judicial career. In a 1913 speech to the Penn Society, Sutherland emphasized that a judge's duty was to expound the fundamental law as expressed in the Constitution without regard to the desires of fluctuating majorities. To submit issues of constitutional interpretation to the masses would, Sutherland contended, undermine the ability of judges to expound the law without will or passion. Popular vote on judicial decisions would destroy the separation of the legislative and judicial power and, he predicted, erode the rule of law.

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The demand for the recall of judicial decisions proceeds upon a theory which completely disregards the nature of the judicial function, which is not to register the changing opinions of the majority as to what the Constitution and law *ought to be*, but to interpret and declare the Constitution and law *as they are*, whether such interpretation satisfies the desires of many or of none at all....

...The whole assault upon the courts has raged about some half dozen cases which bear to the whole body of constitutional decisions a relative proportion so small as to be utterly insignificant. But because there is dissatisfaction with these few decision the demand has gone forth that the people shall resolve themselves into a great and tumultuous court of appeals to recall judicial decisions and thereby engraft upon the Constitution ...an interpretation, not upon a sober dispassionate and deliberate consideration of its general and prospective application, but upon a partial and more or less excited view of some special and exceptional result which has already happened. The effect of the plebiscite will not be to enact a rule for future guidance, binding the majority as well as the minority, but will be to simply give passing expression to the fleeting opinion of the temporary majority, having no binding force upon the less instructed or the more instructed majority of another day. Like idle words written upon the sands, the construction of to-day will disappear to-morrow, only to reappear at a later day as the sentiment of the majority ebbs and flows....

Law is a prescription for future behavior; judgment is a certificate of past conduct. To make law is an act of the will; to interpret law is an effort of the reason; and any system under which the meaning of law is dependent upon will is an unjust, and, an arbitrary and despotic system, whether the will be that of monarch or of multitude, for injustice is an evil which does not depend for its quality upon the machinery by which it is inflicted. Many attempts have been made to define justice, but for all the *practical* purposes of society it must at last come to this: That justice is simply exact conformity to preexisting and obligatory law. . . .

The guaranties of the Constitution are primarily for the protection of the minority. The majority can take care of itself. But if the majority assume the judicial power of interpretation, the rights of the minority are no longer *guaranteed* by the definite terms of the constitutional compact, but are subject to the will of the majority, for it is obvious that a vote is more likely to reflect the wishes of the voter than it is his judgment, since a judgment, unlike a desire, involves patient investigation, in which few will have time to engage, and dispassionate application of general rules to particular circumstances, which many will be in no frame of mind to make. . . .

Judges are selected for their learning, ability, and impartiality, but if they are to be made subject to reversal by the vote of a majority, such men will inevitably disappear from the bench and politicians will take their places who will very naturally endeavor to ascertain the drift of popular sentiment before deciding, and decisions instead of reflecting the intelligent and independent judgment of the judge will voice the speculations of the politician as to what the opinion of the majority is likely to be.

The experience of mankind has demonstrated that when legislative power and judicial power are placed in the same hands, inequality in the operation and application of the law invariably results. . . .

In making law, consequences are very properly considered; in construing law, the judge has nothing to do with consequences, he must enforce the law as he finds it. If then the people who make the constitution also expound it, thus combining in themselves both the power of legislators and judges, the vital distinction between the two functions will soon be lost sight of and alterations of the most profound character will be made in the fundamental law,

not by an amendment which deals with the matter prospectively, generally, impersonally, but by a temporary act of interpretation made expressly to avoid some specific undesired result. This interpretation, having been made to-day will be unmade tomorrow, and the constitution will cease to be a foundation of fixed and dependable stability and become a weathercock, shifting with every breath of popular emotion.

[Document Source: George Sutherland, *The Law and the People*, Address to Pennsylvania Society, New York, December 13, 1913, S. Doc. 328, 63d Cong., 2d sess., 1913, 5–8.]

Senator Robert L. Owen, Proposal to Ban Judicial Review, U.S. Senate, Speech of June 6, 1918

Theodore Roosevelt's campaign for decision recall died with his defeat in the presidential election of 1912, and agitation against the exercise of judicial review quieted during the first term of President Woodrow Wilson. Much popular protest against the federal judiciary was driven by the labor movement; passage of the 1914 Clayton Act, which promised to limit the use of injunctions against labor activity, helped to quell dissent. Two constitutional amendments approved by the states in 1913—one permitting a federal income tax, another the popular election of senators—signaled that the amendment process was a legitimate path to overcoming unpopular judicial interpretation of the Constitution. Perhaps most importantly, between 1911 and 1914, the Supreme Court upheld a number of key regulatory laws, including the Pure Food and Drug Act and a second Federal employer liability law.

Stalwart federal court critics like North Carolina Judge Walter Clark and U.S. Senator Robert L. Owen (D-OK) did not let the issue of judicial review rest for long. Clark had been speaking out against judicial review and in favor of election of federal judges since the 1890s, and Owen, who was a lawyer before entering the Senate, had been a strong supporter of judicial recall. In 1917, Owen, after corresponding with Clark, introduced two joint resolutions in Congress that would have prohibited any lower federal court judge from declaring an act of Congress unconstitutional. Under the proposal, any judge who did so would be deemed to have violated his or her constitutional duty of “good behavior” and “shall be held ipso facto to have vacated his office.”

In 1918, the Supreme Court of the United States, in the case of *Hammer v. Dagenhart*,⁴⁷ declared unconstitutional a congressional ban on child labor that had been passed just two years earlier. Owen submitted a new child labor bill and added to it a provision prohibiting the federal courts from declaring it unconstitutional on penalty of removal from office. In his speech introducing the bill into the Senate, Owen chastised judges for assuming that elected officials either had not the expertise to interpret the Constitution or willfully disregarded their duty to uphold the Constitution. Owen reasoned that the Supreme Court's appellate jurisdiction was granted by Congress and that the legislature had the right to withdraw the power of judicial review and in so doing prevent future conflicts over constitutional interpretation.

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I do not care at this time to review the reasons which led the people of the United States, through their Representatives in Congress, to declare the principle of public policy that child labor should not be exploited for money-making purposes as far as interstate commerce is concerned.

But the public policy was declared by Congress, and now the policy of the people of the United States, acting through the legislative branch, has been nullified, set aside, held for naught by the action, in effect, of a single individual judge necessary to make a majority of this honorable court.

One man has nullified the opinion, the matured public opinion, of the country, as expressed by Congress, and has overruled both Houses of Congress and the President of the United States and four members of the Supreme Court, and has established as a judicial decree that every Member of the Senate and every Member of the House voting for the act and the President of the United States violated the Constitution of the United States, which they severally lifted up their hands before Almighty God and swore to observe.

This act of the Supreme Court is not intended as a personal affront to the Members of the House, to the Senators, and to the President of the United States approving the act by charging that they have severally violated the Constitution of the United States.

47. 247 U.S. 251 (1918).

These learned justices who have declared this act of Congress unconstitutional have merely followed the unwarranted, the unjust, and unsound precedent set by John Marshall in the petty case of *Marbury* against Madison, when he had the temerity to exercise the veto over Congress as the first judge on the bench to declare an act of Congress unconstitutional. John Marshall's decision was absolutely wrong and contrary to the history and spirit of the law, and was a piece of judicial usurpation which was not followed by the Supreme Court of the United States in a single case for 50 years until the fatal case of *Dred Scott*, when that honorable Supreme Court declared slavery a constitutional national right and the Missouri Compromise as unconstitutional, void, and of no effect. . . .

The Supreme Court in rendering its decision has in effect declared that in the opinion of a majority of this honorable court every Congressman and every Senator and the President, in passing the child-labor act, violated the Constitution. This is merely a judicial opinion within the conceived discretion of each judge who delivers the opinion. The opinion is not intended to be disrespectful to Congress; it merely proceeds upon the assumption that the House of Representatives and the Senate of the United States and the President of the United States have not the intelligence to determine whether this law is constitutional or not, and have erred in holding it constitutional. Either this, or that the House of Representatives, the Senate of the United States, and the President of the United States, knowing the law was unconstitutional, passed it in willful defiance of their oaths of office. I do not assume the latter theory possible. . . .

Mr. President, every lawyer, almost without exception, will loyally stand by the decisions of the Supreme Court of the United States as the last word in human wisdom. . . . He instinctively and loyally supports the courts by whose approval he lives and thrives and has his being, but not one lawyer out of a hundred is aware of the fact that the only opportunity, which the Supreme Court has of conflicting with Congress concerning the constitutionality of an act is through the unwise exercise of the very appellate powers granted by Congress. Thus the occasion arises in the Supreme Court which puts upon a conscientious judge of the Marshall school of thought the "solemn duty," which I am sure few judges would desire, of declaring unconstitutional an act which the House of Representa-

tives and the Senate of the United States and the President of the United States had on their oaths of office declared constitutional, provided the judge personally thought the act unconstitutional. The obvious remedy for this possible conflict between the court and Congress is to take from the court the right to consider the question of the constitutionality of an act after Congress had determined the act was constitutional in the manner the Constitution provides (Art. III, sec. 2). A wise judge, I think, would be quite justified, under existing statutes, in declaring that the Representatives of the people of the United States in Congress having declared an act constitutional, the conclusive presumption arises that the act is constitutional, that matter having been settled by competent authority, but since some judges have not had the wisdom to do this it remains for Congress to remove from such judges the embarrassing situation in which such judges find themselves when confronted with the conception of their own interpretation of the Constitution on the one side as against the interpretation of the Constitution by Congress and by the President and by the Attorney General on the other side.

It is said by some that the judges are much more learned and wiser than Congress in construing the Constitution. I can not concede this whimsical notion. They are not more learned; they are not wiser; they are not more patriotic; and what is the fatal weakness if they make their mistakes there is no adequate means of correcting their judicial errors, while if Congress should err the people have an immediate redress; they can change the House of Representatives almost immediately and can change two-thirds of the Senate within four years, while the judges are appointed for life and are removable only by impeachment.

[Document Source: *Congressional Record*, 65th Cong., 2d sess., 1918, 56, pt. 8:7432–33.]

C.A. Hereshoff Bartlett, Denunciation of Proposed Ban on Judicial Review, *American Law Review*, 1918

Senator Robert Owen's proposals to effectively abolish judicial review in 1917 and in the wake of the Supreme Court's nullification of the federal anti-child labor law invited fierce criticism. For example, C.B. Stuart, who had been district judge for the District Court in

the Indian Territory, and after 1907 practiced law in Oklahoma City, went before the Oklahoma state legislature to denounce Owen's proposal as "an arrow [shot] straight at constitutional government."⁴⁸

Legal writer C.A. Hereshoff Bartlett, who wrote on an eclectic array of legal issues ranging from women's rights to international law, attacked Owen's proposal as akin to destroying the federal courts. He rejected the idea that Congress could discipline judges by any other means than impeachment and certainly not for exercising their constitutional duty of protecting the public from unchecked legislative power. Constitutional interpretation was the province of the judiciary, Bartlett argued, and any measure to limit that power made the courts subservient to the Congress and placed Congress above the authority of the American people themselves.

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Sufficient publicity has not been given to the extraordinary debate that recently took place in the United States Senate regarding the Supreme Court of the United States when Senator Robert L. Owen of Oklahoma vigorously attacked the Supreme Court of the United States in proposing to take away from that court its appellate power. The proposition of Senator Owen presents the depressing if not humiliating spectacle of a member of the Senate seriously and publicly insisting on views radically in discord with the fundamental principles of the Federal Government and of the very foundation on which it rests....

Assuming for the purpose of argument that Congress possesses the power to destroy the judicial system of the government and say there shall be no inferior courts, what would be the position of affairs? Would not the country be in a state of anarchy worse than anything found in the history of Russia; would not the whole system of federal government be paralyzed and the rights of property and the safety of individuals jeopardized? Would not the people rise and in their strength overthrow any such revolutionary propaganda as an invasion of their sovereignty? The mere statement of so grotesque a proposition makes it preposterous.

48. Judge C.B. Stuart, "Power of the Supreme Court to Declare Acts of Congress Unconstitutional," Address Before Joint Session of Oklahoma Legislature, February 6, 1917, S. Doc. 708, 64th Cong., 2d sess.

And assuming that Congress did pass a law in the terms indicate[d] by the Senator from Oklahoma by which a judge who in his official capacity denies its constitutionality and is thereby *ipso facto* deprived of his office, what would be the result? He holds his office under the constitution during good behavior and yet in defiance of this constitutional right Congress ousts him therefrom without a trial or an opportunity of being heard—relegates him to civil life because he has performed his duty under the oath he has taken to support the constitution of the United States.

Federal judges are constitutional officers who hold office during good behavior; and as the constitution has prescribed and limited the grounds of removal of an incumbent before the expiration of his term, the legislature has no power to provide for the removal or suspension of the officer for any other reason or in any other mode....

Assuming as it must be assumed that by the constitution the people in their sovereign capacity have delegated certain powers to Congress confined within prescribed limits it follows as a sequence that every act contrary to the mandate of their authority is void and that consequently every legislative act contrary to the constitution is invalid. To disown this would be to hold that the representatives of the people are superior to the people themselves. To the pretension that the legislative body are themselves the constitutional judges of their own powers, as the Senator from Oklahoma argued, and that the construction they and the Executive put upon them is conclusive it can be answered that this cannot be true where it is not to be found in any of the provisions of the constitution....

For a Senator of the United States to get up on the floor of the Senate and demand that federal judges shall lose their offices when assuming to question the will of Congress against the express provisions of the constitution, is simply to manifest a degree of ignorance as to the fundamental laws of our government that is both humiliating and ignoble unless we are to accept the astounding proposition that any judicial conduct contrary to the expressed wishes of the legislative branch of government is bad behavior. It is putting a price on the heads of the judiciary as though they were the slaves of the legislative body—mere servile dependents—whose very existence rests with the pleasure of that

body—when in truth the federal judiciary draws the free breath of their independence and the dignity of their office from the trust reposed in them by the people of the United States found in the constitution, one of the very objects of which, according to its preamble, having been to “establish justice.”

[Document Source: C.A. Hereshoff Bartlett, “The Co-ordinate Powers of Government,” *American Law Review* 52, no. 5 (September–October 1918): 669, 678–83.]

Senator Robert M. La Follette, Proposal for Congressional Override of Judicial Decisions, American Federation of Labor Convention, Speech of June 14, 1922

A series of Supreme Court decisions between 1918 and 1922 reignited organized labor’s outrage against judicial review and led to a renewed public debate over the power of the courts. In addition to the decision in *Hammer v. Dagenhart* declaring the federal child labor law unconstitutional, the Supreme Court in 1921 held that the anti-injunction provisions of the Clayton Act merely codified the existing common law of injunctions and thus did not create any new limitations on its use by federal judges.⁴⁹ The Court shortly after struck down an Arizona law that had prevented judges from issuing injunctions against peaceful picketing.⁵⁰ Finally, in 1922, the Supreme Court once again nullified a new federal anti-child-labor statute.⁵¹

In June 1922, long-time progressive Senator Robert M. La Follette of Wisconsin addressed the annual convention of the American Federation of Labor and unleashed a scathing attack on the federal judiciary and its recent record of labor decisions. He announced his intention to introduce a constitutional amendment to give Congress the power to re-pass any legislation declared void by the Supreme Court. His amendment would also have prohibited lower federal courts from nullifying an act of Congress.

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I believe that the decisions of the Supreme Court and the injunctions of the lower Federal Courts, coming as they have as the culmination of a long train of judicial usurpations, have aroused

49. *Duplex Printing v. Deering*, 254 U.S. 443 (1921).

50. *Truax v. Corrigan*, 257 U.S. 312 (1921).

51. *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922).

every citizen who pretends to have any concern for the welfare of his country. I believe that [t]his question of judicial usurpation is now a supreme issue. . . .

We have never faced the fundamental issue of judicial usurpation squarely, with a determination to make an end of it—once and for all.

The time has now come to do so. It would require a dozen constitutional amendments to correct the evils of the decisions which the court has handed down within the past three or four years.

The time has come when we must put the ax to the root of this monstrous growth upon the body of our government. The usurped power of the Federal courts must be taken away at one stroke and the Federal judges must be made responsive to the basic principle of this government.

Constitutions and statutes and all the complex details of government are ordained, established, and supported for the sole purpose of expressing and executing the sovereign will of the people. . . .

The question is, Which is supreme, the will of the people or the will of the few men who have been appointed to life positions on the Federal bench?

It is idle . . . in my opinion to talk about a constitutional amendment which will merely meet the objection to the Child Labor Law raised by a majority of the Supreme Court. We cannot live under a system of government where we are forced to amend the Constitution every time we want to pass a progressive law. The remedy must adequately cope with the disease or there is no use applying it. . . .

What I propose is that Congress shall be enabled to override this usurped judicial veto and to declare finally the public policy just as it has the power to override the Presidential veto, so that we may realize in fact the fundamental purpose of the Constitution as declared in Article 1, Section 1, that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Certainly no one can complain that the plan proposed is revolutionary, or even radical. It can fairly be criticized as being too conservative, but it at least would give the people an effective method of expressing and enforcing their will if the sentiment and purpose is strong enough, and it would at one sweeping stroke relieve the present intolerable condition. . . .

... Can we not reduce our Federal judiciary to its constitutional powers? If not, we can at least arrest its further growth. We can prevent its further encroachment upon the law-making branch of the Government. The plan I propose will do this, and I believe will be accepted by the people in all parts of the country without regard to party, as the quickest means of restoring government to the people.

[Document Source: *Report of the Proceedings of the 42nd Annual Convention of the American Federation of Labor* (Washington, D.C.: Law Reporter, 1922), 234–35, 241–43.]

Charles Warren, Critique of La Follette's Plan to Limit Judicial Review, *Saturday Evening Post*, October 13, 1923

Senator Robert La Follette's proposal for Congressional override of judicial review was the subject of debate for years, especially after the Senator included the measure in the platform for his 1924 third-party presidential campaign. President Calvin Coolidge and his running mate Charles G. Dawes depicted La Follette during the campaign as a radical who planned to undermine the Supreme Court's protection of liberties and the Constitution itself in order to usher in a socialist agenda. For his part, La Follette attempted to downplay the court issue, which was popular among his progressive faithful but much less so among the rest of the voters.⁵²

Lawyer and legal scholar Charles Warren published a notable attack on the La Follette plan in the *Saturday Evening Post* in 1923, which was later reprinted and distributed as a pamphlet by a group called the National Security League. The article's arguments would also appear in Warren's 1925 book, *Congress, the Constitution, and the Supreme Court*, in which Warren warned of the dangers of unlimited powers in Congress and praised the Supreme Court as the bulwark of individual rights.⁵³ Warren argued that judicial review was the linchpin of the federal government's separation of powers and the protection of state government power. All of these would be at stake if Congress granted itself paramount authority to interpret the Constitution.

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52. Ross, *Muted Fury*, 193–217.

53. Charles Warren, *Congress, The Constitution, and the Supreme Court* (Boston: Little, Brown and Company, 1930; reprint: Buffalo: Hein, 1994).

The cardinal theory of the American Government under a written constitution is threefold: First, that the executive, the legislative and the judicial branches shall be separate, neither exercising any of the functions of the other; second, that, as between Congress and the states, Congress shall possess certain express powers, . . . and that all powers not expressly delegated to Congress shall be reserved to the states or to the whole people . . . ; third, that, as between Congress and the individual citizens, Congress shall be specifically forbidden to exercise certain powers, the citizens thus being guaranteed freedom from such interference by the legislative body.

It will be seen at once that Senator La Follette's proposal demolishes all three of the fundamental provisions of the Constitution.

It destroys the executive branch of the Government; for if any statute, twice passed, is to be the final supreme law, then Congress may change any or all the provisions of the Constitution relating to the powers of the President.

It destroys the judicial branch; for by a similar twice-passed statute Congress may abolish the Supreme Court entirely or regulate its operation in any way it sees fit.

It destroys at once the powers of the states; for if by a twice-passed statute Congress may act on any subject whatever, regardless of the fact that the Constitution has reserved to the states all powers not expressly granted to Congress, then the states may only legislate on such subjects as Congress may choose to leave to them. In other words, all the boundary lines between national power and jurisdiction and state power and jurisdiction are swept away; and the states exist only at the sufferance and tolerance of Congress.

It destroys at once all protection against Congress which the Constitution guarantees to individuals; for by a twice-passed statute Congress may do anything or everything which the Constitution forbids it to do with reference to individuals.

It is this last phase of Senator La Follette's proposal which ought to make American citizens ponder long.

Destruction of the dividing line between the branches of our Government and its checks and balances, destruction of our Federal system of national and state governments each operating on its own distinct set of subjects, would, of course, change our whole system of government. Yet, if the American people wished

to change their system of government, it is conceivable that they possibly could live happily under another system. But destruction of the safeguards of individual rights and liberties of person and property, placing them at the uncontrolled mercy of Congress, would endanger the foundation of any free government at all....

The method devised by the Constitution to bind Congress and the President down from mischief was the erection of a Supreme Court consisting of judges, removed from hope or fear of Executive patronage, rewards or disfavor; removed from the heat of passion and party politics; removed from the necessity of calculating the possible effect of their decisions upon the chances of their re-election. The Constitution could not guarantee a court removed from all possibility of error; for a court is composed of men, and all men must make mistakes. But it could guarantee that such a tribunal, devoting its life to the study of the Constitution and of American ideals, would operate and decide with less chance of error than would a body like Congress. The very fact that, out of its fifty decisions holding Acts of Congress unconstitutional over a period of one hundred and thirty-four years, less than ten of such decisions have met with any violent criticism is the best evidence that the Supreme Court has fulfilled its functions, within that degree of perfection which can be expected of any human institution.

At least, it professes to be controlled by some limits—the limits which it regards as set by the Constitution. Congress, under Senator La Follette's proposal, would be controlled by no limits or restrictions of any kind; for any statute which it chose to pass twice would be law.

Finally, it should be noted that, whatever mistakes the Supreme Court makes, they may always be cured or reversed by a constitutional amendment ...; and thereafter the court is bound by the amendment.

But the La Follette proposal practically makes the Constitution unamendable; for whatever amendment the people may adopt, Congress will be no more bound to respect it than it will be bound to respect the present Constitution; for by a twice-passed statute it may enact something violative of the amendment itself....

In other words, should the La Follette amendment be adopted, it would ipso facto constitute the entire Constitution, and all the rest

of that document would be a scrap of paper, whenever Congress chose so to regard it.

[Document Source: Charles Warren, *Borah and La Follette and the Supreme Court of the United States* (National Security League, 1923), 10, 14–15.]

Senator William E. Borah, Proposal for Seven-Justice Majority for Constitutional Decisions, *New York Times*, February 17, 1923

In 1923, Republican Senator William Borah of Idaho introduced a bill that would have required the vote of seven justices to declare a federal law unconstitutional. Others had proposed requiring unanimous or supermajority votes to nullify legislation, including legal scholar William Trickett in 1907 and Representative Carl Hayden (D-AZ) in a series of proposed constitutional amendments between 1916 and 1921.⁵⁴

For Borah, the most troubling aspect of the Court's controversial decisions was that they were handed down by 5-to-4 votes. Borah's proposal was, in his mind, not so much an attack on the Supreme Court but a way to strengthen it in the eyes of the public. In a 1923 opinion piece in the *New York Times*, Borah explained that he saw 5–4 decisions as, in effect, the opinion of a single individual overriding the determination of Congress, the President, and the people. The existence of three or four dissenters in a given case suggested that a “reasonable doubt” existed as to the unconstitutionality of a law and meant there was a presumption of constitutionality to which the Court was bound to defer. Borah stressed his belief that altering the way in which the Court reached its decisions was not an invasion of the judicial power but a legitimate exercise of Congress's power to regulate its appellate jurisdiction. Above all, Borah argued that his measure would allay public clamor against the Supreme Court and restore public faith in the ability of government to address social and economic problems.

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The five-to-four decisions of our Supreme Court upon great constitutional questions are always a matter of deep regret—regret I suspect upon the part of the Court and certainly upon the part of

54. William Trickett, “Judicial Nullification of Acts of Congress,” *North American Review*, August 16, 1907, p. 848; Ross, *Muted Fury*, 218–19.

the public generally. These decisions seem to justify a want of respect for the decisions of that great tribunal, and seem to breed an atmosphere of distrust in the solidity and worth of our Federal judicial system. They have given rise to more criticism of the court than any other one thing which I am able to recall. When a measure has passed the Congress and received the approval of the President, it seems unreasonable that such a measure should be rejected by a decision in which no more than five out of nine Judges concur in its unconstitutionality. In the last analysis it comes down to the proposition where one Justice has the power to uphold or defeat the law—and in a celebrated case a change of view upon the part of one Judge resulted in holding the law constitutional upon one occasion and unconstitutional upon another. It gives to the whole proceeding an element of chance. Nothing outside of actual misconduct could be more calculated, in my opinion, to detract from the dignity and prestige of the court or more likely to undermine it in the opinion of the American people....

Has the Congress under . . . the Constitution the power to prescribe the number of Judges which shall concur before a statute shall be declared unconstitutional? From the earliest days of the Republic, Congress has determined not only the number of Justices but also the number which shall constitute a quorum. The act of 1789 contains such a provision, and that provision is still in the law, providing that six Justices shall constitute a quorum....

The “judicial power” of the United States is vested in one Supreme Court and such inferior courts as the Congress may create. That “judicial power” it will readily be conceded cannot be invaded by the legislative branch of the Government. But the line which separates the appellate jurisdiction of the court under proper “regulations” from an unwarranted invasion of the “judicial power” is not at all times clear and distinct. Is the Congress invading the “judicial power” when it declares the number of Justices required to constitute a quorum? I think not. Is it derogating from the “judicial power” when it provides by law that less than a quorum shall be authorized to do certain things? It would seem not....

In other words, may we not provide under the scope of “regulations” touching the appellate jurisdiction, that before an act of Congress shall be declared void at least seven Judges shall concur? It seems to me that we have that power. If we have the power, it is

perfectly clear that we should use it.... It is certainly wiser, if we are authorized by the Constitution to do so, to deal with the subject by statute rather than to be meeting it by constitutional amendments.

The regret is often expressed in these days that there seems to be growing up in this country a bitter and settled antagonism to our Supreme judicial tribunal, not merely criticism of its decisions, but antagonism to it as an institution. I do not believe there is any pronounced antagonism upon the part of the people generally....

... They would have difficulty in preserving their respect for this Government if they should continue to feel that there is no remedy for a situation wherein statutes and laws may be declared unconstitutional after receiving the approval of the lawmaking body, the Executive department, and four members of the Supreme Court itself. A method more commensurate with reason and the solidity and the worth of our institutions should be devised. While I would not seek to invade the "judicial power," I would be pleased to know some way had been devised to throw about the judgments of this Court the fullest respect and the highest confidence, both as to their wisdom and their permanency.

[Document Source: William E. Borah, "Five to Four Decisions as Menace to Respect for Supreme Court," *New York Times*, February 18, 1923, p. 21.]

Fabian Franklin, Response to William Borah's Proposal, *The Independent*, April 14, 1923

Critics of Senator William Borah's proposal for requiring a 7-to-2 supermajority to invalidate a Congressional statute struck Court supporters as unfairly tipping the scales of justice against the Constitution. Fabian Franklin—mathematician, economist, and editor of *The Independent* magazine—argued that there was nothing unjust about a 5-to-4 decision because each justice had considered a statute with a presumption of its constitutionality. Requiring a supermajority of seven justices to declare a law unconstitutional, he argued, would create an unwarranted burden of proof against the Constitution. While Borah declared that greater unanimity in nullifying laws would boost public respect for the Court, Franklin countered that such a high threshold for protecting the constitutional rights of litigants would make the Court an impotent institution and irreparably damage the reputation of the federal courts.

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The chief argument by which the [Borah] proposal is supported is that the deliberate act of a legislative body is entitled to a certain presumption of constitutionality; that to overthrow this presumption the infringement of the Constitution alleged against the act must be clear and palpable; that an infringement which turns upon considerations so refined, so doubtful, or so unimportant as to leave nearly half of the Justices unconvinced cannot be of this character; and that accordingly the act should not be set aside unless the court is almost unanimous in pronouncing it invalid.

... But let us examine the matter a little more closely. The Supreme Court is not a hostile body, eager to invalidate the acts of Congress or of the State Legislatures; there is not a member of it who takes pleasure in arraying judicial authority in opposition to legislative power. When five justices have pronounced an act unconstitutional and four have refused to do so, each one of the five and each one of the four has given to the presumption of constitutionality all the weight to which in his judgment it is entitled. The five adverse judgments have not been rendered in wantonness, but because to each of the five justices the infringement *did* seem sufficiently clear, and sufficiently important, to overthrow that presumption; and likewise the four favorable judgments have been influenced, in a degree which there is no means of estimating, by this very consideration that a legislative act should not be invalidated unless the constitutional objection to it is of unmistakable force and importance. In a word, the proposal to require more than a majority vote to pronounce an act unconstitutional rests on the assumption that the court does not give due weight to considerations which are dictated by ordinary fairness and common sense; an assumption for which there is no warrant. . . . The proposal to add to the weight which is actually attached to the presumption of constitutionality by requiring a seven-to-two vote to overthrow it is really a proposal to weight the scales against the Constitution. . . .

The second argument that is urged in behalf of the changes rests on an altogether different ground; it is based not on the inherent merits of the procedure but on the effect of it upon the standing of the court in public estimation. The spectacle, we are told, of five-to-four decisions invalidating legislative acts is calculated to lower the repute of the Supreme Court and to lessen its authority in the eyes of the nation. Undoubtedly there is some truth in this;

though the way in which the court has maintained its standing in the country, decade after decade, in the face of recurrent instances . . . of such decisions seems to indicate that the damage is not so serious as might be imagined. But be this as it may, would the requirement of a seven-to-two vote tend to increase respect for the court? Would it tend to give the judgments of the court a greater authority in the public mind? I think that precisely the opposite would be the case. Every time six out of the nine justices pronounced a law unconstitutional and the law nevertheless went into effect, the country would witness a spectacle far more damaging to the court's prestige than any that is now presented. For we should be living under laws which the Supreme Court, by a two-to-one vote, had condemned as unconstitutional, and which nevertheless we should . . . necessarily regard as constitutional. If anybody were claiming that the Supreme Court was infallible the fact of five-to-four decisions would be an absolutely conclusive refutation of the claim; but no such claim is asserted. We all know that a decision of the court may be wrong; but we also know that what it has decided is the final law of the land. But under the seven-to-two plan the final law of the land may be in direct opposition to the court's emphatic decision as to its constitutionality. Respect for the court can survive any number of demonstrations of its fallibility; it has survived them and will undoubtedly continue to survive them. But how long would it survive repeated exhibitions not of fallibility, which is a necessary attribute of all things human, but impotence, which is the one failing that a court of last resort cannot afford to exhibit?

[Document Source: Fabian Franklin, "Five to Four in the Supreme Court," *The Independent*, April 14, 1923, 247.]

Efficiency, Administration, and Uniformity in the Federal Courts

The role of the federal courts in American society changed dramatically in the first third of the twentieth century. Rapidly expanding commerce brought before federal judges a steady increase of private litigation involving contracts, patents, admiralty, and torts. New federal regulations in areas like food and drugs, antitrust, and railroad safety gave rise to more cases under the category of “federal questions.” Congress also added to the work of the district courts with a federal bankruptcy statute in 1898. The vast mobilization of federal resources during World War I brought the federal government into the courts as a party to an unprecedented degree. Finally, Congress passed new criminal statutes—none more important than the 1919 Volstead Act prohibiting the production and consumption of alcohol—that brought a flood of law enforcement cases into federal courts and radically changed the character of the job of a federal judge. Between the 1900s and 1930s, lawyers, judges, and politicians proposed changes to judicial organization, jurisdiction, and administration designed to help the federal judiciary process its growing workload.

The movement for reform of federal courts was the outgrowth of a broader engagement with judicial reform at the state level in the early twentieth century. State judicial systems were a complex collection of courts that were under as much stress from caseload burdens as the federal courts during the era of industrialization and urbanization. A group of academics—especially a core based in Chicago at Northwestern University, including Roscoe Pound, Albert Kales, and John Wigmore—argued in speeches, articles, and treatises that courts could best meet the needs of an industrial, urban society through improved efficiency, expertise, and administration. They campaigned for greater simplification of court organization and procedure and, along with a growing number of lawyers, pushed for improved education and professionalization of the bar. Reformers drew on the example of the 1873 English Judicature Act—which created a single High Court of Justice with power to act throughout the country—and called for state legislatures to replace their collections of various courts with unified

systems under the leadership of a chief justice. The goal was to create a single, centrally administered court with trial and appellate divisions, whose judges could be designated throughout a state depending on the amount and type of business. Proposals for unified court systems also called for judicial responsibility over rules of procedure and financial management. Proponents of judicial reform cited the creation of a unified municipal court system in Chicago in 1906 as a model for the rest of the country. In 1913, these reformers formed the American Judicature Society (AJS) to publicize their agenda and urge action on the part of state legislatures.⁵⁵

The campaign for reform of federal courts was also driven in part by an emergent and influential portion of the legal profession. Housed in large law firms in the country's urban centers, these elite lawyers represented corporate businesses operating in national markets—railroads, manufacturers, and financial firms. They served less as advocates in the courtroom and more as counsel for large bureaucracies. Through the American Bar Association (ABA), founded in 1878, corporation lawyers committed themselves to addressing legal issues on a national scale and playing a key role in federal and state policy toward the courts. Elite corporate lawyers represented their clients in federal courts far more frequently than the locally oriented practitioners that had previously dominated the profession and took an active interest in adapting the federal courts to handle their growing business.⁵⁶

Legal reformers, the elite bar, and a number of federal judges campaigned for a host of interrelated proposals in the early twentieth century. Consolidation of the district and circuit courts had been supported by many as a way to simplify organization and jurisdiction of the federal courts. Members of the bar who worked in technical areas of the law—such as customs, patents, or railroad rate regulation—lobbied Congress to create appellate courts of special jurisdiction, so that

55. James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company, 1950), 88–107; Michal R. Belknap, *To Improve the Administration of Justice: A History of the American Judicature Society* (Chicago: American Judicature Society, 1992), 1–23.

56. Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American Society*, 2d ed. (New York: Oxford University Press, 2009), 231–46; John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association,” in Gerard W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, CT: Greenwood Press), 75–96.

these cases would be heard by judges with expertise in the non-legal issues involved. Members of the American Bar Association urged Congress to empower the Supreme Court to write uniform rules of civil procedure for the federal courts, a proposal finally adopted in 1934. Influenced by the state unified court system movement, Chief Justice William Howard Taft sought greater authority to assign judges throughout the federal district courts. He also successfully lobbied for the creation of a Conference of Senior Circuit Judges to promote the gathering of information about work in the district courts and to encourage cooperation among judges.

The various court reform movements of the early twentieth century challenged long-standing beliefs about the character of the federal courts. These proposals raised important questions about the boundaries between legislative and judicial functions and the exercise of nonjudicial responsibilities by judges. The push for greater uniformity and centralization of authority led to debates over the independence and local character of federal trial courts. While Chief Justice Taft and members of the national bar believed greater coordination could lead to more efficiency in the trial courts, some lawmakers and judges resisted infringement on district court autonomy. At the same time, the adoption of the 1925 Judges' Bill gave the Supreme Court wider discretion to determine its own docket, which further restricted popular access to the nation's highest court and insulated the justices from the ordinary litigation of the federal court system.

Courts of Special Jurisdiction

Much of the increased caseload of the federal courts in the early twentieth century represented legal disputes in complex and technical areas of the law, such as patent rights and railroad rates.

As the capacity of the courts was tested under the growing workload, lawyers practicing in particular areas of the law proposed that Congress create appeals courts of specialized jurisdiction. In 1909, Congress created the Court of Customs Appeals to hear appeals from the Board of General Appraisers, the administrative body tasked with deciding disputes over import tariffs. In 1911, Congress created a Court of Commerce to field appeals from the rulings of the Interstate Commerce Commission (the short-lived court was abolished in 1913). During the 1890s and 1900s, the patent bar of the American

Bar Association campaigned for a Court of Patent Appeals to resolve patent disputes. Congress did not create such a court, but in 1929 it added appeals from the Patent Office to the work of the Court of Customs Appeals. Lawmakers introduced bills to create special courts for admiralty, land, and pension cases as well.⁵⁷

Supporters of specialized courts argued that disputes involving subjects like railroad regulation, tariff collection, and patented inventions were as much about technology and economics as law and required judges to develop scientific and other types of expertise beyond general common-law doctrines. They argued that specialized courts would lead to rapid resolution of cases in these technical areas while at the same time freeing up the time and resources of the general courts to process general cases. In addition, they argued that tariffs, patents, and interstate railroad rates were inherently national issues that required uniformity across circuit boundaries.

The movement for specialized courts generated opposition from those who feared that judges immersed in a particular field would lose their impartiality and serve the needs of powerful special interests. They argued that courts designed to concentrate on a narrow subject would lead to a splintering of justice in the federal courts as Congress created special courts for any conceivable interest.

American Bar Association Committee on Patent Law, Need for Uniformity of Law, Report of August 28, 1903

One of the concerns driving the movement for courts of special jurisdiction was a desire for greater uniformity of law in subjects that were national in scope. This was particularly true in the case of the ABA's campaign in the early twentieth century to establish a court of patent appeals. Prior to the creation of the circuit courts of appeals in 1891, patent cases were tried in circuit courts with appeals going to the Supreme Court. The 1891 act eliminated the right of appeal to the Supreme Court in patent cases, leaving review up to the Court on writs of certiorari only. Patent attorneys protested that the nine circuit courts of appeals had no duty to rule uniformly on patent protection cases; a patent could be valid in one part of the country and not in another. The patent bar wanted to reestablish a single court of final determination on patents but argued that the Supreme Court could not handle the additional work.

57. Frankfurter and Landis, *The Business of the Supreme Court*, 146–86.

The solution, regularly proposed in bills in Congress between 1898 and 1912, was to create a single Court of Patent Appeals.⁵⁸ In the 1903 *Report of the Committee on Patent Law*, ABA patent lawyers argued that patent holders were forced to protect their rights in multiple courts throughout the country and could not count on consistent rulings from the various circuit appeals courts. While the Supreme Court could ultimately resolve conflicts of law between the circuits, the committee argued that patent rights were valuable for only a limited time and speedy resolution was needed. In an increasingly national economy, patent holders needed a single court that could protect their rights quickly throughout the entire country.

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Our judicial system fails to meet these plain requirements of justice. We have, in effect, nine Supreme Courts for the trial of patent causes. They are not bound to follow one another's decisions in respect to the same patent on the same facts. A patentee having established the validity of his patent in one circuit has no certain assurance that it will be respected in any other. A manufacturer who has defeated a patent in a suit against his customer in one circuit may be compelled to defend another customer in another circuit against suit on the same patent and fight the whole ground over again. A patent upheld by one Circuit Court of Appeals may be nullified by another.

The power of the Supreme Court to hear patent appeals on *certiorari* and so settle conflicts between Circuit Courts of Appeals affords no substantial relief. A patent is too short-lived to survive the proceedings. The government issues to the inventor a grant which purports to vest in him a legal title to his invention for the whole country. But it fails to provide means by which he can establish that title against trespassers for the whole country. It issues as many illegal patents as legal ones, and yet fails to put it within the power of the people to protect themselves against wrong by the holders of them.

When we consider the part which patented invention has borne in the development and prosperity of our country, the capital and

58. For a detailed list of these proposals, see Frankfurter and Landis, *The Business of the Supreme Court*, 179–84.

labor invested in that form of property, and the extent to which patented inventions enter into all industries, this omission of the government to provide adequate means for settling controversies about patents is nothing less than a flagrant failure in the discharge of plain duty. . . .

There should be one Court of Appeals in patent matters because each patent covers the whole United States, and a suit on it is in reality one between the patentee and all the people of the United States; the issue being the right of the patentee to exclude the public for a time from the use, without his consent, of the thing patented, or alleged to be patented. When brought into litigation, the patent should be dealt with once for all by an appellate court, whose conclusions would be binding upon the courts and people of the whole United States. It is only in this way that the patentee and the public generally can become assured of the extent and limitation of their respective rights. Moreover, all patents should be dealt with not only in accordance with the same rules of law, but with the same spirit and from the same point of view, and this is possible only when as to all patent questions there is a single court of last resort. If such a court were *quasi* permanent in character, as it should be, it would soon develop a definiteness of view and a uniformity of tradition which would give to the administration of the patent laws a completeness and certainty which, to the great disadvantage of the community, does not characterize their present administration.

[Document Source: "Report of the Committee on Patent, Trade-mark, and Copyright Law," *Report of the 26th Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1903), 461–64.]

Representative John Esch, Support for Expert Appeals Court for Commerce Cases, House of Representatives, Speech of February 8, 1905

Supporters of specialized federal courts argued that an expert court was necessary to alleviate the costs and delays suffered by a particular group in the general courts, be they patent holders, railroad corporations, or government duty collectors. They argued that some subjects were simply too complex for judges who had not spent significant time studying them. Not only did appeals to the Circuit

Courts of Appeals result in delays and added costs, but the fact that nine separate courts could hear appeals led to uncertainty in the law.

In the following speech in support of a Commerce Court in 1905, Representative John Esch, a Republican from Wisconsin and future member of the Interstate Commerce Commission, emphasized the delays inherent in rate cases and argued that the special court would not only reach decisions more quickly, but the decisions would garner more public respect because of the caliber of expert judges committed to nothing but rate cases.

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[The Judiciary Committee] believed, under all the circumstances and the testimony, that some separate tribunal must be created in order to expedite the findings of the [Interstate Commerce] Commission and to bring speedy relief. Looking at the experience which the Commission has had in the past under the existing interstate-commerce act, we found that its efforts were thwarted from year to year by processes and appeals in the existing Federal courts. We found in the testimony that there were cases pending four and five—nay, eight and nine—years, so that when a decision was finally rendered conditions had all changed, and the decision availed nothing. We therefore thought a separate and distinct court would expedite the findings of the Commission and would bring relief—a court that should have no other duty than to decide upon appeals from the Interstate Commerce Commission, a court not distinct and apart from the judiciary, but an integral part of it, composed of five circuit judges appointed by the President and confirmed by the Senate, of judges of high standing and capacity, who could devote their entire time, if need be, to the consideration of these complicated questions relating to rates. These judges should sit practically in continuous session, with four stated terms of court. They should be ready to receive and hear appeals at all times. They should have power to travel throughout the country wherever justice might be promoted. This was the idea we had when we created the court of transportation.

With reference to its operation we say that, constituted as it is, its decisions would receive greater respect than a decision by a court of appeals or a circuit or district court in which rate litigation is only incidental and not primary and exclusive. The judges

of this new court in time would become experts on rate litigation and, understanding the conditions which change rates and the causes which influence rates, would be better able to determine the right of a case than would the average circuit or district judge in different portions of the country, with no prior experience with reference to rates. I am informed by an official of the Government who had long experience in litigation before the Commission and the Federal courts that it is sometimes difficult, if not impossible, to get circuit judges of the United States to sit in rate cases. They do not want to sit in such cases because of their highly technical and complicated character, requiring in their determination previous knowledge. It is the same feeling which some of the circuit judges have manifested when called to sit in patent cases, cases which presume scientific accurate and technical knowledge; but when we have a court of transportation and we have the proper men selected, whose duty it shall be to study rate litigation and to make that their life specialty, there will be no excuse for not bringing cases before them and getting a speedy hearing. We believe that this court being always open, being always ready, will expedite these appeals, whereas now under the existing practice it can not be done.

[Document Source: *Congressional Record*, 58th Cong., 3d sess., 1905, 39, pt. 2:2083–84.]

Senator Albert Cummins, Concern About Power of Special Interests in Specialized Courts, U.S. Senate, 1909 & 1910

One of the overriding concerns about courts of special jurisdiction was that they would come to serve the specific needs of powerful interest groups and cease to serve justice impartially. Senator Albert Cummins (R-IA) objected to expert courts because he believed they would favor special interests, whether it was the U.S. government in customs cases or railroad corporations in rate cases. Cummins argued that exposure to broad issues of law was necessary for judges to maintain a focus on fair and equal justice. He warned that carving special courts out of the judiciary would diminish public respect for the judiciary as Americans were given reason to doubt the independence and objectivity of federal judges.

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I am opposed to the establishment of a customs court of appeal for two reasons.

The first is that it is a specialized court. It is a court that is to be brought into existence for the purpose of deciding in favor of the Government under all circumstances and no matter what the law or the evidence may be. I do not say that the men who are to compose it will be other than men of high character and great ability, but they are to be experts, their judicial business is to be confined to the matter of the duties on imports, and they will speedily become, just as all such courts become, the instrumentality of the Government for collecting the revenue; and they can not retain open and impartial minds, for it is impossible that they can escape the environment that will surround them.

I have no particular sympathy for importers, but the importers of the United States are entitled to justice. They are entitled to a fair and impartial administration of the law that we pass here. They are entitled to be judged by men who have no bent and who are not predetermined against them. All that I want is a fair judicial court, a court with a mind broadened all the time by contact with other judicial questions and the rights and privileges of citizens in other capacities, and you will not have such a court when you establish the tribunal as here suggested.

It is no secret upon the floor of the Senate that the purpose of this court is to secure men who either are at the time of their appointment, or will become, experts—specialists in the construction of this law. It is no secret that it is intended to remove from the circuit courts of the United States a jurisdiction which they have hitherto exercised, in order that there may be more judgments in favor of the United States and fewer judgments in favor of importers.

I care not whether a judgment be in favor of an importer or in favor of the United States. I only care to have a judgment that shall construe the law as it is, and a tribunal that will enter upon the consideration of any such case without any fear or favor or partiality for or against either of the litigants. You will find it, I believe, a grave mistake to erect a judicial tribunal of this sort.

So long as the Board of General Appraisers was a mere administrative tribunal, and so long as it was the final tribunal save as cases might be reviewed by the regularly constituted courts of the United States, no scandal could arise, because they recognized

themselves to be but administrative or executive officers of the United States. But you are now attempting to draw the judiciary into the prejudices and the plans of those desiring to have the laws of our country so construed that importers shall have no chance whatsoever in their construction of the law.

[Document Source: *Congressional Record*, 61st Cong., 1st sess. (1909), 44, pt. 4:4185.]

My objection . . . is that it is unwise and impolitic to create a special tribunal for the trial of railway cases. It is just as important to the honor of the administration of the law in our country that the people shall have unbroken and unbounded confidence in the judgments of the court as it is that those judgments shall be right and true; and if you create a tribunal commissioned only for the trial of railway cases, selected as this tribunal originally is to be, and recruited as this tribunal is to be from time to time, I predict that, whether right or wrong, the people of this country will lose that unswerving and unfaltering faith which they have heretofore reposed in their judicial tribunals.

I do not know whether the tribunal will be disposed toward the railways or whether it will be disposed toward the commission and the people, but I do know that any judicial tribunal appointed or selected for the purpose only of adjusting or determining disputes between the great railway companies of the country and the people of the country will be subjected to that suspicion which naturally arises in the human heart. You can not subdue it; you can not overcome it.

Again, I am opposed to it because of the influences that will necessarily surround the selection of the judges. I agree that the President of the United States is as far removed from these influences as mortal man can be; I agree—or, at least, I hope—that every succeeding President will be so removed; I know that the honor and the integrity of the Supreme Court of the United States and its distinguished Chief Justice are without blemish; but when you remember that this tribunal is to weigh the fortunes of all the people of the United States in their controversies with railway companies; when you remember that the railway companies surround the Government of the United States in all its functions and in all its branches as pervasively as the atmosphere surrounds those who breathe it; when you remember that there are countless channels

through which these great corporations exercise their power; I warn the Senate of the United States not to create a tribunal of this character, having jurisdiction only of a special, limited class of cases, upon the one side of which will always be the tremendous power of the railway corporations of the United States.

[Document Source: *Congressional Record*, 61st Cong., 2d sess. (1910), 45, pt. 3:3348.]

Representative William Adamson, The Supreme Court and Uniformity of Law, House of Representatives, Speech of April 14, 1910

While establishing uniformity of rate decisions across judicial circuits was a key argument in favor of the Commerce Court, some congressmen believed such a mission was misguided. Representative William Adamson (D-GA) argued that conflicts and disharmony in the law across courts and regions were inherent to the federal judicial system. The entity charged with resolving those disputes, and the only one truly capable of bringing uniformity, was the Supreme Court of the United States.

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The demand for uniformity in decisions is little short of ridiculous. As long as God makes many men of many minds, as long as different environment, heredity, education, kinship, and financial interest produce different modes of thinking and different predilections, as long as this great country, stretching from ocean to ocean and from the frozen North to the tropic seas, teems with the thrifty sons of all nations of the world, with the body of the text and practice of the laws of all civilized nations, the idea of uniformity in anything is absolutely impossible, and our Supreme Court has so declared. The only possible tribunal that can be relied upon to harmonize and unify different theories, practices, and ideas, and declare what shall prevail is the Supreme Court of the United States, and though you create this court and a dozen other special courts, there will still be, although fugitive cases, instances and forms of litigation in which all those questions may reach the Supreme Court from courts other than the commerce court, and the final unifier, if one can be found, will be the Supreme Court.

[Document Source: *Congressional Record*, 61st Cong., 2d sess. (1910), 45, pt. 5:4721.]

Rules of Civil Procedure

In the first decades of the twentieth century, litigants, lawyers, and legal scholars began criticizing the confusion, costs, and delays of private litigation in America's courts, both state and federal. Roscoe Pound, Albert Kales, John Wigmore, Louis Brandeis, and others lamented the costs and complications of litigation and criticized bench and bar for transforming what was supposed to be a search for justice into a battle of gamesmanship over who could best navigate arcane and complex procedures.⁵⁹

Leaders of the American Bar Association resolved that the solution to the nation's litigation problems was to empower the Supreme Court of the United States to write uniform rules for the federal courts, rules that would then serve as a model for judicial rule-making throughout the state courts as well. Beginning with New York in 1848, most states jettisoned the complex and inflexible common-law writ system in favor of a more simplified statutory code, based on the famous Field Code drafted by David Dudley Field. Procedural codes were frequently amended by state legislatures in the late nineteenth century until lawyers began to lament the complexity of pleading and procedure and the frequent costs and delays caused by failure to comply with it. Under the Conformity Act of 1872, federal courts were required to follow state rules of procedure "as near as may be," but had discretion under this vague language to alter the rules as they saw fit. Thus, by the early twentieth century, not only did state procedural rules differ from each other, as state legislatures continually amended their codes, but individual federal courts had rules distinct both from the state in which they sat and federal courts in other districts.⁶⁰

The ABA, led by Norfolk, Virginia, attorney Thomas W. Shelton, campaigned for over twenty years to achieve uniform civil procedure based on Supreme Court-made rules. In 1912, Shelton worked with Representative Henry D. Clayton (D-AL) to draft a bill granting the Supreme Court authority to prescribe rules of procedure and practice

59. Russell R. Wheeler, "Roscoe Pound and the Evolution of Judicial Administration," *South Texas Law Review* 48, no. 4 (Summer 2007): 943–67.

60. Stephen B. Burbank, "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review* 130, no. 5 (May 1982): 1015–197.

in the federal courts.⁶¹ Congress had granted the Court authority in 1842 to proscribe rules in admiralty and equity; the Court, in fact, had just completed rewriting the rules of equity in 1912. Supporters of Court-made rules also cited the English Judicature Act of 1873, which had granted rule-making authority to that country's judiciary.⁶²

Clayton submitted his bill in December 1912, but it was not until 1914 that the House Judiciary Committee held hearings.⁶³ The bill cleared the House committee but faced opposition in the Senate Judiciary Committee, led by Montana Senator Thomas J. Walsh, who blocked its report from committee in 1915. An altered version of the bill was introduced again in 1916 by Senator George Sutherland (R-UT), and another revised bill was promoted by the ABA beginning in 1924, written by Senator Albert Cummins with Chief Justice William Howard Taft.⁶⁴ The bill failed to pass the Senate on a number of occasions during the 1920s and only became enacted in 1934 after Franklin Roosevelt and his attorney general, Homer Cummings, supported it.⁶⁵

The movement for Supreme Court rule-making power was part of a larger push to give judges greater control over judicial administration during the early twentieth century. Supporters of judge-made civil rules argued that judicial administration was the victim of short-sighted legislators who inaccurately believed that the rules of practice and procedure could be established in detailed fashion by statute. They instead argued that judges with expertise could draw on their experiences in the courtroom to produce rules that would operate more efficiently and flexibly. Supporters of uniform procedure asserted that rule-making was a judicial function, not a legislative one.

Supreme Court rule making also raised important questions about centralized authority and uniformity in the U.S. legal system. Repre-

61. H.R. 26,462, 62d Cong., 3d sess. (1912); S. 8454, 62d Cong., 3d sess. (1912). The bill was reintroduced in the next Congress. H.R. 133, 63d Cong., 2d sess. (1914).

62. Roscoe Pound, "Regulation of Judicial Procedure By Rules of Court," *Illinois Law Review* 10 (1915): 163-77.

63. *Reforms in Judicial Procedure: American Bar Association Bills*, House Judiciary Committee, Hearings on H.R. 4545, H.R. 9991, H.R. 7355, 63d Cong., 2d sess., Part 2, February 27, 1914.

64. S. 4551, 64th Cong., 1st sess. (1916); S. 2061, 68th Cong., 1st sess. (1924); Burbank, "Rules Enabling Act," 1066-83.

65. Public Law 73-415, *U.S. Statutes at Law* 48 (1934): 1064.

sentatives of small, “country” lawyers complained that uniform rules in the federal courts would mean disparate rules between state and federal courts, making it difficult for lawyers who did not frequently practice in federal courts. Critics of the plan also argued that the Supreme Court would not be responsive to the needs of litigants and attorneys when it came to altering faulty rules. There was also debate as to whether the Supreme Court had any legitimate authority to dictate rules of procedure to the trial courts in the federal system.

Thomas W. Shelton, Proposal for Supreme Court Authority Over Civil Procedure, *Central Law Journal*, February 14, 1913

Supporters of Supreme Court control over civil rules saw their goals as both administrative and political. They argued that popular dissatisfaction with the federal courts flowed not from controversial decisions involving the major policy debates over economic and social regulation. Rather, public respect for the courts was eroding because of the confusion, costs, and delay of civil litigation. A uniform and flexible system of pleading and practice handed down by the Supreme Court, they believed, would relieve the public from the hardships of litigation. It would also give the federal courts more independence from the legislative branch.

In his voluminous writings in favor of court-made civil rules, the ABA’s Thomas W. Shelton turned the issue of courts and politics on its head. While supporters of judicial recall argued that the federal courts were infringing on the power of legislatures, Shelton contended that the courts, both state and national, were the captives of the lawmakers. He argued that legislatures injected political influences into the judicial process and produced ineffective judicial administration, though it was the courts that were attacked by the public. He called on Congress to “let the Supreme Court free,” allow it to function as an independent branch of government, and create a model of rational, effective procedure for the country. Only then would interest-group and partisan influences be removed from the administration of justice.

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The times call for a more general and popular study of the elementary principles of government that the body politic may realize that the difficulty is not with the Courts as institutions, but with the conduct thereof.... The solution, I profoundly believe, lies much

in divorcing the Courts from politics and political influences and requiring them and the Bar to clean their own house....

Pursuing this thought, if lawyers and judges are to be held solely responsible, as in right they should, then they must be given the power to correct the evil by putting into practice all necessary reforms in the Courts. . . . The people should rise up in their might and *require that Congress shall set the Supreme Court free*. It is a complete solution of the difficulty.... Congress should be prevailed upon to do away with the empty pretense of conformity with State practice on the common law side, . . . stop patching conflicting and incompatible statutes, authorize the Federal Supreme Court to prepare a simple, economical, complete, correlated system of pleading and procedure, make it mandatory and stop there. Let the Supreme Court do the rest. . . . Besides, politics have no respective place in jurisprudence. On the other hand, the solemn voice of the Supreme Court would bring the entire Bar and the people to a point of complete acquiescence and the forceful support and there would be permanent results the greatest of which, next to simplicity and economy, would be uniformity in pleading and procedure in the Federal Courts and quite naturally amongst the States. In their own interests, there would eventually be adopted any simple, economical system that bears the *imprimatur* of the approval of the United States Supreme Court; that has proved its merits in the Federal Courts and which has become certain and fixed through precedents.

[Document Source: Thomas W. Shelton, "Reform and Uniformity of Judicial Procedure," *Central Law Journal*, February 14, 1913, 114–16.]

Editorial, Civil Rules as a Judicial Function, *Journal of the American Judicature Society*, June 1917

The movement to grant the Supreme Court authority over civil rules was part of a broader movement by lawyers and legal scholars in the early twentieth century to reestablish judge-led rulemaking throughout state courts as well. Supporters of court-made rules traced judicial responsibility back to English courts and argued that Congress and state legislatures had, misguidedly, "interfered" with judicial power over rules in the nineteenth century, making both state and federal courts beholden to procedural codes. The move-

ment, then, was for a restoration of what was considered an inherently judicial function.

In the article excerpted below, the editors of the journal of the American Judicature Society—an organization founded in 1913 to advocate for judicial reforms throughout the country—conceded that lack of administrative capacity by the nation's judiciaries had made legislative procedural reform attractive in the mid-nineteenth century. The editors argued, however, that the shift in authority from the courts to the legislatures undermined the separation of powers and kept the rule-making process out of the hands of those with the expertise required to produce efficient administration of justice. They argued that the nation's courts, entrusted with enforcing the rights of citizens and the rule of law, should be trusted with creating the system required to carry out its mission, free of legislative interference.

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The significant fact is that for more than fifty years courts have been dependent upon legislatures as the source of procedural reform. In some of the so-called common law states there have been enacted twenty-five hundred sections of procedural law.

This era of dependence upon legislated rules was doubtless inevitable as a method of modernizing judicial procedure, because the courts, lacking the organization needed for administrative control, could not react to the demand for rational procedure.

Legislated procedure has brought with it a train of evils. It violates the fundamental principle of separation of powers. It tends to restrict and belittle the courts. It hopelessly divides responsibility for administering justice. It makes courts dependent upon inexpertness in rule drafting. It exalts mere procedural rules to the realm of substantial rights, thus multiplying the number of issues to be tried, and making our litigation more and more an inquisition into non-essentials....

These considerations have led to a widespread movement for restoring to the courts their traditional function of controlling and developing at least the less essential parts of procedure. . . . There is an administrative side to judicial power necessary as an aid to the essential judicial function. Just so it is coming to be seen that there is a rule-making or legislative side in support of the primary function of adjudicating.

The idea that judges are to be trusted with decisions in matters of the highest private and public concern, but are incompetent to determine the manner of conducting litigation, is wholly untenable.

[Document Source: "Procedure Through Rules of Court," *Journal of the American Jurisdiction Society*, June 1917, 18–22.]

Representative Henry D. Clayton, Efficiency of Court-Made Procedure, *Central Law Journal*, January 5, 1917

Though the Conformity Act of 1872 required district courts to replicate state procedure "as near as may be," in practice this left federal judges enough leeway to adopt rules that were unique to their own courts. Procedure in federal courts was a collection of state code, federal statute, and judge discretion and, supporters of the Clayton bill argued, created confusion and inefficiency.

In an article in the *Central Law Journal* in 1917, Democratic Representative Henry D. Clayton of Alabama explained that the Supreme Court would be the best suited body for creating a simple, uniform code that was rooted in the experiences of legal practice. He contrasted the expertise and broad vision of the justices with the fragmented and halting work of legislators, who altered judicial procedure in small steps without a view toward overall coherence of the system. Clayton had an abiding faith that the justices of the Supreme Court would dedicate themselves to the task.

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Let it be emphatically said that the present lack of system in pleading in law cases in the district courts of the United States is attributable to the fact that no uniform system of procedure has ever been had. Indeed, . . . no systematic procedure to govern law cases in the federal courts has ever been attempted. Furthermore, it is a truth demonstrated by the existing unsettled, confused and uncertain condition of federal procedure that there is necessity for an authorized way out of such condition. . . .

...The practitioner knows that no pleader in any district court can tell in every case . . . whether, or to what extent, the state procedure in any given jurisdiction will be followed in the district court. It has been often and well said that this conformity statute [of 1872] has been as much honored in the breach as in the observance. . . . It is

not necessary to deal here further with this conformity statute, for it is a proven failure, and even the most salient reasons for its enactment have passed away with conditions long since changed. We are not now a new country entering upon the untried experiment of government. . . . And volumes have been written on American law, the statutory and customary, all evidencing the growth of our substantive law. But it is lamentable that our adjective law has not grown either in such proportion or wisdom as the requirements of our American life now demand. We are living in the present, and much of the old customary law, as well as the old procedural, is now inappropriate, inapplicable and inadequate. From the grave of the dead centuries no voice can come to stay the progress of our jurisprudence. . . .

It is believed by nearly all of those who have studied the subject that the remedy for the highly unsatisfactory condition in federal procedure ought not to be attempted through the medium of a rigid legislative code, and unamendable, except by the slow process of legislative regulations designed to control at every important step the entire procedure and practice of the federal courts. It will be hard to make this inflexible statutory method workable and efficient, admitting that it is possible for congress to provide a plan so comprehensive. Nor are the senators and representatives justified, it is respectfully said, in waiting for the development of a federal system of procedure to be wrought out and established by the slow process of evolution, the process that the courts are now compelled to pursue. . . . It is submitted that the important reform demanded can be the better and more speedily secured by the rules to be formulated and promulgated by the Supreme Court of the United States.

These rules will not trespass upon the substantive law; nor will they fail to retain all that we now have in procedural law which experience has shown to be good and helpful in the application of the real law in any case. And, it is not to be doubted that such rules will make more certain and speedy the vindication of rights and . . . the condemnation of wrongs. . . . It may be assumed that no judge, or no active practitioner, will deny that in addition to this desired simplicity, more than probable celerity, and increased efficiency of the courts in the dispatch of business there will also come greater

economy of the public time and money consumed in administering justice.

It is apparent that the existing lack of system in procedure is conducive to wastefulness of both the time and funds that belong to the public, as well as to the waste of time, money and property of individual litigants, who have sought the court or who have been compelled to submit to the courts for settlement of business controversies. . . . Courts ought to be set free to better conserve public funds and the money and property of individuals. . . .

The Supreme Court needs no panegyric. There it stands and there it must stand as long as our popular representative government shall live. The high responsibilities of that court and its exalted character guarantee that whatever may be done under the bill proposed, it will be well and wisely done.

It has been suggested that the measure might provide for a commission to be composed of lawyers and judges to formulate these rules. To this let me hazard the reply that such is not necessary. For the court is composed of pre-eminently able and skillful lawyers who can best determine what the rules should be. They will carefully consider all proper rules and after study and conference, and after consultation with other learned lawyers, if it is deemed helpful to consult them, the rules will be drawn and made effective and will constitute a well conceived and a well wrought out system or plan of procedure that will be highly remedial where remedy is now so much needed. And, finally, it may be said that the Supreme Court now has committed to it, under the organic law, powers and duties far exceeding in importance to the public and to the individual citizen those now proposed to be conferred in the mere matter of procedure.

[Document Source: Henry D. Clayton, "Uniform Federal Procedure," *Central Law Journal*, January 5, 1917, 7-13.]

Senate Judiciary Committee, Procedural Rule Making as a Legislative Function, Report of January 2, 1917

The issue of responsiveness was central to debates over authority to write civil rules of procedure. Lawyers who favored court-made rules argued that legislators altered procedural rules based on political pressures and that judges would change rules only accord-

ing to judicial experience and the needs of justice. These lawyers argued that the legislative codes and the process of altering them were inflexible and saddled attorneys with conflicting yet durable procedural rules.

Opponents of the Clayton civil rules bill countered that drafting rules of procedure was a legislative, not judicial, function. They argued that the Supreme Court had no constitutional authority to confer rules upon inferior federal courts. More pragmatically, they argued that the justices of the Supreme Court had little-to-no interaction with the lawyers and judges who operated in the trial courts. While Thomas Shelton and the ABA had complete faith in the Supreme Court justices to achieve optimal court procedures, a slim majority⁶⁶ of the Senate Judiciary Committee questioned whether the Court had the capacity, in addition to its growing caseload, to carefully study the rules and respond to the lawyers who operated under the procedural rules in the lower courts.

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The Supreme Court of the United States is, by its very constitution, conservative. It continued in force the old equity rules for nearly forty years after they were discarded in England, and until their very language became obsolescent and archaic. It is ordinarily overburdened with its customary work of trying cases. Even if it were readily responsive to popular demand and public opinion, it would rarely inaugurate any change until at least twenty-four States made some clamor. Its work is of such a character that the justices have no opportunity, or at least little opportunity, from their own experience and observation, to know whether the system as a whole or in any detail works satisfactorily or not. They are not thrown into such intimate contact with the members of the bar or the judges of the trial courts as would serve to enlighten them touching defects. While not exactly recluses, something of the sanctity and the solitude of the priesthood attends them.

66. Though the favorable report of the committee was labeled as the “majority report,” it was actually signed by a minority of the Senate Judiciary Committee, when one member changed his views after the initial vote for a favorable report. See Thomas J. Walsh, “Reform of Federal Procedure,” Speech Before Tri-State Bar Association at Texarkana, April 23, 1926, S. Doc. 105, 69th Cong., 1st sess. (1926).

How would those who have any complaint to make against the rules as a whole or against any specific provision of the rules, or because of any omission in the rules, make themselves heard? The court must turn itself into a quasi legislative body, hear the testimony of lawyers who can speak concerning the new system from intimate acquaintance with its working, who practice under it . . . and others who can enlighten the court concerning a better rule or set of rules in vogue in some of the States or in a foreign country.

The foregoing suggests that the function to be devolved upon the court is much more legislative in character than it is judicial. If a uniform code is a desirable thing, why should not Congress enact it? . . . It is quite strange that so many people have such an indifferent opinion of our legislative bodies and feel such security in a court that is removed as far as possible from the influence of popular opinion.

The reflections just indulged in lead to the inquiry as to whether the authority with which the bill seeks to invest the Supreme Court can be conferred upon it. Undeniably the Congress could, itself, adopt a code of procedure to be followed in the district court.

It has repeatedly passed laws affecting the proceedings in inferior courts which none of them ever felt they were at liberty to disregard as being without the scope of the powers vested in Congress. The original judiciary act . . . was an exercise of the power claimed by Congress always to prescribe the procedure in its courts of justice. If any of these many statutes ever had any virtue at all, it was because they were enacted pursuant to the legislative powers vested in Congress by the Constitution. It has no others. No legislative powers are reposed in the Supreme Court, and it is indisputable that Congress can delegate to it none such. Courts do make rules by which their own proceedings are governed, but always in subordination to the statutes. Rules of court are intended to meet contingencies for which express statutes make no provision. It is elementary law that except within very narrow limits a rule of court in conflict with a statute is void. . . . It is sometimes said that the right of a court to promulgate rules is an inherent right and it may be that if a court were created and no provision were made by law governing the procedure therein, it would have the power itself to prescribe how suitors should proceed to obtain a hearing before it. But the right so to regulate its own proceedings would

give way to the legislative will when legally expressed. That right, however, accords to the court power only to make rules governing its own procedure, not to regulate the procedure in another court, even though it be an inferior court. . . .

Whatever merits the plan of instituting a more simple and uniform system of procedure in the Federal courts has, it should be adopted upon a draft made by commissioners through the direct action of Congress, which, confessedly, has the authority to give to it legal sanction rather than through the action of the Supreme Court, whose power, either inherent or under an attempted delegation, is open to the most serious question.

[Document Source: *To Authorize the Supreme Court to Prescribe Forms and Rules*, S. Rep. 892, pt. 2, 64th Cong., 2d sess., January 2, 1917.]

Senator Thomas J. Walsh, Burden of Federal Rules, Tri-State Bar Association (Texarkana), Speech of April 23, 1926

Achieving uniformity of procedure across the federal courts necessarily meant that procedure between state and federal courts would diverge. Proponents of Supreme Court-made rules argued that with adjustments made by federal judges over the years, state and federal court rules already differed substantially. In addition, proponents hoped that uniform federal rules would act as a model for the states and encourage the adoption of uniform rules throughout the country.

Senator Thomas J. Walsh (D-MT), the Senate Judiciary Committee's primary opponent of uniform federal rules, objected that proposed Court-made rules would burden local "country lawyers" who practiced largely within a single state. He argued that it was too much to expect lawyers well-versed in local procedure to have to master new rules in order to enter a federal court. Presuming that the Supreme Court would establish rules based on common-law traditions, Walsh noted that lawyers trained in code-based rules would have a particularly difficult time transitioning to federal court. Ultimately, Walsh stated, litigants would be the ones to suffer from the challenges faced by their attorneys.

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It is argued in its behalf that it will bring about uniformity in the practice in actions at law in the Federal courts and simplify the procedure, thus relieving the courts and the bar of the heavy bur-

den they now carry in consequence of controversies that continually arise quite apart from the merits of the litigation with which they are concerned. It is undeniable that it would insure uniformity as between the different States, but it is equally undeniable that it would result in a lack of uniformity as between the practice in the courts of a State and the practice in the Federal courts in the same State. The legislator is concerned with the question as to which variety of uniformity ... is the more to be desired. Uniformity as between the several States would be convenient, no doubt, for Mr. Shelton and his associates among the members of the American Bar Association who try cases in many States, but the humble lawyer whose practice is confined to the State in which he resides may be pardoned for looking at the matter in quite a different light. It is not to be understood that any accusation is made that those urging the legislation are actuated by consciously selfish motives. ... But upon what consideration should the Congress impose the burden of mastering a new practice system upon the multitude of lawyers who never encounter any embarrassment because of a different system of practice in some State other than their own for the accommodation of the relatively few whose practice is more extensive. I am for the one hundred who stay at home as against the one who goes abroad.

Under the existing system the lawyer who has mastered the practice prescribed by the legislature of his State or developed by the decisions of its courts upon the foundation of the common law is equally equipped to institute, prosecute, and try actions at law in the Federal courts. ... The task is to be imposed upon him of acquainting himself with another system that may differ radically and is certain to differ in detail from that in which he has been trained, and with which, by experience, he has become intimately familiar. The burden would be a heavy one upon the young and active mind, but it would be oppressive in the case of the practitioner of advanced years wedded to the system learned in his youth, and all would be subject to error that might be serious or even fatal by confusing the requirements of the one with those of the other. Moreover, the rules prescribed would approximate those of the practice at common law, in which case lawyers bred under the code would be perplexed, or they would in general conform to the principles of the code, in which case the common law lawyer

would sweat, or they would be quite different from either, harassing everybody....

I inquire again, what is the substantial gain to be anticipated from this departure? Why does anyone want uniformity in the practice in actions at law in the Federal courts, except it be, as heretofore suggested, the lawyers whose practice extends over more than one State, a negligible number. It is offered in this connection that when the system comes into vogue the States, respectively, will conform their system to that prevailing in the Federal courts and thus uniformity will obtain through the Nation. One can understand how uniformity in respect to many subjects falling within the domain of substantive law is to be desired, . . . but with respect to procedural law variety is a matter of relatively little consequence. But upon what ground is the prophecy based that the States will conform their practice to that prescribed by rules of the Supreme Court? The lessons of experience must be disregarded to indulge any such belief.

[Document Source: Senator Thomas J. Walsh, "Reform of Federal Procedure," Speech Before Tri-State Bar Association at Texarkana, April 23, 1926, reprinted as S. Doc. 105, 69th Cong., 1st sess. (1926).]

American Bar Association Committee on Uniform Judicial Procedure, Support for Supreme Court-Made Rules, Report of August 10, 1922

By the early 1920s, Thomas W. Shelton and his ABA Committee on Uniform Judicial Procedure were becoming increasingly frustrated with Congress for failing to adopt what they considered to be a simple and popular reform. Prior to the 1920s, Shelton and the ABA rarely acknowledged or addressed criticisms of Supreme Court rule making and were content to boast about the number of lawyer and business organizations that supported the change.

In 1922, however, the ABA Committee on Uniform Judicial Procedure directly answered the objections of Senator Thomas J. Walsh, especially his complaints about the burden that a new court-made system of civil rules would place on country lawyers. In its report, the Committee dismissed such concerns as "selfish" and assured that the majority of lawyers would be willing to sacrifice to achieve the benefits of a uniform federal system of procedure. If anything, the Committee stated in its report, a uniform system of rules would also be a simpler system and would place local lawyers on the same footing as lawyers with vast experience in the federal courts.

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While objections are rare, it will serve a useful purpose to make reply to the few offered in the Senate to the Bar Association's program.

They seem to revolve around the political fear of *inconveniencing lawyers*, instead of facilitating the administration of Justice and benefiting litigants.

One objection, was to any change in the federal or state practice at all because some lawyers might be inconvenienced in having to learn a new system. The answer is that the lawyers have not sunk so low that they would put their personal comfort or advantage or even their lives ahead of the sacred duty of assuring a reasonable certainty of justice or of improving their noble and responsible profession. Viewing it in a lighter sense, it [is] as if one rebelled against the laws of sanitation because of the trouble of taking a bath. The bankers have accepted and are profiting by a complete reorganization of their business[.] Lawyers have sufficiently demonstrated that they are equally as patriotic. . . .

The second objection was that the small practitioner and the country lawyer could not afford to learn the new system for the few cases he would command. This connotes a spirit of selfishness and lack of patriotism unjust to the lawyers of small practice, who have always stood for the best in American life and its advancement because they had the time as well as the disposition to give thought to purely public matters. Their voice has been oftener heard upon the Hustings than that of any other vocation. But the objection will be accepted with a grain of humor by active practitioners in the Admiralty, Bankruptcy and Equity Courts. There will be but little to learn in the simple correlated system of rules that will be prepared by the United States Supreme Court with the aid and suggestions of lawyers and judges. Moreover, all classes of lawyers will start upon the same level and all will have had an opportunity to participate in its preparation and thus become familiar at first hand with its every detail. The objection is likewise a reflection upon the ability or the good intention of America's Great Tribunal. There will be no technicalities and no pitfalls to avoid. The Statute expressly provides that the Supreme Court shall see to that. The English did it in 1873 without inconvenience and

to their great satisfaction. There will be few to deny that American lawyers can do as much, even though they be inconvenienced. American lawyers and judges have been so long harassed by a technical and difficult court procedure, that requires intense study and great familiarity, that some have lost all sense of the possibility of a perfectly simple procedure....

But it is manifest that the small practitioner will be substantially benefited because, with a uniform system of simple court-made rules, he will find the door of no federal court closed in his face and will no longer need the association of one of the expert federal court practitioners now found at every Bar. They will start in together with the new system. It is the experts who would be expected to oppose this bill upon selfish grounds but they have been too patriotic to do it. The objection is as unworthy as it is unfounded because it places the small practitioner in the attitude of being willing to defeat improvement in the administration of justice for the sake of his personal convenience or profit, as has been pointed out, a sentiment that we feel assured will be promptly repudiated when brought to their attention.

[Document Source: Report of the Committee on Uniform Judicial Procedure, *Report of the Forty-Fifth Annual Meeting of the American Bar Association* (1922), 376–78.]

Attorney General Homer S. Cummings, Reviving the Movement for Uniform Procedure, Speech of March 14, 1934

By 1933, after years of failing to persuade the Senate to pass its bill, the ABA Committee on Uniform Judicial Procedure resolved to cease lobbying for procedural reform and to disband. That year, however, Senator Thomas J. Walsh, the long-time opponent of federal civil rules, was tapped to be Franklin Roosevelt's first attorney general but died before taking office. In his place, FDR appointed Homer Cummings, who was strongly in favor of the procedure bill and recommended its passage in 1934 with the support of Roosevelt himself.⁶⁷

In a March 1934 speech to the New York County Lawyers' Association, Cummings tied procedural reform to public concerns about the justice system's inability to keep up with growing crime, fears that had been growing since the recently ended era of Prohi-

67. Burbank, "Rules Enabling Act," 1094–98.

bition. He saw uniform federal procedure as a sign of order and efficiency in the federal courts that was required in a period where the machinery of justice faced serious challenges. With the absence of Walsh's strong criticism and the administration's support during the height of New Deal legislative activity, the procedure bill—as written in 1924—was reported favorably by the House and Senate judiciary committees and passed by both houses shortly after Cummings' public endorsement.

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I am persuaded that if the Federal courts could reform their procedure and render it not only simpler but more responsive to actual needs, the example of such a system would have a powerful and corrective effect upon the practice in the several States.

Courts exist to vindicate and enforce substantive rights. Procedure is merely the machinery designed to secure an orderly presentation of legal controversies. If that machinery is so complicated that it serves to delay justice or to entrap the unwary, it is not functioning properly and should be overhauled.

When the details of procedure are prescribed by statute, errors can be cured only by legislation. Regulation follows regulation with bewildering multiplicity until there is created a morass of laws in which the whole profession is mired. Thus, the Field Code of Procedure adopted in New York in 1848 contained only 391 sections. It later grew to 3,397 sections. The California code was amended 340 times in 10 years. Manifestly, procedural questions are too technical and too lacking in popular appeal to receive adequate consideration by any legislative body.

The Federal Conformity Act of 1872, regulating actions at law in the district courts, provides that practice and procedure in such actions shall conform, "as near as may be," to that which is followed in the State in which the Court sits. Whenever the Congress has legislated as to a particular matter the statute thus enacted is, of course, controlling. The words "as near as may be," under the liberal interpretation given to them, have introduced a bewildering mass of exceptions. A litigant in an action at law in a Federal District Court is, therefore, compelled to study, first, the State system of practice, second, Federal legislation relating to procedure and, third, judicial decisions sanctioning departure from State practice.

As the practice is not uniform in the 48 States, a serious burden is imposed upon lawyers who appear before Federal courts in more than one State, and, also, upon judges who are assigned to sit outside their immediate jurisdictions. Perhaps the most vital objection is that the Federal courts are tied to the antiquated system of statutory regulation now generally prevailing in the various States. Reform and improvement are, therefore, hopelessly stalled at the outset.

Let me turn, by way of contrast, to the manifest advantages of a system under which rules are adopted by the Courts. Clearly, this centers authority and responsibility in qualified hands. If changes are required, they are readily perceived by those who function under them. Surely, rules of court can be applied with less rigidity than statutory provisions. Under such an arrangement we would have every right to anticipate fewer decisions based upon technical questions of procedure while the attention of the bench and bar could be directed to the substance of right rather than to its form. Moreover, such a system tends to preserve the true balance between the legislative and judicial branches of the government, and is, therefore, in harmony with basic constitutional principles....

Our one great enemy is inertia. But surely the hour has struck. Let us not confess that we are so disorganized, so indifferent, so lazy, so ineffectual and so impotent that we cannot marshal our forces in behalf of a measure of reform which the leaders of the bar have so long and so overwhelmingly approved.

[Document Source: Homer S. Cummings, "Immediate Problems for the Bar," *American Bar Association Journal* 20 (1934): 211–12.]

The Conference of Senior Circuit Judges

Federal wartime contracts, a host of new federal regulatory laws, and the start of the Prohibition Era in 1919 brought a flood of civil and criminal cases into federal courts and once again stressed the capacity of the federal judiciary. The number of civil cases commenced annually to which the U.S. government was a party grew from 2,800 to 9,700 between 1918 and 1921, with other civil cases growing from 13,800

to 22,400 in the same period.⁶⁸ The number of criminal cases exploded from 19,600 in 1917 to over 35,000 a year later and 54,000 in 1921.⁶⁹ In his 1921 report, Attorney General Harry M. Daugherty estimated that it would require at least 30 new judgeships for the courts to begin to process the backlog of cases.⁷⁰

To meet the new demands on the courts, Daugherty and Chief Justice William Howard Taft presented Congress with legislation designed to give the Supreme Court greater power to coordinate the allocation of federal judges throughout the judicial system. Taft's proposal was to create a conference of senior circuit judges to gather information about caseloads in the various circuits and meet once a year to discuss how best to mobilize judges in the courts. Taft modeled this conference on the state judicial councils that progressive reformers were promoting to empower judges and members of the bar to study the courts, prescribe rules of procedure, and offer administrative reforms.⁷¹

Under Taft's original plan, Congress would have appointed eighteen new judges to be designated "at-large" within a judicial circuit and assigned to districts by the Chief Justice based on the recommendations of the senior circuit judges and the Attorney General. The "at-large" seats would only be temporary and not refilled after the termination of the appointed judge. Daugherty contended that the demands on the judiciary were largely temporary as a result of World War I and posited that a method besides new permanent judgeships would be more appropriate—and less expensive to the Treasury.

Taft's proposal for greater court control over the allocation of federal judges sparked heated debate over the transfer of responsibility over the courts from the legislative branch to the judiciary itself. Taft's desire to inject what he termed "executive" principles into court administration raised questions as to how much extra-judicial power

68. American Law Institute, *A Study of the Business of the Federal Courts, Part 2: Civil Cases* (Washington, DC: American Law Institute, 1934), 111.

69. American Law Institute, *A Study of the Business of the Federal Courts, Part 1: Criminal Cases* (Washington, DC: American Law Institute, 1934), 107.

70. *Report of the Attorney General of the United States* (1921), 3.

71. Wisconsin pioneered the judicial conference in 1913, and Massachusetts created the first judicial council that included members of the bar and other representatives in 1924. Hurst, *Growth of American Law*, 96.

judges should exercise. Taft's proposals contemplated much greater administrative power of the Chief Justice over the entire judiciary. Finally, the idea for at-large judges not rooted in any particular district and designated without the input of Congress challenged long-held beliefs in local political control over judgeships.

William Howard Taft, Expanding the Assignment Powers of the Chief Justice, American Bar Association Annual Meeting, Speech of October 21, 1914

William Howard Taft had been commenting on delays in the federal courts since he campaigned to be President of the United States in 1908. After leaving the White House in 1913, Taft served as president of the American Bar Association and, in his presidential address of 1914, articulated a plan for helping the federal courts process its growing business. In addition to giving the Supreme Court the power to write uniform rules of procedure for the federal courts (discussed above), Taft advocated giving the Chief Justice and an assisting council of judges the authority to freely reassign judges to district courts throughout the country.

There was some precedent for assigning judges across circuits. Since the 1850s, a circuit justice (and after 1869, a circuit judge) could reassign district judges within a circuit in case of a disability or an accumulation of business. If the circuit judge was unavailable or the designated district judge did not fulfill his duties, the Chief Justice could reassign a district judge to a district court in a contiguous circuit.⁷² In 1907, Congress empowered the Chief Justice to reassign a district judge from any circuit in case of disability.⁷³ In response to the extraordinary caseloads in the Southern District of New York, Congress in 1913 passed a law allowing the Chief Justice to reassign a district judge from any circuit—with the judge's consent and the approval of the senior circuit judge of the circuit—to hold district court in the Second Circuit. (The original bill was to apply to the entire system but was limited to the Second Circuit by the Senate Judiciary Committee.) In addition, the judges of the abolished Commerce Court were designated as at-large and could be assigned by the Chief Justice to any court in the country.⁷⁴

72. Revised Statutes 1 (1875), Sec. 591–593, p. 103.

73. Ch. 2940, *U.S. Statutes at Large* (1907), 1417.

74. Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton: Princeton University Press, 1973), 14–17.

Taft argued that it was time to address the federal judiciary as a coherent system rather than a collection of individual courts. He believed that placing the power to mobilize judges in the hands of the Chief Justice would inject a much needed “executive method” into judicial administration. With proper study of conditions in the courts, he contended, judges could maximize the efficient use of the judicial force and remove the decision from the politics of Congress.

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There is one means of facilitating the dispatch of business in courts of justice that might well be applied in our federal courts. We have in our federal system 32 circuit judges and 94 district judges. The district judges are apportioned, one, two, or three, or even more, to a state with its judicial districts, and the states make up the nine circuits. Originally the district judges and the circuit judges of each circuit could be used to help along the business in all the districts of that circuit, and in the business of its Court of Appeals. Now the Chief Justice can send district judges in a limited class of cases from one circuit to another circuit. This system works well so far as it has been applied, but I think a much greater advantage could be derived from it if it were amplified to its logical development. Now that litigation has increased in parts of the country so that its mass is overwhelming, we must approach the problems of its disposition in the same way that the head of a great industrial establishment approaches the question of the manufacture of the amount that he will need, to meet the demand for the goods which he makes. This is done by estimate of the work to be done and an assignment each year of a competent force to do it. In other words, the time has come to introduce into the dispatch of judicial work something of the executive method that great expansion has forced in other fields of human activity.

In the judicial business of the United States we should devise a system by which the whole judicial force of circuit and district judges could be distributed to dispose of the entire mass of business promptly. Some judges have too much and a greater number could do more. Let us equalize their burdens and give them a maximum of effectiveness. It seems to me that either the Supreme Court or the Chief Justice should be given an adequate executive force of competent subordinates to keep close and current watch upon

the business awaiting dispatch in all the districts and circuits of the United States, and likely to arise during the ensuing year, to make periodical estimate of the number of judges needed in the various districts to dispose of such business, and to assign the adequate number of judges to the districts where needed. Then the Supreme Court by making the rules of procedure and by distributing the judicial force could greatly facilitate the proper disposition of all the legal business in the country and in a sense become responsible for its dispatch. If it is found that there are not judges enough, then we should hear from the Supreme Court as a competent authority, not influenced by political or personal considerations, how many judges are needed and where, and the judicial force could be increased to meet the real exigency. On a small scale this system has been worked in the Municipal Court in Chicago and in some other municipal courts, and the possibility of thus getting rid of an enormous mass of litigation has been demonstrated.

[Document Source: "Address of the President," *Report of the Twenty-Seventh Annual Meeting of the American Bar Association* (1914), 383–84.]

Daugherty Committee, Proposal for At-Large Judges, Report of July 21, 1921

In 1921, Attorney General Harry M. Daugherty appointed a committee of judges and attorneys general to investigate ways to relieve the courts of congestion. Once confirmed as Chief Justice of the United States, William Howard Taft also met with Daugherty and the committee to offer his own suggestions. The committee, chaired by District Judge John E. Sater of the Southern District of Ohio, prepared a bill, which came to be known as the Daugherty bill, that provided for eighteen at-large judgeships, two for each circuit. The authority over where to assign the at-large judges was given to the Chief Justice of the United States, who would consult with the Attorney General and a new Conference of Senior Circuit Judges.⁷⁵

In its report, the committee emphasized that its recommendations were best suited for what it saw as a temporary emergency. Rather than requiring statutes to create new judgeships in individual districts—a process that would be slow, political, and irreversible—Sater and the others saw its “general law” as serving the needs of the entire judicial system in a rapid fashion. In a nod to the temporary

75. Fish, *Politics of Judicial Administration*, 24–32.

nature of the problem, the bills provided that the judges would have no successors appointed after the original appointee left the bench.

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The existing condition can be relieved only by increasing the number of district judges and by providing a method of mobilizing the judicial forces so as effectively to reach and relieve congested districts. We believe the number of bills pending before Congress for the creation of new districts and additional judges and in some instances for the redistricting of States will not alone . . . give the present desired relief. We believe the proper and prompt enforcement of the national prohibition act and other recently enacted statutes . . . can be best accomplished by a law which gives immediate and general relief throughout the entire country rather than by a number of laws which extend only to particular districts. A general law is best adapted to give quick relief to an urgent situation which may be temporary in duration. The enactment of local laws is adapted to furnish permanent relief in particular districts when the congestion is not likely to be temporary. . . .

We are confronted by two distinct situations: (1) Congestion in many of the districts throughout the country, largely due to violations of the prohibition laws; (2) increase in the civil and criminal business of the Federal courts due to growth in population and business in large cities and the leading industrial centers. The first we believe to be temporary; the second we are sure is permanent. We have, therefore, concluded the situation developed by the two kinds of congestion mentioned should be differently treated because they are different in duration—the one calling for temporary relief only and the other demanding legislation of a permanent character. . . .

The advantage of the creation of the judges at large to relieve the temporary congestion is they may be mobilized through designation by the Chief Justice at the suggestion of the Attorney General and senior circuit judges at points most needed and so marshaled as to render the most efficient service. It is contemplated that the exigency which they are created to meet may pass away and so it is provided that, unless Congress enacts to the contrary, no successor shall be appointed upon the death or retirement of any such judge.

es. Although the creation of judges at large will be an expedient adopted to relieve the existing temporary excess of business, it may so demonstrate its worth as to justify a permanent continuance of such judges. We feel that the creation of unattached district judges is not the best method of caring for an increase of business in the Federal courts due to normal growth in population and business in certain of the districts of the country. This increase is not in any sense occasional and can only be cared for by methods that give permanent relief, i.e., the creation of permanent judgeships. In such case we believe that the additional judges should be attached to the district overburdened with cases and should not be itinerant. The interest of the judge in his district and the advantage to litigants of having resident rather than imported judges as a permanent condition forbid the creation of unattached judges to remedy permanent congestion in particular districts. We have in pursuance of this policy limited the number of recommended judgeships at large to the minimum number believed to be necessary to care for the temporary congestion due to the flood of criminal litigation arising out of prohibition and war statutes and the unusual amount of litigation due to the narcotic law, the shipping industry, and bankruptcy proceedings resulting from the country's financial readjustment.

[Document Source: Report of the Committee Selected by the Attorney General to Suggest Emergency Legislation to Relieve the Federal Courts of their Congested Condition, July 21, 1921. Reprinted in U.S. Senate, Committee on the Judiciary, *Additional Judges, United States District Courts*, 67th Cong., 1st sess., October 5 & 11, 1921.]

Chief Justice William Howard Taft, Oversight of Judges,
American Bar Association Annual Meeting, Speech of
September 1, 1921

Chief Justice Taft advocated the creation of the Conference of Senior Circuit Judges throughout 1921 in public addresses and testimony before Congress. In the 1910s, Taft had described his idea of a council of judges as a way to study conditions in the courts and assist in decisions regarding the reassignment of judges. In a 1921 speech to the American Bar Association, Taft also stated that he saw the conference as a way to pierce the independence of the district courts and encourage what he often referred to as “team work” among the individual judges.

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In the bill is another important feature that in a sense contains the kernel of the whole progress intended by the bill. It provides for an annual meeting of the Chief Justice, the senior circuit judges from the nine circuits, and the Attorney-General, to consider required reports from district judges and clerks as to the business in their respective districts, with a view to making a yearly plan for increasing for the time the new and old judicial force of the United States where the arrears are threatening to interfere with the usefulness of the courts. It is the introduction into our judicial system of an executive principle to secure effective team work. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men and some are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to cooperate much more readily in an organized effort to get rid of business and do justice than under the "go-as-you-please" system of our present federal judges which has left unemployed in easy districts a good deal of the judicial energy that may be now usefully applied elsewhere.

[Document Source: "Informal Address by Honorable William Howard Taft," *Report of the 44th Annual Meeting of the American Bar Association* (1921), 564–65.]

Editorial, Unification of the Federal Courts, *Journal of the American Judicature Society*, December 1921

The Daugherty plan for a conference of senior circuit judges appealed to judicial reformers interested in court unification. Leaders of the American Judicature Society and the American Bar Association believed that states could achieve more efficient judicial administration by replacing their collection of distinct courts into unified systems under centralized administration. The editors of the *Journal of the American Judicature Society* believed that the plan for a conference of senior circuit judges offered benefits of court unification to the federal judiciary. A conference of judges would allow the courts to gather and analyze statistics about the court system in a more timely fashion and allow greater responsiveness to the needs of the system. The conference, the editors argued, would constitute the institutional memory of the courts and allow judges to plan for the future rather than only responding to immediate needs.

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There are various other bills before the Congress aimed at meeting the need, but they are all local in character, like similar legislation in the past. The bill which bears the attorney general's name takes a comprehensive view of the entire national problem. Any other solution would be certain to result in waste and lack of entire success, for the business in different districts fluctuates from year to year and nobody can tell far in advance what their relative demands will be. A system of assignment is imperative.

The proposal embodied in the Daugherty bill implies a functional unification of the United States judiciary. It permits of utilizing the judicial force at all times to one hundred per cent capacity. It provides means for making the most of the individual talents and experiences of the judges....

Other features of the unified court principle naturally follow. Assignment involves administrative direction, and this calls for judicial and administrative statistics and stated meetings for the consideration of the problems arising.

The lack of statistics generally in our judicial systems is what mainly differentiates them from the courts of other countries. Without statistics the courts are blindfolded. Statistics in a properly organized institution constitute its memory. Without memory there can be no thinking and planning. It is no wonder that the courts of the country, whether state or federal, cannot meet criticism or shape policies to obviate it.

[Document Source: "Rally Support for Daugherty Bill," *Journal of the American Judicature Society* 5, no. 4 (December 1921): 120–21.]

Senator John Shields, Objection to Executive Principle in Judiciary, U.S. Senate, Speech of March 31, 1922

William Howard Taft's proposal for at-large judges assignable by the Chief Justice generated heated opposition against centralized authority in the federal judicial system. Critics characterized the plan in military terms, with the chief justice acting as a general in charge of mobilizing troops. Mississippi Senator John Sharp Williams, for example, called the proposed at-large judges a "perambulatory light dragoon flying skirmish-drill squadron." District Judge William B.

Sheppard of the Northern District of Florida called the new powers over trial courts “dictatorial.”

In congressional debate, Senator John Shields (D-TN) offered the most elaborate criticism of giving the Chief Justice executive authority over the courts. Shields—who resented Taft’s role in drafting the legislation in the first place—argued that district courts were independent entities and that the power to reassign judges represented an infringement on their independence. He feared that the Chief Justice could use his power to assign judges to particular districts in hopes of achieving specific results in cases there. Congressmen charged that the bill was supported by those who wanted to send judges from dry states into wet states to enforce prohibition laws. Finally, he argued that judges should not exercise authority that was not strictly judicial in character.

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I believe the bill is of a most revolutionary character. I believe it contains the germs, at the least, of the most serious assault that has ever been made upon the integrity and independence of the judiciary of the country....

... The Chief Justice has no more to do with the judges of the district courts of the United States, and with the trial of cases, and procedure in those courts, or the congestion of business in them, than does King George. His interference is purely voluntary and officious....

Judges should never be authorized to exercise powers not strictly judicial. Their whole time, with proper seasons, of course, for recreation and repose, and their serious thoughts should be devoted to the duties of their high office. They should be wholly judges, always judges, and nothing but judges. The judicial power is incompatible with any other pursuit in life. All the faculties of every man who assumes it ought to be constantly exercised and confined to the serious consideration of his judicial duties. Above all things, judges should not be charged with the exercise of executive or political duties. I believe that it is the opinion of the bar and the people of the United States, and especially as relates to the Federal judiciary where the tenure of office is practically for life, that when a man accepts a judgeship and becomes a high priest of justice, ministering at the altar, he should be separated from all business concerns and forswear political ambition and preferment.

The power given the Chief Justice to call conferences of the circuit judges, adopt plans, and ultimately himself assign judges is a dangerous innovation of doubtful constitutionality. The Chief Justice and the Supreme Court are, by the organic law constituting that court, given no original jurisdiction over the trial of cases in the district courts, and they have no right to interfere in any manner or to control the proceedings of those courts by moral or other influence. There should be no opportunity for such influence and no semblance of its exercise. It is true there is no provision here for direct control of district judges in the trial and decision of cases, but need Senators be told of the questions which can be discussed by the Chief Justice with the circuit judges in the conferences, and how their views and wishes can be passed down to the district judges? Is not this an opportunity for political influence and power over the judiciary of which a designing man could avail himself in times of great political turmoil?

Would any Senator favor giving the chief justice of the highest court in his State the power to summon the judges of the inferior courts before him in conference to make reports of the condition of the dockets and business of their districts and then, in his discretion, divide up this business and assign and send judges out of their jurisdiction as he might think to the public interest? The people of the States would not tolerate such an assault upon the independence and purity of their courts. They would consider such an arrangement, however honest and patriotic those promoting it might be, a potential political machine subject to great abuse and eventually contaminating the judges with partisan spirit and strife which would destroy the integrity of their courts.

A very serious objection is that the bill confers upon the Chief Justice executive power. The Constitution vests the power to appoint judges in the President of the United States. This bill vests it in the Chief Justice for the time being. The commission of the President authorizes and directs a judge to hold court in a certain district, where he is to reside and where he is known to the people. This bill gives the power to the Chief Justice to modify that appointment and send this judge away from his home to preside over the courts and dispose of the business of other people, to whom he may be unacceptable. The assignment may be for any period—for life. When the judge of a particular district is nominated to fill an

existing vacancy the people of the district have the right to protest against the appointment for any valid or sufficient reason, and, in that way, they have a certain choice in the selection of their judge.

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The appointment can be made under this bill without the knowledge of the people of the district, without their consent, and without an opportunity to protest. It is an encroachment upon the prerogatives of the Executive, and, worst of all, it deprives the people of the very limited right they have in the selection of Federal judges. It is wrong in principle and it is unjust in practice. While the present bill is not so obnoxious as the one which the Chief Justice appeared before the Judiciary Committee to advocate, it is the entering wedge for the recognition of a bad policy and an assault upon the independence of the judiciary, which may grow and grow and sap and undermine that independence. The powers of government are not only separated into three great departments, but it is the policy of the law that the individual holding office in one of those departments shall not also exercise the functions of another department, for without this they can not be separate and independent and must necessarily be contaminated with political influence.

[Document Source: *Congressional Record*, 67th Cong., 2d sess., 1922, 62, pt. 5:4855–65.]

Representative William F. Stevenson, Preserving Localism in the Federal Courts, House of Representatives, Speech of December 10, 1921

The Daugherty bill aroused fierce resistance from Southern Democrats who feared that centralized power in the hands of the Chief Justice would make citizens subject to out-of-town judges. The House Judiciary Committee removed the provision for eighteen at-large judges and replaced it with the appointment of twenty-three judges to specific districts. The committee sought to maintain some flexibility by extending the Chief Justice's reassignment authority to send district judges across circuit lines (the Chief Justice already had power to reassign judges within a circuit and to the overburdened Second Circuit). Even this provision aroused strong opposition, however, from politicians who objected to the Chief Justice's ability to foist upon their courts judges from distant locales.

Representative John Sharp Williams of Mississippi stated that he opposed “carpetbagging Nebraska with a Louisianan, certainly to carpetbagging Mississippi or Louisiana with somebody north of Mason and Dixon’s line.”⁷⁶ Senator Broussard of Louisiana observed that “I regard it as fundamental that a judge appointed for a given district is appointed to preside over the cases which arise among the people occupying that jurisdiction.”⁷⁷ He protested that “men [would be] tried by judges who possibly are not altogether in sympathy with the ideas of the people over whom they are presiding.” Finally, in a speech excerpted below, South Carolina Democrat William F. Stevenson objected that judges should not sit in courts where they were unfamiliar with local legal culture.

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Mr. Chairman, this is merely a provision which is an entering wedge to having what once was called a lot of “carpetbag judges” transported from one section of the country to another. I have no harsh words to speak about that class of judges, but the Federal courts administer law which is written in the States. In matter of property, in all important matters, the proceedings are according to the law of the State where the court is conducted. Now, you propose to fix it here so as to take judges, say, from Louisiana, where the civil law applies, over into Alabama, where the common law applies, and put them to work to hold court and try all sorts of cases. You propose to take men from Maryland or Virginia or Pennsylvania and send them down to South Carolina, where the practice is different, where many of the rules of property are different, where the decisions are entirely unfamiliar to the transferred judge. You transport him down there and put him on the bench to try the cases that are to be tried in that jurisdiction.

[Document Source: *Congressional Record*, 67th Cong., 2d sess., 1921, 62, pt. 1:204.]

Senator Thaddeus Caraway, Judicial Reassignments and Anti-Lynching Laws, U.S. Senate, Speech of March 31, 1922

As the frequent reference to “carpetbagging judges” by southern representatives in Congress suggests, the Daugherty bill’s provisions for

76. *Congressional Record*, 67th Cong., 2d sess., 1922, 62, pt. 5:5107.

77. *Id.* pt. 5:4847.

reassignment of judges tapped into southern anxieties about northern interference with the region's racial order. Beginning in 1918, Congress debated an anti-lynching bill introduced by Representative Leonidas Dyer (R-MO), which targeted leaders of mob violence against African Americans as well as state and municipal officials who failed to prosecute them. The National Association for the Advancement of Colored People strongly supported the Dyer bill, and it almost became law in 1922 when the House approved it and only a filibuster in the Senate prevented its passage.

Senator Thaddeus Caraway of Arkansas charged that Republicans would use the transfer provisions of the Daugherty bill to ensure that northern judges were assigned to the South to enforce an anti-lynching law. He alleged that a "powerful influence" was lobbying to have outside judges sent into particular courts to enforce federal law "according to their ideas."

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I happen to know, or else the spokesman of the people did not correctly represent them, that this bill with section 2 in it is being supported by a certain powerful influence because they believe that if judges in a certain circuit do not enforce the law according to their ideas they can send some other judge to that circuit to do it. I happen to have been approached by the representative of these people and urged to support the bill with section 2 in it; and he said that if section 2 was stricken out, the bill, so far as they take an interest in it, would be destroyed. It was the idea . . . that they would hold over a judge the constant threat, "If you do not enforce the law according to our ideas, we will put somebody else there who will"

Suppose, for instance, the antilynching bill were to pass. Of course it never was intended to be passed; it was only a bid to induce the negro to continue to vote the Republican ticket; but if it were at some time to become the law, do you not know that there will be a constant threat held over the judges in some sections, "If you do not try these causes according to our view, we are going to get back of the matter with this powerful organization and send a judge there who will try them according to our idea"? That is a threat, and it is a thing that will do more to discredit the judiciary than anything else. It is a constant threat held over the judge that "if you do not try these causes the way we desire, if you do not get

the results that we want, we will send somebody here that will.” It is a humiliation to which no judge ought to be compelled to submit.

[Document Source: *Congressional Record*, 67th Cong., 2d sess., 1922, 62, pt. 5:4848.]

Representative Clarence Lea, Conference of Senior Circuit Judges and the Legislative Process, House of Representatives, Speech of December 10, 1921

Some lawmakers objected that the meeting of the Conference of Senior Circuit Judges infringed on the legislative process. In remarks against the Daugherty bill, Representative Clarence Lea (D-CA) asserted that the conference’s mandate to study the conditions in the courts and make recommendations to Congress for the appointment of additional judges infringed on the responsibilities of Congress over the courts. He also objected that the conference put federal judges in the position of advocating legislation for their own benefit through a publicly supported organization. Lea feared that the conference injected judges into political concerns and threatened to harm the public reputation of the federal courts.

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I believe there is a real need for increasing the number of judges in this country. But in my judgment it would be a mistake to make section 2 a part of the law of the land. Section 2, in effect, provides for an annual conference of Federal judges, to be called annually by the Chief Justice of the Supreme Court, the expense to come out of the Treasury. The judges summoned are compelled to attend whether they desire to do so or not and are compelled to “remain throughout its proceedings.” Each district judge in the country is compelled to submit annually to the conference his recommendations as to the “needs of additional judicial assistance” for the next year. Every judge, whether he wants any assistance or not, must annually express his opinion upon that matter. Though they need no assistance, many will be required to travel annually to a common meeting place, at public expense, to so report.

The conference itself must, among other things, make “a comprehensive survey” of the court business of the country, and, further, judges shall “advise as to the improvement of the administration of justice.” In other words, the Federal judges, in conference

assembled, are to be a legally constituted and publicly financed propaganda organization in behalf of the Federal judiciary of the country.

I am opposed to this section for four reasons. In the first place, it places the judiciary of the country in a self-seeking position. In the second place, it assigns to the judges legislative and political functions, and throws the judiciary of the country into the fields of destroying controversies. In the third place, the conference proposed would easily deteriorate into a publicity-seeking propaganda effort. And, in the fourth place, it is cheapening to the judiciary for its judges to desert court work, to assemble annually at public expense in what would be regarded by the public as more or less a junket or annual vacation.

If the Federal judges of the United States were members of a legislative body, if they were a boosters' organization, or if they were a fraternal order, such an arrangement as provided for in section 2 might be appropriate, but I believe this scheme is wholly inappropriate for the Federal judges of the United States. . . .

I regard our courts, and particularly our Federal courts, as the first and last bulwark of our Government. It is of primary importance in the administration of our Government to keep the Federal judiciary so far as possible above legitimate criticism. We should not endanger the prestige of our judges or invite them into fields of destroying controversies by compelling them to perform functions primarily legislative or political. We should not encourage—or we should not require, as this bill does—our Federal judges to participate in practices that will inevitably subject them to charges of junketing and self-seeking at public expense.

This conference scheme will tend to organize our Federal judges into a judicial machine. It will furnish new grounds of attack by those who would weaken and destroy the functions of our Federal courts. . . .

What will these judges do when they meet? In making a survey they will perform a legislative function that belongs to a committee of Congress and not to a judicial body.

They are required to "submit recommendations as to the needs." They are charged with the duties of advising as to "improvement or expedition of the administration of justice."

We know about what that will mean. It will mean eventually that our Federal judiciary in conference assembled will become the propaganda organization for legislation for the benefit of the Federal judiciary. As section 1 gives judges and the Attorney General the right to create a Federal judgeship, section 2 will give official color to the judicial recommendations to Congress to create more judgeships and seek other advantages for the Federal judiciary.

[Document Source: *Congressional Record*, 67th Cong., 2d sess., 1921, 62, pt. 1:202.]

Supreme Court Appellate Jurisdiction

By the 1910s, the caseload of the Supreme Court of the United States was once again reaching the point of crisis. The Circuit Courts of Appeals Act of 1891 had diverted a portion of the Court's appellate jurisdiction to the new intermediate courts. Under the 1891 act, the Supreme Court heard appeals as of right from the district and circuit courts, all cases involving construction or application of the Constitution, or any challenge to the constitutionality of a U.S. statute. All other cases would be appealed to the circuit courts of appeals. Cases brought into the federal courts based solely on diversity of citizenship (as well as a few other categories of cases, such as those arising under patent or revenue laws) were made final in the appeals courts and could be brought to the Supreme Court only by the Court's discretion through a writ of certiorari. Federal questions not involving the Constitution, such as cases based on construction or application of a federal statute, could be appealed from circuit courts of appeals to the Supreme Court.⁷⁸

Congress expanded the scope of certiorari through a number of statutes in the 1910s. Prior to 1914, the Supreme Court granted writs of error as of right in cases where a litigant claimed a federal right and was denied by the highest court of a state. The Framers had been concerned above all with upholding federal authority from local prejudice. When the New York State Court of Appeals (the highest court in the state) struck down a state workers' compensation law as a violation of the federal constitution in the case of *Ives v. South Buffalo Railway Company* in 1911, there was almost universal protest

78. *U.S. Statutes at Large* 26 (1891), 826.

that a state could not appeal a ruling that voided important social legislation, especially when similar statutes had been upheld in other states. Congress responded in 1914 with a statute that did not grant a writ of error in such cases, but instead allowed litigants to petition for a writ of certiorari.⁷⁹ In that way, the Supreme Court could ensure uniform constitutional decisions among state courts without adding to its growing caseload. A 1915 statute ended appeals as of right in bankruptcy cases. Congress in 1916 abolished the Court's obligation to hear appeals from circuit appeals courts under a host of specific federal laws. In that statute, Congress also expanded the Court's discretion over appeals from the state courts by limiting appeals as of right to two classes of cases: where a statute or treaty of, or authority exercised under, the United States was challenged as repugnant to the federal constitution and the state court denied its validity, and where a state statute, or authority exercised under, was challenged as unconstitutional and it was upheld. Cases involving state court construction of a federal statute, or where a federal right was asserted without challenging the validity of a statute, were now subject to the Court's discretion to grant certiorari.⁸⁰

By the 1920s, growing caseloads led to renewed debate over altering the appellate jurisdiction of the Supreme Court. Chief Justice William Howard Taft led a campaign to reduce the Court's workload by giving the justices more discretion over the cases that they would hear. Upon his appointment as Chief Justice in 1921, Taft appointed Justices William R. Day, Willis Van Devanter, and James C. McReynolds (with George Sutherland taking over for Day upon Day's retirement) as a committee to draft a bill codifying in a single statute the array of laws governing appeals to the Supreme Court and limiting its mandatory appellate jurisdiction further. Taft had spoken during the previous decade of reducing the Supreme Court's caseload as part of his overall plan for administrative reform in the federal courts. For Taft, fewer cases would free the justices to fulfill the other administrative responsibilities for which he was campaigning: writing rules

79. *U.S. Statutes at Large* 38 (1914), 790.

80. Edward A. Hartnett, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," *Columbia Law Review* 100, no. 7 (November 2000): 1643–38.

of civil procedure and studying court conditions to efficiently allocate judges throughout the country.⁸¹

The proposal, submitted to Congress in 1922 and popularly known as the Judges' Bill, called for sending appeals on federal and constitutional questions from the district courts to the circuit courts of appeals and making appeals final there unless the Supreme Court granted a writ of certiorari.⁸² A select group of cases would continue to be appealable directly to the Supreme Court from the district court: those involving the Sherman Antitrust Act, the Interstate Commerce Act, criminal appeals, and injunctions against state officers and the Interstate Commerce Commission. Appeals from the Court of Claims, the Court of Customs Appeals, and the Court of Appeals of the District of Columbia—courts that had become a voluminous source of appeals to the Supreme Court because of issues arising from the U.S. participation in World War I—were also transferred to the discretion of the Court.

Taft's proposal led to a broader reconsideration of the role of the Supreme Court at the head of the nation's legal system. Taft and others argued that the Supreme Court was not a tribunal for adjudicating the rights of individual litigants. Instead, they believed the Court was to expound constitutional principles and resolve legal disputes of national importance.

Justice Willis Van Devanter, Need to Limit Appeals to the Supreme Court, Testimony Before House Judiciary Committee, December 18, 1924

As concerns about the speed and cost of litigation in the federal courts grew, some lawyers and judges began to target multiple appeals as a way to expedite cases and unclog the courts. As early as 1898, Supreme Court Justice David Brewer counseled, "Do not be so anxious to give every man the right to many trials."⁸³ As President, William Howard Taft included in his annual messages to Con-

81. Frankfurter and Landis, *The Business of the Supreme Court*, 255–72.

82. H.R. 10479, 67th Cong., 2d sess. (1922). The bill was resubmitted in 1924 as S. 2061, 68th Cong., 1st sess., and H.R. 8206, 68th Cong., 2d sess.

83. David Brewer, "Growth of the Judicial Function," *Annual Report of the Organization and the First Annual Meeting of the Colorado Bar Association* (1898), 91.

gress in 1909 and 1910 a call to limit appeals to the Supreme Court to constitutional questions.⁸⁴

In testimony before the House Judiciary Committee in 1924, Justice Willis Van Devanter argued that in most cases an appeal to the Supreme Court needlessly extended the time and cost of litigation. Review by a state supreme court or a circuit court of appeals, he contended, was usually enough to ensure that the cases were correctly decided.

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It is not too much to say that one-third of the business which now comes to the Supreme Court results in no advantage to the litigants or the public. Permit me to explain how this is so. Cases coming from a State court have already passed through two courts; and so of cases coming from a circuit court of appeals. In each instance the case has been through a court of original jurisdiction and an appellate court. Of course, most of them have been rightly decided. Our obligatory jurisdiction operates to give a review in a third court as of right, even though the decision is obviously correct. A further review in such a case serves no useful purpose. It is of no benefit to anyone. In such cases the review usually is sought for purposes of delay or in an obstinate effort to wear out an adversary; and the crowded state of the docket assists in accomplishing that purpose. . . . More than two-thirds of the cases which come to us under our obligatory jurisdiction—from State courts, circuit courts of appeals, district courts, and the Court of Claims—result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution. This, we think, illustrates that the present statutes are too liberal—that they permit cases to come to us as of right with no benefit to the litigants or the public. What we learn of the cases in examining them confirms and emphasizes this conclusion. Of course, in proportion as our attention is engaged with cases of that character, it is taken away from others which present grave questions and need careful consideration.

[Document Source: House of Representatives, Committee on the Judiciary, *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States*, Hearing on H.R. 8206, 68th Cong., 2d sess., December 18, 1924, 12–13.]

84. *Congressional Record*, 61st Cong., 2d sess., 1909, 45, pt. 1:31; *Congressional Record*, 61st Cong., 3d sess., 1910, 47, pt. 1:25.

Chief Justice William Howard Taft, Certiorari and the Supreme Court's Role, Testimony Before House Judiciary Committee, March 30, 1922

The Supreme Court justices who publicly supported the Judges' Bill in 1924 asserted that not all legal issues classified as "federal questions" were of equal importance. In testimony before the House Judiciary Committee, Chief Justice William Howard Taft articulated his vision for the role of the Supreme Court in the federal judicial system and described what types of cases should be permitted a hearing. He stated that appeals to the Supreme Court were too often a way for wealthy litigants to delay resolution of a lawsuit and make justice too costly for ordinary Americans. He argued that the Supreme Court should only decide issues of law that affected the nation as a whole, not just the litigants to a particular lawsuit. The Supreme Court would establish uniform principles of law for the country, rather than resolve ordinary legal disputes.

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The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Whenever a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course. These being the considerations that govern our allowance of certioraris the question whether the case was rightly decided in the court below as a matter of first impression is one of minor consideration with us. A case may be a very important case financially; it may involve millions of dollars, but it may turn upon a question of fact or principle of law, the exposition of which is not important because it is well settled. In such cases we reject the petition. It does not come in because it is financially important to the parties, or because it is important to the parties at all. Every case is important to the parties. It comes in simply because the principle involved is such that it is important to have a general exposition of it for the benefit of the lawyers, for the benefit of the inferior courts, and for the benefit of the public at large, especially with respect to any constitutional

issues involved. With these principles clearly before us the proper basis for the distribution of jurisdiction among the courts, we came to the question of how are we going to limit the jurisdiction of the Supreme Court. . . .

Important cases are not determined by the amount involved. On the other hand, we should not be influenced by a desire to give every man a chance to go to the Supreme Court. The not infrequent view of State legislators, expressed in the declaration, "I want a system by which the poorest man can carry his case through to the highest court," is fundamentally erroneous in its practical operation. There is no class of litigants to whom the dispatch of business is so important as to the poor litigants. It is the rich corporation or the man with the long purse who, as a litigant in the court, is greatly advantaged by a number of appeals. Therefore, in the long run, quickness in disposing of business and the limitation of appeals are in the interest of the poor man. Only those cases should come to the highest court which are sufficiently important *pro bono publico*, without regard to the interest of the litigants.

[Document Source: House of Representatives, Committee on the Judiciary, *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court, Hearings on H.R. 10479*, 67th Cong., 2d sess., March 30, 1922, 2–3.]

Judge Benjamin I. Salinger, Objection to Supreme Court Discretion, Testimony Before House Judiciary Committee, April 18, 1924

In testimony before the House Judiciary Committee, Iowa State Judge Benjamin I. Salinger argued that expansion of certiorari blocked access to the Supreme Court and left litigants at the mercy of lower court and state court error. Salinger examined the logic of Chief Justice Taft, who asserted that the Supreme Court's role was to expound principles of law for the general public, and Salinger believed that if an area of law were settled in previous cases the Supreme Court would not take a case on certiorari, even if a court had committed error below. Salinger further contended that a petition for certiorari involved the same expense as a proper appeal without the benefits of a hearing or an opinion outlining the reasons for denial.

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To bring before the committee why I object to the change, it becomes necessary to state what on inquiry, information received, and experience in the practice I understand review by application for certiorari to be and to effect.

The applicant must pay the same filing fee required on appeal or on writ of error; he must send up the record and an argument (both in print, as I understand it). There is no oral argument. If the application is denied (and, as I understand it, in the past there has been a denial of practically every application), no opinion is written, though occasionally the denial carries a few words of suggestion or explanation. There being no opinion, no standard is set. . . . It follows that as to knowing whether certiorari will be granted no more light can be found in case law than is obtainable in countries where decisions are never reported. The lawyer can give the client nothing better than an arbitrary guess on whether the Supreme Court will hear him, even if he feel clear that the client's rights under the Constitution have been invaded. With all the State courts virtually free from Federal review, chaos will exist as to Federal questions. Indeed, much may be said in support of the great frequency with which certiorari is denied. It is not the function of the writ to protect from mere error, no matter how gross.

The cure for error is writ of error. Take a "change of decision" case. When such change is the basis for application for certiorari it can rightly enough be said that such change of front [i.e. departing from precedent] is merely gross error. Certiorari is primarily for reaching cases of lack of or of going beyond power. But there is power and jurisdiction to decide erroneously. One reason why such change of front is gross error is that the Supreme Court has so often condemned decisions working such change. But the very fact that this is so would furnish an additional reason for denying relief on certiorari. It would be clear that there was no law to settle it; it is already settled—and relief on certiorari might well be denied on the ground that adding one more decision condemning the change to fifty such that had already been made, would be no more of a deterrent. On writ of error, the error is simply corrected no matter how many times like error has been corrected in the past. Indeed, the passage of this bill would be almost an instruction, because the bill abolishes review by writ of error, obtainable as matter of right. It may not be deemed important by you, but it is

the fact that few lawyers the country over ever have a case in the Supreme Court except writ of error complaining of the action of the court of last resort on a Federal question. In my judgment, one effect of this bill is to limit practice in that court to lawyers for the Government, and a few lawyers in Washington and in the four or five great port cities. To the great body of the bar this great national court will be as foreign as the courts of Germany are. It will cease to have any aspect of an institution created by a democracy.

[Document Source: House of Representatives, Committee on the Judiciary, *Jurisdiction of Circuit Courts of Appeals and the United States Supreme Court*, Hearings on H.R. 10479, 67th Cong., 2d sess., April 18 & 27, 1922, 1–3.]

Senator Thomas J. Walsh, The Right to Appeal Federal Questions, Virginia State Bar Association, Speech of June 8, 1922

Senator Thomas J. Walsh wanted to preserve the Supreme Court's review of federal questions coming from either state or federal courts. He complained about the 1916 law limiting what could be heard from a state court and objected to any further limitations. Walsh proposed that the way to reduce the Supreme Court's workload was to limit all of its appellate review to federal questions, leaving issues of common law to inferior courts. He further proposed that the Supreme Court be freed from having to review the entire record when accepting cases from the circuit courts of appeals—instead the Court should consider only the federal question as it did when reviewing state decisions. He lamented that the bill's further narrowing of cases to be allowed a writ of error from state courts meant that complex issues of federal statutes would have no appeal as of right. To Walsh, the Supreme Court was not, as Taft argued, designed only to expound constitutional principles, but to be the final arbiter of all federal law.

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I think the act of 1916 made an unfortunate innovation in limiting the cases in which a review of the decisions of the State courts might be had, as of right, and that the bill to which your attention is now directed, imposing, as it does, a further limitation, ought not to command the support of the bar, at least in that respect. . . .

We have developed in the Western States a wonderful system of mining law, consisting of the acts of Congress of 1866 and 1872, and acts amendatory thereto, providing for the disposition of the mineral lands of the United States, the customs of miners to which the laws referred to give the sanction of statutory enactments and the decisions of the courts construing and applying them. The whole system of the disposition of the public lands naturally bears a close relationship to that which is concerned exclusively with the mineral lands and a more or less intimate knowledge of the former is essential to a full comprehension of the intricacies of the latter. . . . It need not be said that the amounts involved in the controversies out of which mining law as it is understood in this country has been evolved are often vast. The producing area of the Butte district, the output of which has run into billions, the richest mineral deposit the world has ever known, is not to exceed two miles square. . . . To deny a litigant a right to present to the Supreme Court a question arising under the laws of Congress touching the disposition of the mineral lands, except by writ of certiorari to be issued upon written application supported by briefs, but without oral argument, is all but to compel him to abide by chance alone with the odds all against him.

Scarcely less intricate are the problems which arise under the public land laws generally, and while our section may be more fruitful in causes presenting Federal questions than others or than the country generally, there is scarcely any region that does not produce controversies depending for their solution upon Federal statutes. It is not only such that are shut out but, as well, every case involving the denial of a title, right, privilege or immunity set up or claimed under the Constitution of the United States. There would be included, no statute being involved, a right claimed under the full faith and credit clause, the clause guaranteeing to the citizens of each State the privileges and immunities of citizens of the several States, and those ample rights guaranteed by the fourteenth amendment.

It is understood that it was because of the frequency with which actions were brought to the Supreme Court upon the claim, often shadowy, of the denial of a right under the amendment mentioned that the restriction was asked and, as I think, unreflectingly imposed by Congress. . . . But the prevalence of the evil . . . is a very poor rea-

son for denying to the meritorious classes of cases to which I have referred a right to be heard in the tribunal whose appropriate function is to give an authoritative interpretation to the Federal law.

Quite likely a vexing fecundity has been exhibited by the bar in respect to appeals said to present questions of the disregard of rights protected by the fourteenth amendment, but if the idea advanced is without substance or not open to serious debate, the appeal may be dealt with summarily by the usual motion to dismiss or affirm or by relegating it to the short cause calendar, while the practice of prosecuting such may be deterred by the consistent imposition of the penalty for frivolous appeals.

As heretofore pointed out the bill in question not only confirms the departure, the unwisdom of which I have not hesitated to condemn, but it would likewise transfer to the permanent jurisdiction causes in which are involved the validity of an *authority* exercised under a State, as distinguished from a *statute* of such State, on the ground that it is repugnant to the Constitution of the United States, or the validity of an authority exercised under as distinguished from a treaty or statute of the United States....

I conceive, as heretofore stated, that the primary function of that court is to give an authoritative interpretation of Federal law, constitutional and statutory. First among the cases enumerated in the Constitution to which the judicial power of the United States extends are those "arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority." I would only as a last resort curtail in any degree the right to a hearing on such cases in the Supreme Court, but I would limit that hearing to the Federal question involved. In the case of causes brought into the Supreme Court from the State courts the hearing is, as is well known, so limited. There is no reason why in the case of causes in which the Federal jurisdiction is invoked, in the first instance, because of the presence of a Federal question, the review in the Supreme Court should not be similarly limited....

If the jurisdiction of the district court over causes in which a Federal question is presented is to be preserved the judgments or decrees of the Circuit Courts of Appeals in such should be made final, except as to the Federal question, which should be reviewable by writ of error. Such a change would afford some very sub-

stantial relief to the Supreme Court. It frequently happens that the Federal question upon which the jurisdiction of the district court is invoked is so doubtful in character as barely to sustain such jurisdiction, the real controversy between the parties depending upon issues of law and fact quite apart from such question.

[Document Source: Thomas Walsh, "The Overburdened Supreme Court," *Proceedings of the Thirty-Third Annual Meeting of the Virginia State Bar Association*, June 8, 1922, 216–37.]

District Court Jurisdiction

The changes in the Supreme Court of the United States' appellate jurisdiction in the 1925 Judges' Bill dramatically decreased the work of the Court but did nothing to address the congestion in the federal trial courts. Just as during the late nineteenth century, concerns about delays in litigation led to proposals for radically limiting the jurisdiction of the federal courts. Lawmakers, academics, and lawyers—including Senator George Norris of Nebraska, law professor Felix Frankfurter, and future court of appeals judges Henry Friendly and Charles E. Clark—revived the campaign to abolish federal jurisdiction based on diversity of citizenship. They mounted familiar arguments that prejudice between residents of different states no longer existed (or to Friendly, had never existed), that corporations abused the privilege to increase the inconvenience and costs of litigants, and that federal courts applied their own interpretation of the common law at variance with state decisions. Diversity jurisdiction still had its defenders, however. Corporation lawyers in the American Bar Association argued that diversity jurisdiction continued to protect nonresident litigants from biased juries and elected state judges.⁸⁵ Federal judges supported diversity jurisdiction as a way to ensure that federal courts participated in the full range of legal issues before the community. Congress took no action to curb diversity jurisdiction in the 1920s and 1930s, but the Supreme Court itself addressed one of the protests against it when in 1938, in the case of *Erie v. Tompkins*,⁸⁶ it overturned *Swift v. Tyson*

85. "Whittling Away at the Federal Tribunals," *American Bar Association Journal* 14 (1928), 179.

86. 304 U.S. 64 (1938).

and ruled that federal courts had to apply state common law to diversity cases, not an independent federal interpretation of the common law.⁸⁷

Felix Frankfurter shifted the debate over federal jurisdiction in the late 1920s by supporting not just the end of diversity jurisdiction, but also a reduction in federal question jurisdiction. Just as the Judges' Bill drew a distinction between important and unimportant federal questions for the purpose of decreasing Supreme Court appeals, Frankfurter argued that the district courts were being overburdened with cases arising under federal criminal and regulatory statutes that, while nominally dealing with federal questions, were really more local in character. He argued that state courts were more appropriate tribunals for such disputes and the transfer of cases would contribute to the quality of work and prestige of the federal courts.

Felix Frankfurter and James Landis, Argument to Limit Federal Jurisdiction, *The Business of the Supreme Court*, 1928

Harvard Law professor and future Supreme Court Justice Felix Frankfurter supported the Judges' Bill and the movement to limit the Supreme Court to cases involving important constitutional principles. He also believed, however, that federal trial courts should be relieved of much of their jurisdiction so as to reduce congestion in the lower courts and cut off Supreme Court appeals at the source. Frankfurter urged Congress to drastically limit or end completely federal jurisdiction based solely on diversity of citizenship. He drafted a number of bills in 1927 and submitted them to lawmakers and judges for comment, including limiting removal based on a "separable controversy," prohibiting corporations other than those operating in interstate commerce (railroads, telegraphs, etc.) from removing cases, and raising the amount in controversy for diversity cases to \$10,000. Other bills sought to block corporations from suing in federal court if corporations failed to obey state requirements to gain access to state courts and to require federal courts to follow the common law of a state as decided by its highest court.⁸⁸

87. Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (New Haven: Yale University Press, 2000).

88. See Draft Bills to Reduce Federal Jurisdiction (ca. 1927–1928), Felix Frankfurter Papers, Reel 83, Subject: Federal Courts.

Frankfurter's goal was not just to limit diversity jurisdiction, however, but to limit all "local" cases, especially the flood of cases entering the federal courts under federal criminal and regulatory legislation, like the Volstead Act enforcing national prohibition of alcohol. Frankfurter called for reconsidering the grant of federal question jurisdiction dating back to 1875 and argued that the state courts were better equipped to evaluate facts and construe federal law in what were essentially disputes of local importance.

Frankfurter pressed his ideas on federal jurisdiction in law reviews and popular periodicals, but especially in his landmark history of the federal courts, *The Business of the Supreme Court*, co-authored with his student, James Landis. *The Business of the Supreme Court* was an in-depth history of policy relating to the federal courts, but it was also an expression of Frankfurter's progressive political views and his conviction about judicial restraint.⁸⁹ Frankfurter campaigned for a small, exclusive federal court system with limited jurisdiction as a way to maintain the quality of federal judges and to reestablish the authority of state and local courts. He believed that keeping cases out of federal courts would minimize federal interference with state and local regulation of economic life. He believed that the federal courts should focus on areas of true national importance and leave questions of police powers and law enforcement to the states, even if emerging under federal statutes.

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With the minor exception relating to federal corporations, the efforts which culminated in the Act of 1925 did not seek to explore ways and means of shutting off at its sources litigation that eventually finds its way to the Supreme Court. Neither the Court nor Congress attempted to reconsider the wisdom of continuing the wide range of controversies to which the district courts are open. But any effort to relieve an overburdened federal judiciary may well, for instance, reexamine the justification of the existing jurisdiction resting solely on diversity of citizenship. The plea for withdrawal from federal courts of litigation solely concerned with local matters has been reinforced by the vast increase of essentially federal litigation and the vigorous movement for state judicial reforms. A

89. Edward A. Purcell, Jr., "Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts," *Law & Social Inquiry* 24, no. 3 (Summer, 1999): 679–750.

systematic revision of the Judicial Code should certainly consider the desirability of continuing the present sanction given to incorporation in foreign states merely for the purpose of gaining access to the federal courts. Future federal judicial legislation will also have to scrutinize the justification of the load which the federal courts now carry in their administration, through receivership proceedings, of local public utilities and ordinary business corporations....

Heretofore the area of federal police legislation has been extended with little consideration of the consequences entailed on the effective functioning of the federal courts in enforcing such legislation. The huge number of prosecutions under the Volstead Act has sharply challenged attention to the recent preoccupation of the federal courts with misconduct of an essentially local nature, widely different in its practical incidence from the kind of transactions which in the past have invoked the federal criminal law. Particularly in the large cities are the federal courts diverted from disposition of cases uniquely federal in character to the prosecution of offenses which theretofore have been left for state action. Liquor violations, illicit dealing in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, these and like offenses have brought to the federal courts a volume of business which, to no small degree, endangers their capacity to dispose of distinctively federal litigation and to maintain the quality which has heretofore characterized the United States courts. The burden of vindicating the interests behind this body of recent litigation should, on the whole, be assumed by the states. At the least, the expedient of entrusting state courts with the enforcement of federal laws of this nature, like state enforcement of the Federal Employers' Liability Act, deserves to be thoroughly canvassed. Another alternative is the withdrawal of the petty criminal business from the federal district courts by devising an appropriate method of summary procedure [such as by U.S. Commissioners]. One thing is clear. The relief of the district courts from this avoidable litigation, which eventually has its reflect upon the Supreme Court's work, is an insistent problem of federal jurisdiction.

[Document Source: Felix Frankfurter and James Landis, *The Business of the Supreme Court* (New York: Macmillan, 1928), 292-93.]

Charles E. Clark to Paul Howland, The Burdens of Diversity Jurisdiction, Letter of March 12, 1932

While Felix Frankfurter tried to focus attention on the ways in which federal question jurisdiction contributed to court congestions, debate in the late 1920s and early 1930s instead returned to jurisdiction based on diversity of citizenship. Renewed interest in curbing diversity jurisdiction coincided with mounting concern over the ability of the federal courts to handle its workload, especially in relation to its sizable criminal docket. In Congress, Senator George Norris of Nebraska, who in 1922 had delivered a speech calling for abolishing the lower federal courts entirely, led the movement to end diversity jurisdiction.⁹⁰ In 1928, he proposed a bill that would have taken from the federal courts all jurisdiction—federal question and diversity—except where the United States was a party.⁹¹ After objections, Norris quickly amended his 1928 bill to focus only on diversity of citizenship and followed with similar bills in 1930 and 1932, both of which were reported favorably by the Senate Judiciary Committee.⁹²

Professor Charles E. Clark of Yale University—who would go on to draft the Federal Rules of Civil Procedure in the 1930s and be appointed a judge on the U.S. Court of Appeals for the Second Circuit—supported the movement to end diversity jurisdiction as the best method for allowing the federal courts to fulfill their mission as a national court. In a letter to Paul Howland, chair of the American Bar Association's Committee on Jurisprudence and Law Reform and a strong opponent of ending diversity jurisdiction, Clark argued that it was time to reconsider the arguments in favor of diversity of citizenship. He differed with Frankfurter in accepting that the federal courts were best suited to handle cases emerging out of expanded federal regulation and criminal laws. He agreed, however, that the time spent adjudicating “petty” cases harmed the public reputation of the courts, and he believed the 1925 Judges' Bill, which reduced the Supreme Court's appellate jurisdiction, offered a model for how to save the prestige of the courts.

90. *Congressional Record*, 67th Cong., 2d sess., 1922, 62, pt. 5:5107.

91. S. 3151, 70th Cong., 1st sess. (1928).

92. U.S. Senate, Committee on the Judiciary, *Limiting the Jurisdiction of District Courts of the United States*, Report No. 691, 71st Cong., 2d sess., May 20, 1930; U.S. Senate, Committee on the Judiciary, *Jurisdiction of the District Courts of the United States Over Suits of State Administrative Boards*, Report No. 701, 72d Cong., 1st sess., May 18, 1932.

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There is a tendency to view all proposals for any limitation of Federal judicial jurisdiction in cases of diversity of citizenship as an attack on the Federal court system. On the contrary, however, supporters of that system, cherishing its historic and present functions in our Government, may well view with something akin to consternation the rapid expansion and dilution of that jurisdiction by all sorts of cases, petty as well as important. They may well study with considerate care any proposals which might serve to make that jurisdiction more respected and more worth while. It must be safeguarded even from its friends who would so overwhelm it that it can not serve its proper function as a unifying arm of the central government. The business now placed upon it is such as in many districts to compel it to sacrifice its deliberative functions to the merely mechanical disposition of countless cases unimportant to a national court. Further expansion of the judicial establishment and consequent lowering of its prestige seems quite undesirable. Public sentiment responded adversely even to the suggestion of adding judicial powers to the United States commissioners. The opposite way, that of limiting jurisdiction, is the better one. The Supreme Court of the United States has shown how respect for a tribunal, which might easily have been overwhelmed by trivialities, is preserved and enhanced by sound restrictions on its jurisdiction.

Proposals for limiting Federal jurisdiction therefore deserve thoughtful attention on their merits. It is true that the Congress and the people may find a social policy so overwhelmingly important that the prestige of the Federal court system must be sacrificed, however regrettable that course may be. The eighteenth amendment [prohibition of alcohol] is of that character. If the policy of prohibition is to be enforced at all, it must be done through the Federal system, since the States obviously are not inclined to do so. Other important Federal policies, such as that embodied in the due process clause of the fourteenth amendment, may be so cherished as not to justify limitation of the court jurisdiction as to them. Moreover, increasing Federal activity of innumerable forms points to an almost necessary expansion of Federal court activity. Among all these classes competing for a share of the attention of our national courts, it is not unnatural to question that jurisdiction least public

in nature and most nearly comparable to the private litigation typically handled by local tribunals. . . . Assertions are made that this branch of Federal jurisdiction is extensive in amount, comprising perhaps “most” of the ordinary civil private suit. I do not believe we yet have accurate enough statistics to justify an estimate; but if it is true that litigation, essentially private in its nature and properly determined by the local substantive law and local policy governing the ordinary relations of citizens, is occupying so large a portion of the time of the Federal tribunals, then it seems to me that argument for some change is strong.

[Document Source: Charles E. Clark to Paul Howland, March 12, 1932, printed in *Limiting Jurisdiction of the Federal Courts*, Hearings before a Subcommittee of the Senate Judiciary Committee, 72d Cong., 1st sess., March 18 & 19, 1932, 36–37.]

Judge John J. Parker, Defending Diversity Jurisdiction, Georgia Bar Association, Speech of June 3, 1932

Circuit Court of Appeals Judge John J. Parker, the senior circuit judge of the Fourth Circuit, publicly defended diversity jurisdiction in an address to the Georgia Bar Association in 1932. Parker held up the federal courts as a nationalizing institution that transcended local interests and brought uniformity to the law. While Norris argued that the alleged biases that created the initial need for diversity jurisdiction were a thing of the past, Parker countered that the federal courts were key to cases between citizens of different states based on a more basic principle: the federal courts belonged to all citizens equally, not just those of a particular state. All citizens, Parker argued, should have the right to enter into his or her own courts, rather than those of their adversary.

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The provision conferring this [diversity] jurisdiction on the lower federal courts was contained in the Judiciary Act of 1789; and these courts have had the jurisdiction without interruption from that day to this. No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the

sanctity of private contracts. Interstate commerce has grown to an extent that the framers of the Constitution could not have foreseen; interstate travel and communication have increased; and the flow of capital for investment across state lines has become an essential part of our national existence. And while it is true that these things have doubtless ameliorated local prejudices to some extent, they have also greatly increased the number and importance of the controversies between citizens of different states; and have rendered it a matter of prime importance that controversies affecting citizens of different sections shall be decided by tribunals of a national rather than a local character—courts which represent the people of all sections and which for that reason will command the confidence of the people of all sections. When life everywhere is expanding and becoming national in scope, it is no time to make the administration of justice a local matter.

One of the principal arguments in favor of jurisdiction based on diversity of citizenship is that its existence is essential to furnish the non-resident an impartial tribunal in which his controversy may be tried. This argument is as valid today as it was in 1787. I do not assert, I do not believe, that federal judges are men of higher character than state judges or that jurors in federal courts are more intelligent or more impartial as a general proposition. But there is this difference: the state trial judge is generally a local man with a local outlook. The federal trial judge has jurisdiction over a wide territory; he is part of a national judicial system and his action is subject to review as of right by a court having jurisdiction over a number of states. The jury in the state court comes from the county of the resident party: the federal jury is drawn from a wide territory and usually knows no more about the plaintiff and his attorney than about the defendant and his attorney. . . . You need only ask yourselves this: if one of you gentlemen were defending a citizen or corporation of Georgia sued in a rural county in the state of Kentucky or New York, would you prefer to try your case before the local county judge and before a jury composed of the fellow countymen of the plaintiff, or in the federal court where the judge has jurisdiction over half the state and where the jurors are drawn from a number of counties? There is but one answer to that; and you can rest assured that citizens of Kentucky or New York feel the same way about going into local courts in Georgia or

North Carolina that we feel about going into local courts in their states. . . .

Almost as important as either of the foregoing considerations is the fact that the abolition of the diversity of citizenship jurisdiction will destroy the uniformity of decision throughout the United States in matters of general law which, beginning with *Swift v. Tyson*, . . . has gradually been built up through the years. The doctrine is now well established that in matters of general law such as contracts, agency, negotiable instruments, insurance, negligence, torts, etc., the courts of the United States will follow their own decisions and not those of the several states. The result of this has been the creation of a great body of decisions of the federal courts upon the basis of which a lawyer can advise his client with assurance as to his rights. Destroy the jurisdiction based on diversity of citizenship and this uniformity of decision is destroyed. . . .

It seems to me, therefore, that upon these practical considerations . . . the jurisdiction based on diversity of citizenship should be preserved; but there is an argument based on principle which appeals to my mind more powerfully than any of these. When a citizen of the United States must go into a court in the United States to assert or defend his rights, he ought to have the right to go into a court which is as much his court as it is the court of his adversary. The judicial settlement of disputes appertains to the sovereign; and when I go into court I wish it to be my sovereign that exercises sovereign power. The federal court represents all of the people of the United States; and if I go into a federal court in New York, it is as much my court as it is the court of a citizen of that state. The judge is appointed by my President, is confirmed by my senate and is subject to have his actions called in question by the senators and representatives whom I vote for as well as by the senators and representatives who represent my adversary. If I go into a state court in New York, however, I am in a court which represents a sovereignty upon which I have no claim. The judge represents the people of New York, he does not represent me or the people of the state from which I come. Citizenship in the United States is both local and national. For matters involving the local citizenship the local courts are provided. For matters which involve citizens of different states, only the federal courts

can furnish to both a tribunal of the sovereignty to which both owe allegiance and to which both look for protection.

[Document Source: John J. Parker, "The Federal Jurisdiction and Recent Attacks Upon It," address delivered to Georgia Bar Association, Albany, Ga., June 3, 1932, in *American Bar Association Journal*, July 1932, 433–79.]

Executive Power and Judicial Independence

The debates surrounding the federal judiciary throughout the early twentieth century frequently centered on the relationship between judicial and legislative power. Calls by some Progressives for election of judges, popular and congressional recall of judges, congressional power to override constitutional decisions, and curbs on judicial review all reflected a desire to make judges more responsive or deferential to the popular will as expressed through Congress and state legislatures. At the same time, judges and lawyers campaigned to shift authority over areas like the rules of civil procedure and the allocation of judges from Congress to the judges themselves under the leadership of the Supreme Court of the United States.

In the late 1930s, debate shifted to the judiciary's relationship with executive authority. In 1937, President Franklin D. Roosevelt set off a storm of protest when, frustrated by Supreme Court decisions striking down a number of New Deal laws as unconstitutional, he proposed a plan to "pack" the federal courts with new judges. In an era with mounting anxieties about authoritarian governments and the fragility of democracy, judges, politicians, and lawyers spoke out to defend the judicial branch from Roosevelt's attempt to secure decisions favorable to his administration's policies. Roosevelt's plan led to lengthy debates on the independence of the federal judiciary and the extent to which the President could legitimately alter its personnel and jurisprudence. At the same time, and growing partly out of unease about the influence of the executive branch on the courts, federal judges pushed for legislation to move courts out from under the administrative oversight of the Justice Department and give the judiciary greater authority over its own finances and resources. The establishment of the Administrative Office of the U.S. Courts raised important questions about the appropriate independence of the judiciary as a coordinate branch of government and what form that administrative independence would take.

President Roosevelt's Court Reorganization Plan

Franklin D. Roosevelt was re-elected to the presidency in an unprecedented landslide in November 1936, defeating his opponent Alf Landon in the electoral college 523–8 and garnering 61 percent of the popular vote. Roosevelt saw these returns as a mandate for his administration to further expand the authority of the federal government to meet the challenges of the Great Depression.⁹³

Roosevelt believed, however, that the Supreme Court of the United States was a looming threat to any extension of his New Deal program. Roosevelt and other liberals heavily criticized the Supreme Court in 1935 and 1936 for allowing what they saw as its restrictive interpretation of government power under the Constitution. Members of Congress introduced over 100 bills in 1936 to curb the power of the federal courts, including measures to ban judicial review of congressional statutes, to require unanimous decisions to invalidate statutes, and to increase the number of justices on the Supreme Court. Also offered were Constitutional amendments to enlarge Congress's power over interstate commerce or to thwart judicial review by allowing Congress to re-pass laws that had been invalidated by the Court.⁹⁴

Roosevelt chose to remain publicly silent on the Court issue throughout 1936, even as he and his Cabinet conferred on a plan to neutralize the Court. Only after the election did Roosevelt choose a path developed by Attorney General Homer Cummings.⁹⁵ The President proposed a law to give the President the power to appoint an additional judge for each sitting judge that had reached 70 years of age and 10 years of experience and who did not retire. The idea to provide for additional appointments to supplement aging judges was first introduced by then-Attorney General James McReynolds in 1914, who recommended the measure only for district and circuit appeals courts.⁹⁶ Under the plan, Roosevelt, who had not yet appointed a justice to the Supreme Court, would have had the opportunity to appoint

93. Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (New York: W.W. Norton, 2010), 239–43.

94. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1996), 102–03.

95. S. 1392, 75th Cong., 1st sess. (1937).

96. U.S. Department of Justice, *Annual Report of the Attorney General* (Washington, D.C.: Government Printing Office 1913) 5; H.R. 61, 64th Cong., 1st sess. (1916).

up to 6 new justices. He could also appoint lower court judges in the same circumstances, but not to exceed 50 new judges. Roosevelt attempted to downplay the plan's impact on policy outcomes by describing it as a measure to improve court administration. The President's bill called for the Supreme Court to appoint a "proctor" whose responsibility would be to study the business of the courts, identify backlogged judges, and recommend to the Chief Justice reassignment of judges to relieve congestion in the busiest districts. Finally, the bill sought to protect federal legislation by requiring that no decision or injunction against the constitutionality of a federal statute without notifying the Attorney General and giving him opportunity to present evidence in court as to the validity of the law. In cases where a law was declared unconstitutional by a district judge, the bill required that the case be given a direct appeal to the Supreme Court and "that such cases take precedence over all other matters pending in that Court."

Opponents of Roosevelt's court plan charged the President with seeking to drag the courts into policy debates and to make the courts the tool of the executive. The plan, they argued, threatened the independence of the judiciary and the rule of law and planted the seeds of dictatorship. Opponents of the plan, like Democratic Senator Burton K. Wheeler of Montana, preferred to deal with the Court's decisions by sending the question to the people through the process of amending the Constitution. Roosevelt and other New Dealers argued, however, that the Constitution as it was written was suitable to the exercise of federal government power, only that the policy preferences of a majority of the sitting justices were the obstacle. They stressed that the judiciary was already a political institution, not the bastion of the rule of law that its defenders claimed. By granting the President greater ability to bring new judges to the bench, Roosevelt's court plan would ensure, its proponents argued, that no longer would the Supreme Court be permitted to impose policy views so out of line with popular politics and social realities.

Roosevelt's reorganization plan set off a storm of popular protest and was defeated in the Senate in the summer of 1937. At the same time, the Supreme Court appeared to reverse course and upheld the constitutionality of a number of New Deal statutes. Over the next few years, the Court's conservative contingent would gradually leave the bench and Roosevelt had his chance to appoint new justices. The public esteem for the Supreme Court, the public commitment to federal

judicial independence, and the insistence on law as a realm insulated from politics endured Roosevelt's offensive and continued to define the federal judiciary even as the Court accepted the constitutional assumptions that underlay the New Deal.

President Franklin D. Roosevelt, Plan for Court Reorganization, Message to Congress, February 5, 1937

Roosevelt announced his court plan in a February 5, 1937, message to Congress. Roosevelt placed his policy differences with the Supreme Court in the background and stressed that his plan was a “reorganization” of the judiciary that would accomplish a number of key goals, especially decreasing congestion in the lower courts and improving judicial administration. He contended that the number of existing judges was insufficient to handle the growing business throughout the federal courts. He referred to the fact that the Supreme Court rejected all but 150 out of 867 petitions for certiorari—under the discretion granted the Court by the Judges’ Bill of 1925—as evidence that the Supreme Court itself could not keep abreast of its work and was overburdened. Roosevelt linked this failure of efficiency in the courts to the advanced age of many judges in the federal system, especially the Supreme Court. Clearly referencing his disagreements with the decisions of the Court, Roosevelt pleaded with Congress to infuse “new blood” into the courts so that the judiciary would have the “vigor” to understand the needs of a modern, changing economy and society. Younger judges, he believed, would recognize the economic and social conditions that demanded federal intervention and see in the Constitution as it already existed the authority of government to act.

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The judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries, and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice....

The simple fact is that today a new need for legislative action arises because the personnel of the Federal judiciary is insuffi-

cient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States courts.

A letter from the Attorney General, which I submit herewith, justifies by reasoning and statistics the common impression created by our overcrowded Federal dockets—and it proves the need for additional judges.

Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the circuit court of appeals will further increase.

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the Court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the Court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants?

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the Federal courts....

The duty of a judge involves more than presiding or listening to testimony or arguments. It is well to remember that the mass of details involved in the average of law cases today is vastly greater and more complicated than even 20 years ago. Records and briefs must be read; statutes, decisions, and extensive material of a technical, scientific, statistical, and economic nature must be searched and studied; opinions must be formulated and written. The modern tasks of judges call for the use of full energies.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future....

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

[Document Source: President's Message to Congress, *Congressional Record*, 75th Cong., 1st sess., 1937, 81, pt. 1:877.]

Popular Responses to President Roosevelt's Court Plan, *New York Times*, February 14, 1937

Roosevelt's announcement of his plan led to an outpouring of public debate. In town meetings, social clubs, bar associations, and even movie theaters, Americans argued about what Roosevelt's proposal meant for the Supreme Court and the future of judicial indepen-

dence. Congressmen reported receiving hundreds of letters a day expressing opinions for and against the plan.⁹⁷

Newspapers also received a flood of correspondence over the court plan in the days and weeks following FDR's message to Congress. The *New York Times* published pages' worth of letters, excerpted below, from readers both cheering Roosevelt for standing up for the people and attacking him for laying the foundations for despotism in America.

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May the Supreme Court stand fast for what it believes to be right, may Congress resist this attack on our liberties and may our aroused people scotch the threat of dictatorship so that it shall never again raise its ugly head in our land. *John Reynolds, N.Y.*

President Roosevelt's splendid message to Congress proposing the modernization and rejuvenation of our judicial system will be greeted by liberals, by workers and by all who have suffered from the law's delays and injustices and from ancient autocrats sitting on judges' benches all over the country as a blessing and a deliverance. *Jean Ellis, Hollywood, Calif.*

If the highest court of our democracy is to become merely a tool of the administration, then the vaunted security and independence of American citizens will rest only upon the whims of a political leader who is able to make of Congress a rubber stamp. *John Mitchell, Summit, N.J.*

The Constitution does not make the Supreme Court an independent body standing above the people. Like the other two branches of our government, the judiciary must at all times be responsive to the will of the people as expressed at the ballot box. *Samuel Churgel, Brooklyn*

The obvious endeavor of President Roosevelt to change the decisions of our highest judicial tribunal by adding those whom he feels will vote to carry out his policies strikes at the taproot of our form of government. *Holmes Forsyth, Princeton, N.J.*

97. Leuchtenburg, *The Supreme Court Reborn*, 134–35.

If the President receives the right to appoint six additional justices, is it not a fair assumption that they will be men of integrity, worthy of the honor? If the six additional justices were approved, making the court fifteen, is it reasonable to assume that a majority or, in fact, any one of them will take orders from the President? The statement that our form of government, the Constitution or the Supreme Court would be detrimentally affected by increasing the number of justices seems to me unfair. *C.A. Bishop, Chevy Chase, Md.*

The Constitution plainly provides that the justices shall be secure in their tenure for life and not subject to removal for political reasons, and its spirit is violated by the President's proposal. Aside from that, the profound unwisdom of the proposal lies in the fact that it will become a dangerous precedent, rising in the future to threaten the rights and freedom of the common man. *Thomas L. Anderson, Washington, Pa.*

Men over 70 are rarely able to perceive with sympathy that which is new and untried. This is particularly true if they are in positions such as are the Supreme Court Justices. The present members of the Supreme Court have shown little understanding of the new conception of life which the past four years have opened up in this country. President Roosevelt must not be handicapped in what he plans to do by the stupidity of brilliant minds. *Alice Carpenter, Boston, Mass.*

Chief Justice Charles Evans Hughes, Response to President Roosevelt, Letter to Senate Judiciary Committee, March 22, 1937

Among the most important voices to weigh in on Roosevelt's court plan was that of the Chief Justice of the United States, Charles Evans Hughes. During February and most of March, Hughes, who saw Roosevelt's plan as an attack on the independence of the Court, was content to remain publicly silent on the issue. In mid-March, however, Justice Louis Brandeis, who also strongly objected to the plan, informed Senator Burton K. Wheeler, who was leading the opposition to the bill in the Senate, that the Chief Justice would be willing to speak out. Rather than appearing before the Senate Judiciary Committee, Hughes and Brandeis (with the approval of

Justice Willis Van Devanter, as well) decided that the Chief Justice would submit a letter that Wheeler would be permitted to read into the record of the Senate hearings. Hughes was not nearly as comfortable as his predecessor, William Howard Taft, in publicly taking a stand on legislative matters regarding the courts. Ultimately, however, Hughes concluded that Roosevelt's plan warranted a public response.⁹⁸

In his letter, Hughes rebutted Roosevelt's claims that the Supreme Court was unable to keep up with its docket. Presenting his letter as purely informative, Hughes reported Supreme Court caseload statistics to show that the Court's docket had actually not grown in recent years and that the justices showed no signs of struggling to dispose of cases. He devoted much of the letter to explaining the procedure for reviewing petitions for certiorari in order to demonstrate that the high number of rejected petitions provided no evidence on the efficiency of the justices. Finally, Hughes opined that increasing the number of justices on the Supreme Court, if anything, would hurt the Court's ability to work harmoniously and efficiently.

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The work of passing upon these applications for certiorari is laborious but the Court is able to perform it adequately. Observations have been made as to the vast number of pages of records and briefs that are submitted in the course of a term. The total is imposing but the suggested conclusion is hasty and rests on an illusory basis. Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. It is only when the facts are interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves. This is also true of controversies over contracts and documents of all sorts which involve only questions of concern to the immediate parties. The applicant for

98. Shesol, *Supreme Power*, 392–401.

certiorari is required to state in his petition the grounds for his application and in a host of cases that disclosure itself disposes of his request. So that the number of pages of records and briefs afford no satisfactory criterion of the actual work involved. It must also be remembered that Justices who have been dealing with such matters for years have the aid of a long and varied experience in separating the chaff from the wheat.

I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality.

... An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned. As I have said, I do not speak of any other considerations in view of the appropriate attitude of the Court in relation to questions of policy.

[Document Source: U.S. Senate, Committee on the Judiciary, *Reorganization of the Federal Judiciary*, Hearings on S. 1392, Part 3, 75th Cong., 1st sess., 1937, 490–91.]

Senate Judiciary Committee, Adverse Report on President Roosevelt's Court Plan, June 14, 1937

After two months of hearings on Roosevelt's reorganization plan, the Senate Judiciary Committee reported the President's court reorganization bill with a recommendation against passage. In addition to a lengthy consideration of judicial independence and the ways in which the Roosevelt administration was trying to invade judicial authority, the committee majority also engaged the bill on its own terms. The majority found that the measures of the bill would not produce greater efficiency for the lower courts or the Supreme Court

and questioned the relationship between the bill's efficiency goals and its focus on supplementing judges over the age of 70. The report argued for adding to the judicial force based on the volume of litigation in the various courts, not the age of judges. The majority dismissed the original justifications for the bill as a mere cover for a political attack on the federal judiciary.

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How totally inadequate the measure is to achieve either of the named objectives, the most cursory examination of the facts reveals.

In the first place . . . the bill does not provide for any increase in the personnel unless judges of retirement age fail to resign or retire. Whether or not there is to be an increase of the number of judges, and the extent of the increase if there is to be one, is dependent wholly upon the judges themselves and not at all upon the accumulation of litigation in any court. To state it another way the increase of the number of judges is to be provided, not in relation to the increase of work in any district or circuit, but in relation to the age of the judges and their unwillingness to retire.

In the second place . . . only 25 of the 237 judges serving in the federal courts on February 5, 1937, were over 70 years of age. Six of these were members of the Supreme Court at the time the bill was introduced. At the present time there are 24 judges 70 years of age or over. . . . Of the 24, only 10 are serving in the 84 district courts, so that the remaining 14 are to be found in 5 special courts and in the 10 circuit courts. Moreover, the facts indicate that the courts with the oldest judges have the best records in the disposition of business. It follows, therefore, that since there are comparatively few aged justices in service and these are among the most efficient on the bench, the age of sitting judges does not make necessary an increase of personnel to handle the business of the courts.

... It must be obvious that the way to attack congestion and delay in the courts is directly by legislation which will increase the number of judges in those districts where the accumulation exists, not indirectly by the contingent appointment of new judges to courts where the need does not exist, but where it may happen that the sitting judge is over 70 years of age. . . .

The next question is to determine to what extent “the persistent infusion of new blood” may be expected from this bill.

It will be observed that the bill before us does not and cannot compel the retirement of any judge, whether on the Supreme Court or any other court, when he becomes 70 years of age. It will be remembered that the mere attainment of three score and ten by a particular judge does not, under this bill, require the appointment of another. The man on the bench may be 80 years of age, but this bill will not authorize the President to appoint a new judge to sit beside him unless he has served as a judge for 10 years. In other words, age itself is not penalized; the penalty falls only when age is attended with experience.

No one should overlook the fact that under this bill the President, whoever he may be and whether or not he believes in the constant infusion of young blood in the courts, may nominate a man 69 years and 11 months of age to the Supreme Court, or to any court, and, if confirmed, such nominee, if he never had served as a judge, would continue to sit upon the bench unmolested by this law until he had attained the ripe age of 79 years and 11 months.

We are told that “modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business.” Does this bill provide for such? The answer is obviously no. As has been just demonstrated, the introduction of old and inexperienced blood into the courts is not prevented by this bill.

More than that, the measure, by its own terms, makes impossible the “constant” or “persistent” infusion of new blood. It is to be observed that the word is “new,” not “young.”

The Supreme Court may not be expanded to more than 15 members. No more than two additional members may be appointed to any circuit court of appeals, to the Court of Claims, to the Court of Customs and Patent Appeals, or to the Customs Court, and the number of judges now serving in any district or group of districts may not be more than doubled. There is, therefore, a specific limitation of appointment regardless of age. That is to say, this bill, ostensibly designed to provide for the infusion of new blood, sets up insuperable obstacles to the “constant” or “persistent” operation of that principle.

Take the Supreme Court as an example. As constituted at the time this bill was presented to the Congress, there were six members of that tribunal over 70 years of age. If all six failed to resign or retire within 30 days after the enactment of this bill, and none of the members died, resigned, or retired before the President had made a nomination, then the Supreme Court would consist of 15 members. These 15 would then serve, regardless of age, at their own will, during good behavior, in other words, for life. Though as a result we had a court of 15 members 70 years of age or over, nothing could be done about it under this bill, and there would be no way to infuse “new” blood or “young” blood except by a new law further expanding the Court, unless, indeed, Congress and the Executive should be willing to follow the course defined by the framers of the Constitution for such a contingency and submit to the people a constitutional amendment limiting the terms of Justices or making mandatory their retirement at a given age.

It thus appears that the bill before us does not with certainty provide for increasing the personnel of the Federal judiciary, does not remedy the law’s delay, does not serve the interest of the “poorer litigant” and does not provide for the “constant” or “persistent infusion of new blood” into the judiciary. What, then, does it do?

The answer is clear. It applies force to the judiciary. It is an attempt to impose upon the courts a course of action, a line of decision, which, without that force, without that imposition, the judiciary might not adopt.

[Document Source: U.S. Senate, Committee on the Judiciary, *Reorganization of the Federal Judiciary*, S. Report No. 711, 75th Cong., 1st sess., June 14, 1937.]

Senator Arthur H. Vandenberg, Denouncing “Court Packing,” Radio Address of March 3, 1937

President Roosevelt’s message to Congress in February sparked strong criticism from lawyers, politicians, and the nation’s press. The charge quickly emerged that the President was using the cover of judicial efficiency to “pack” the Supreme Court with justices who would ratify the New Deal program. Editorial pages throughout the country denounced Roosevelt for his “devilish ingenuity” in hiding his intentions behind the “specious guise” of expediting justice. People flooded newspapers and their representatives in Congress with

letters defending the independence of the judiciary and its power to interpret the Constitution.

Politicians took to the airwaves throughout February and March 1937 to attack and defend Roosevelt's plan. Senator Arthur H. Vandenberg (R-MI), in a radio address transcribed in the *Washington Post* and excerpted below, saw the reorganization plan as a fundamental challenge to popular respect for and independence of the Supreme Court. He accused Roosevelt of seeking to amass power in the executive branch and of trying to alter the Constitution without resorting to the amendment process. Vandenberg defended the Supreme Court as the legitimate espouser of Constitutional principles and the people as the only source for altering the Constitution.

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The life-blood of the Constitution is its checks and balances against concentration of dynastic power in any one spot—its warrant that an independent judiciary, an independent legislature and an independent executive each shall check the other. If the precedent be set that the executive's grip on the Congress shall produce an equivalent grip on the Supreme Court, then the spirit of the Constitution languishes. This could produce a concentration of authority such as Europe calls by an ugly and unwelcome name; and we have no right to judge it short of its maximum authority, no matter how trusted the immediate Administration may be, and no matter how anxious many of us are for healthier and more equitable social progress.

You can never make a tyrant out of an independent Supreme Court which lacks a single power of affirmative enslavement, which is unable to initiate a single statute, which cannot even enforce its own decisions, and which is continuously answerable to Congress for its probity and virtue. But you can make any sort of a despot, suited solely to the appetite of a transient passion, out of either a legislature or an executive supreme above all things and above all men....

... There is only one right way to alter [the Constitution] or to control its interpretations if one wishes change. That one right way is through amendments acceptable to its sovereigns—and its sovereigns are neither Presidents nor Congresses nor courts—its sovereigns are solely and exclusively the people of the United States.

When they really want an amendment they recently have demonstrated they can get it as quickly as nine months.

The mere fact that a Supreme Court decision may be contemporaneously unpopular bears no relationship to its constitutional virtue. Those who are inclined most vehemently to complain at one moment usually live to see some other moment when they wholeheartedly applaud.

Taken as a whole, and regardless of occasional lapses in popular confidence, the record of the Supreme Court of the United States is an amazing triumph of virtue, wisdom, vision and equity. It is a profound achievement in human institutions. It is universally recognized as the greatest judicial tribunal in the world. It has been the indispensable balance wheel of our democracy. When it speaks it does not speak for itself. It speaks for the Constitution and the Bill of Rights—and sometimes it speaks when other tongues are silent. It has no right to take its orders from any source except the Constitution; and the orders of the Constitution can be changed only by the people in their several States. Any other process—any effort to alter this formula except by direct popular authority in the manner which the Constitution itself prescribe—potentially jeopardizes the individual liberty and the civil rights of every man, woman and child under the Stars and Stripes. No expediency, however benevolent its auspices, can justify such risks—particularly at a restless moment when human institutions all round the globe are in a state of dizzy flux and when democracy in our own beloved America is definitely on trial.

[Document Source: "Vandenberg and Logan Speeches on Court Change Proposal," *Washington Post*, March 3, 1937, p. 6.]

President Franklin D. Roosevelt, Defending the Court Plan, Radio Address of March 9, 1937

In two addresses in March 1937, Roosevelt responded to the vocal criticism leveled at him and his plan to add justices to the Supreme Court. In both his speech at the Democratic Party Victory Dinner on March 4 and in his fireside chat radio address on March 9, Roosevelt stressed that the legislative work of the New Deal was far from finished. He contended that his program was being hindered by justices of the Supreme Court who willfully misrepresented the Constitution. To those who accused him of subverting the legitimate

process of amending the Constitution, Roosevelt, relying on the dissents of Justices Harlan Fiske Stone, Louis Brandeis, and Benjamin Cardozo, argued that the Constitution itself was already sufficient to the needs of the country. He compared the branches of government to a three-horse team and counseled listeners that only by all three branches working together could the government succeed in dealing with economic and social problems.

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The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

How then could we proceed to perform the mandate given us? ...

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have Judges who will bring to the Courts a present-day sense of the Constitution—Judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed. ...

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to “pack” the Supreme Court and that a baneful precedent will be established.

What do they mean by the words “packing the Supreme Court”?

Let me answer this question with a bluntness that will end all *honest* misunderstanding of my purposes.

If by that phrase “packing the Court” it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called “packing the Courts,” then I say that I and with me the vast majority of the American people favor doing just that thing—now. . . .

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make it dependent upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Judges and a few members of the Supreme Court. Until my first term practically every president of the United States had appointed at least one member of the Supreme Court. . . .

Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal decision of individuals.

[Document Source: *The Public Papers and Addresses of Franklin D. Roosevelt, 1937 Volume: The Constitution Prevails* (New York: Macmillan, 1941), 126–30.]

Senator Burton K. Wheeler, Constitutional Amendment as Alternative to Court Plan, Radio Address of February 19, 1937

Roosevelt's court plan generated strong opposition from progressives who had been vocal critics of the Supreme Court but preferred to deal with the issue by empowering voters. Roosevelt's attempt to exert greater executive branch authority over the federal courts struck many as a threat to democracy in an era when dictators abroad were gaining in power. Senator Burton K. Wheeler of Montana, a progressive Democrat who had served as Robert La Follette's running mate in the 1924 presidential election, led the opposition against the court plan in Congress. Wheeler had been a strong critic of the Supreme Court, especially its decisions against banning child labor and regulating workers' wages and hours, but argued that the solution was to empower the people to overcome Court intransigence. His preferred response to the Court—a measure that had been touted by Senator La Follette in the 1920s—was to pass a constitutional amendment that allowed Congress, when a law was declared unconstitutional by the Court, to re-pass the law by a two-thirds vote after an election had taken place. To Wheeler, such a measure preserved the independence of the Court while allowing democratic forces to overcome judicial objections to popular laws. Wheeler saw Roosevelt's plan as an attempt to alter the Constitution by nondemocratic means and held the seeds of dictatorship in America.

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I am opposed to the executive branch of the Government usurping the powers either of the legislative branch of the Government or of the judicial branch of the Government—and the proposal of the Administration has for its purpose only that.

There was a time in Europe when democracy and liberalism were synonymous. Today in most countries in Europe, liberalism means fidelity to despotism and dictatorship. Believers in democracy are executed as reactionaries and yet Hitler and Stalin talk of their democracies. Every despot has usurped the power of the legislative and judicial branches of the government in the name of the necessity for haste to promote the general welfare of the masses and then proceeded to reduce them to servitude. I do not believe that President Roosevelt has any such thing in mind but such as been the course of events throughout the world. . . .

...Every labor leader, every farmer and every progressive-minded citizen in the United States would have been shocked and protested from the housetops if President Harding, President Coolidge or President Hoover had even intimated that they wanted to increase the Supreme Court so as to make it subservient to their wishes. The progressives would have said, and rightly so, that it was fundamentally unsound, morally wrong and an attempt to set up a dictatorship in this country.

And I am for a liberal constitution. I recognize that that instrument is the fundamental expression of the people's will. I know something of the modern complexities. But I do not think the creation of a political court will solve them. I am ready for amendment to the constitution, and I believe the people of this country are ready for such an amendment, but I want it to be amended by the people in the way they have provided and not by packing the court to make it subservient to anyone's desires. There is no relief in that. We must do right things in the right way. This is no strategy of delay: It is the strategy of the right, of permanence, of real and abiding relief.

The Attorney General of the United States tells us we should trust the President. So we should. And I will tell him the President should trust the people—especially when it comes to changing the document which is theirs. They can attend to their job. I am not afraid to trust them. They have the blood, the youth, the age and the wisdom to keep the Constitution and the law alive.

If there must be a dictator in America, I nominate the American people for dictator.

[Document Source: Senator Burton K. Wheeler, Radio Address, February 19, 1937, excerpted in *Washington Post*, February 20, 1937, p. 9.]

Assistant Attorney General Robert Jackson, Combating Judicial Supremacy, Testimony Before Senate Judiciary Committee, March 11, 1937

In response to charges that Roosevelt was trying to usurp judicial power, supporters of the President's plan countered that Congress possessed legitimate authority to alter the size and organization of the judiciary. Assistant Attorney General Robert Jackson, whom Roosevelt would appoint to the Supreme Court in 1941, argued that Congress's inaction regarding the overreaching decisions of the Supreme Court had enabled the development of "judicial supremacy." Jackson believed that to change the size of the Court was a justified exercise of checks and balances and had been left to Congress precisely to prevent the judiciary from wielding arbitrary power against the legislative and executive branches.

To those who demanded that New Deal supporters respond to the Court's decisions through constitutional amendment, Jackson countered that the Court's interpretation of the Constitution would require numerous amendments and that the Court could simply expand its "tortured construction" to the new amendments and block government action further.

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When a situation exists in the Supreme Court which the President feels he cannot continue to ignore, it is to the Congress that he may properly bring the problem.

The responsibility upon Congress for seeing that the American people have a workable, harmonious, and cooperative judicial system is so usually overlooked by those engaged in building up the tradition of judicial supremacy that the burden of constitutional responsibility on Congress deserves examination.

A sentiment has developed that sole responsibility for the functioning of the Supreme Court as an institution is upon the Justices, and that their independence requires that a majority of them be let alone to shape the institution as they will. In short, it is urged that the Court belongs to the Justices, and that the President and the Congress must keep hands off.

The fact is that the Supreme Court cannot function without the periodic aid of the Congress, and that Congress, by inactivity, may be assuming responsibilities for the Supreme Court's acts as great as any responsibility it may assume by exerting its power. . . .

This power to reduce the Supreme Court to a mere phantom court was not an accident. Our forebears knew the story of judicial abuse and tyranny, as well as the story of legislative and executive abuses. These checks and balances were therefore embodied in the Constitution to enable Congress to check judicial abuses and usurpations, if the same should occur. If there are abuses in this Court . . . their continuance can only be due to default in the exercise of checks and balances placed by the Constitution in the hands of Congress and the Executive. . . .

When the Congress, as the supreme legislative and policy-making body of the United States, was granted such conclusive powers over jurisdiction and enforcement of decrees of the Court, and over appointment and behavior of its personnel, it is idle to contend, as many of the advocates of judicial supremacy do, that it was ever intended that the Supreme Court should become a supergovernment. From these powers it is apparent that Congress, by failure to exert its checks and balances, assumes responsibility for the functioning of the Court. It is clear that Congress has the power to see that the personnel of the judicial system is adequate, both with respect to number and to neutrality of attitude. It is a responsibility of Congress to see that the Court is an instrumentality in the maintenance of a just and constitutional government, and that it does not become an instrumentality for the defeat of constitutional government. The duty of cooperation is not cast upon Congress and the Executive alone. . . .

Legislation creating or abolishing vacancies in the Court is authorized by the Constitution and validated by historical practice as a method of bringing the elective and nonelective branches of the Government back into a proper coordination.

Its frequent use has avoided amendments which would make the Constitution a document of patches and details. It does not change the constitutional powers of the Court or the distribution of powers between the legislative and judicial branches. It does not eliminate any check or balance of the constitutional system.

Changing the size of the Court has never deprived it of independence or prestige. It was obvious at the founding of the Government that the Court would not always remain of the same size, and that changes in its size would be made, as they have been made, at those times when its decisions caused dissatisfaction. It is just

as constitutional to add members to keep the Court up with the country as it is to add members to keep the Court up with its business. The power of the Congress to avert constitutional stagnation is as great as its power to prevent congested dockets. And whatever other motives have influenced the changes that have been made in the composition of the Court, the dominant one has always been to keep the divergence between the Court and the elective branches from becoming so wide as to threaten the stability of the Government.

[Document Source: U.S. Senate, Committee on the Judiciary, *Reorganization of the Federal Judiciary, Part I*, Hearings on S. 1392, 75th Cong., 1st sess., March 10–16, 1937, p. 37.]

Senator Pat McCarran, Threat to Public Confidence in the Supreme Court, U.S. Senate, Speech of July 10, 1937

Critics of the President's plan objected that it would create distinctions between the justices on the Supreme Court and threatened the public esteem of the Court as a whole. Senator Pat McCarran (D-NV) argued that the new judges appointed by Roosevelt under the bill would essentially be placed on the Court to nullify the vote of a conservative judge already sitting. For McCarran this represented an unwarranted intrusion of the executive branch on the independence of the Court. If the decisions of the Supreme Court could be so easily tailored by presidents, McCarran argued, constitutional principles espoused by the Court would become ephemeral and subject to constant revision. The erosion of public regard for Supreme Court decisions would irreparably harm its role as the expositor of Constitutional doctrine and a check on the power of the political branches.

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Perhaps we might be justified in calling [the judges to be appointed under this bill] "quasi judges." I do not know whether or not that would be a good name for them; but any name will do for them. . . . If they should go on the Bench, and if the judgment and conclusions of the Justices on the Bench, whom they were to sit beside . . . were not in accord with what the appointive power thought was the spirit of the time, then they would vote contrarily. So by indirection the executive branch of the Government would place a veto against the will and judgment of one sitting on the

Supreme Court of the United States, whose will and judgment should be free, an indirect veto coming from the White House; and not alone from the White House, but from this very body, this body which would confirm the appointment. There would be a veto power over a Judge who was regularly on the Bench, and when, perchance, his judgment went contrary to the ideas and judgment of the new Judge, then they would pair, so we would have paired Judges, and we would have no judgment at all. . . .

... There could be no harm in enlarging the Supreme Court if the enlargement were to be permanent, natural, normal. It has been done before; it can be done again. It is permissible. But the bill before us does not propose to enlarge the Supreme Court. The bill does not propose to place new permanent members on the Supreme Bench. The bill proposes to place ad-interim members on the Supreme Bench if I may so term them; ad interim in that they will serve as coadjutors, so to speak, until the ones for whom they "pinch hit" are called beyond, or retire. When that happens, I take it from the tenor of the bill that the ad-interim Judge becomes a permanent Judge. He is always permanent to the extent that he cannot be removed except for cause. He is there to the extent that he can always affect the decisions of the Court.

That brings me to the subject of whether or not decisions would be affected by such a condition, and affected in a way that would be intolerable to the American people and to our form of government. There should be a final word in every litigation; there should be a final decision; but no one can ever say that after we place on the Supreme Bench ad interim Judges or coadjutors, or whatever we may call them, the American people will ever be satisfied with a decision rendered by such a court.

Mr. President, it may be said for the American people that, regardless of whether or not the decision is in their favor or against them, they are willing to abide by the decision of the court of last resort. It has no army to enforce its mandates. It has no power behind its judgments save and except the power of popular accord, popular declaration, and a nation, and a constitution. Those are the things that stand behind the Supreme Court, and which, if we pass this bill, we shall take from the Supreme Court. Those are the things for which some of us would rather strive here, even though we do not come back to the Senate; because, after all is said and done, a na-

tion is more than a power, and a people is more than an individual; and, however much we may love public place, we love more those who look to us for guidance. We love the honor of following the dictates of our own consciences more than we love anything else.

...

Mr. President, I say now, in my humble judgment, without fear of contradiction, that the passage of this bill would destroy the Supreme Court of the United States; it would destroy its efficacy; and we might as well destroy the thing itself as to destroy its efficacy. The passage of this bill would destroy the confidence in the Court which now rests in the hearts of the people, and that is the only army it has behind its mandates. When we destroy the confidence of the people of the country in any one branch of the Government, we have entered upon the destruction of the Government itself.

[Document Source: *Congressional Record*, 75th Cong., 1st sess., 1937, 81, pt. 6:7024–25.]

Leon Green, Support for “Unpacking the Court,” *New Republic*, February 24, 1937

Legal scholars who identified with the legal realist movement supported Roosevelt’s court plan as a frontal attack on what they believed to be a misguided understanding of the relationship between law and politics. While critics charged the President with “packing” the Supreme Court, legal realists like Northwestern University Law School Dean Leon Green argued that what the president was doing was actually “unpacking the court.” For Green, the Court already represented a particular political viewpoint and Roosevelt was simply attempting, within the limits of the Constitution, to break up the entrenched politics of the Supreme Court. Green and others were less offended by this because, in addition to their support for New Deal regulations, they contended that the courts were inherently political already and that the interpretive stance of liberal judges—as embodied in Justices Stone, Cardozo, and Brandeis—was as legitimate as the conservative judges. Green characterized charges of dictatorship against the President as misguided. He stressed that the judges to be appointed would still take each case individually and be free to decide them as they saw fit, free of political pressure, once on the bench.

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The opposition boils down to one point, *viz.*, the circumvention of the Constitution so as to undermine the independence of the Supreme Court, and to bring it under the control of the Executive. That is the fundamental principle which is claimed to be involved. But the particularization of that principle is found in the fact that the opposition fears the President has found a way to legalize the New Deal. Thus the opposition is political. And no one should expect it to be otherwise. Those who talk as though the court system is not a political matter talk nonsense. As long as the courts play their role in our government they will be and should be at the very heart of our political order. That is not something to be condemned; it is a virtue.

Assuming then that the opposition to the proposal is political, let it be met on that ground. On that basis what is wrong with the proposal?

It is charged that the President will pack the Court with Judges who reflect his own attitude toward current reform and recovery legislation. It will not be charged, of course, that this packing will be done in any subterranean manner, or that the Senate will confirm anyone who is not qualified as a lawyer and as a citizen to sit on the Court. It is merely feared that the appointees to the Court who are chosen and confirmed will be favorable to the administration.

And what is wrong with that? Certainly such a course cannot be said to be outside the Constitution. Perhaps the fact that it is within it is what proves so exasperating. It is not unconstitutional to appoint new Judges who will have the same degree of honesty, learning and patriotism as those who have so far rendered the legislative efforts of the past few years nugatory. There is nothing in the Constitution that requires new Judges to hold the same views as those who are now on the Court, or that forbids new Judges to hold views in accord with current political opinion.

But it is said that the proposal puts the Court under the power of the President and makes him a dictator. That of course is an exaggeration that can only come from desperation—from one who is waging a losing fight. The new Judges will be as free as the present ones are. They may or may not decide specific cases as the President or Congress would like to see them decided.... But assuming their decisions coincide with the desires of Congress and the Pres-

ident, it would only mean that the Court gave one interpretation to the Constitution or statute rather than another. And that is done in every case. It does not mean that the Constitution is destroyed or that the President has become a dictator. The next case will be a new one and the Court will be free to deal with it on its merits too. Moreover, the President's term ends within a short period and there will be a new President with whose program they may or may not agree. The proposal does not in any way affect the Judges' independence nor does it make the Court subject to executive control, and those who so argue are merely excited. The Constitution is adhered to both in form and in spirit.

But the opposition charges that the proposal is an ingenious way to amend the Constitution. That charge too is groundless. The proposal merely affords a way for the *interpretation* of the Constitution to be kept more nearly abreast with the development of the nation. . . . A constitution must grow if it is to remain the charter of a political institution like our national government. Our Constitution grows both through formal amendment, and through interpretation by men whom we call Judges, who translate it in the light of the needs, desires and interests of the people. The latter method reflects the more usual and normal growth. Citizens express their needs, desires and interests in political matters generally by election of public officials, particularly in matters affecting the courts by election of Senators and Presidents, who in turn select Judges to interpret our basic laws as they may be involved in litigated cases. That is the American form of government. It is a good way. It is a slow way and a safe way. But let it be interrupted by any part of the machinery failing to function as, for example, by the failure of Judges to interpret our basic laws in harmony with the needs, desires and interests of the nation as a whole, and that way of government is imperiled.

[Document Source: Leon Green, "Unpacking the Court," *New Republic*, February 24, 1937, pp. 67–68.]

Administrative Independence of the Courts

After the public furor over Roosevelt's proposal for adding to the size of the Supreme Court subsided in late 1937, a number of leading

judges and lawyers refocused their attention on that part of Roosevelt's plan that they believed had merit: creating administrative machinery within the judicial branch to achieve greater efficiency in the lower federal courts.

Since the 1870s, the Department of Justice had been the administrator of the federal judicial system, being charged with compiling statistics related to the size and character of judicial business and with controlling the budgetary and financial operations of the courts. The dependence of the judiciary in administrative matters was especially felt during the 1930s as the Congress and the Budget Bureau implemented a number of cost-cutting measures to cut government spending during the first years of the Great Depression, including reductions in per diem rates for traveling judges. In addition, Attorney General William D. Mitchell eliminated expenditures for bailiffs, criers, and personal messengers. Under President Roosevelt's economic measures for the 1934 fiscal year, the courts faced a 25 percent reduction in the Justice Department budget, and the salaries of secretaries to retired judges were cut in half.

Members of the Conference of Senior Circuit Judges had been considering measures to gain more autonomy from the Justice Department since the early 1930s and cooperated with the Roosevelt administration to draft a bill toward that end. The judges, with the support of administration officials like Attorney General Homer Cummings, began to articulate an idea of judicial independence that went beyond rendering impartial decisions in cases. Judges who supported the creation of an administrative office for the courts argued that such an institution was necessary to guarantee the independence of the judiciary as a coordinate branch of government, free from institutional pressure from the legislative and, especially, the executive branches.⁹⁹

The movement for administrative independence of the courts had widespread support in 1937–1939 but raised important questions about the distribution of authority within the judicial branch itself. Federal judges differed over how much power an administrator should have over the judges and to which body—the Judicial Conference of the United States or the Supreme Court—the new officer

99. Fish, *Politics of Judicial Administration*, 91–124; Henry P. Chandler, "Some Major Advances in the Federal Judicial System, 1922–1947," 31 *Federal Rules Decisions* (1963): 360–83.

should answer. They differed over how much responsibility over judicial administration should be placed in the hands of the Chief Justice of the United States. Judges also debated to what extent senior circuit judges could utilize the new administrative arrangement to monitor and discipline district judges in order to bring greater efficiency to the courts.

Attorney General Homer Cummings, Delays in the Courts,
Annual Report, January 3, 1938

Attorney General Homer Cummings drafted a bill in 1936 empowering the Chief Justice to appoint an administrator to oversee the administrative and budgetary business of the federal courts. All financial operations conducted by the Department of Justice would be transferred to this new administrator and the executive and legislative budget agencies (the Bureau of the Budget and the General Accounting Office, respectively) would have no authority to alter or revise his findings. The Conference of Senior Circuit Judges approved the bill in principle but deferred formal endorsement of the Attorney General's measure until the Supreme Court could review it.¹⁰⁰

At the urging of American Bar Association President Arthur T. Vanderbilt, Homer Cummings resumed his efforts at administrative reform in 1937 after the defeat of Roosevelt's court plan. American Bar Association surveys compiled during the court fight showed that while lawyers overwhelmingly opposed Roosevelt's plan for the Supreme Court, strong majorities favored the appointment of an administrator for the federal judiciary.¹⁰¹ Vanderbilt approached Chief Justice Hughes, who was wary of any further political attacks on the courts, and convinced him that by taking control over its own affairs, the federal courts could address any legitimate criticisms of court efficiency and stave off future radical political action.¹⁰²

In his annual report issued in January 1938, Attorney General Cummings called for new administration for the courts. He highlighted the continuing delays throughout the trial courts and urged Congress to give the courts the administrative tools for more effective management of the judicial branch. The Attorney General's views were reflected in a bill introduced in the Senate by Henry F. Ashurst (D-AZ) that same month.

100. Chandler, "Major Advances in the Federal Judicial System," 370–71.

101. *American Bar Association Journal* 23 (May 1937): 384–88.

102. Chandler, "Major Advances in the Federal Judicial System," 374.

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Permanent additions to the judicial personnel in circuits and districts where they are urgently needed and reforms of procedure will be of enormous help, but will not entirely solve the age-long problem of the law's delays. Congestion is apt to be a temporary phenomenon, making its appearance sporadically in various districts as a result of special conditions that are not necessarily lasting. For example, the illness or incapacity of a judge, the filing of a large number of actions of special kind, such as war risk insurance cases or suits for damages affecting a great many persons, may temporarily clog the dockets. A protracted trial of a mail fraud case or a prosecution under the Sherman Act, may postpone the disposition of other business and cause an accumulation of arrears that will take months to dispose of. Circumstances of this kind frequently recur, making their appearance when least expected. A system of some degree of flexibility is indispensable. It is gratifying to note that at the last session of the Congress the rigidity of the old rules was somewhat relaxed. Nevertheless, serious thought should be given to increasing that flexibility by appropriate measures that will involve a greater coordination of the judicial machinery, a better method of assembling data and continuous oversight by the judiciary itself of its functions and efficiency.

An efficacious administrative machinery is as necessary in the courts as it is in other branches of Government and in private enterprise. Individual judges must of necessity confine their time and energy principally to the transaction of judicial business. The senior circuit judges are occupied with their judicial labors and can give but scant time to the performance of administrative duties. The conference of senior circuit judges meets but once a year and continues in session only three days. It performs a valuable and useful function, but obviously it does not and cannot act as a continuous administrative body. It is highly desirable that provision be made for a permanent administrative officer, with adequate assistance, to devote his entire time to supervision of the administrative side of the courts; to studying and suggesting improvements in the matter of handling dockets; to assembling data and keeping abreast of the needs of the various districts for temporary assistance; and to ascertaining what judges are available for such assignments, as well

as performing other incidental functions. Such an officer should be appointed by the Supreme Court and act under the supervision of the Chief Justice.

[Document Source: U.S. Department of Justice, *Annual Report of the Attorney General of the United States* (Washington, D.C.: Gov't Printing Office, 1938), 5–6.]

Judge Harold M. Stephens, Judicial Branch Independence,
Testimony Before Senate Judiciary Committee, April 5, 1939

In the aftermath of Franklin Roosevelt's court reorganization plan and the prospect of executive pressure on the federal courts, federal judges began to articulate a vision of greater independence for the judiciary as a coordinate branch of government. They pointed out that the United States government, represented by the Justice Department, was the largest litigator in the federal courts and had the potential, at least in theory, to use its control over court finances to influence judicial decisions.

In hearings on the 1939 bill that would pass the Senate and ultimately establish the Administrative Office of the U.S. Courts, Judge Harold M. Stephens of the Circuit Court of Appeals for the District of Columbia, pointed out that no other branch of government was as vulnerable to interference as the judicial branch. He contended that the Congress and the President had the power to veto the judiciary's budget. Stephens argued that the public respect for the courts depended on their ability to process their business and called for the judges, whom the American people held responsible for the administration of justice, to be given true responsibility for managing the business of the federal courts.

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Happily, through the course of the Government thus far, there has been no serious conflict or encroachment upon the independence of the courts through this fiscal and financial power of the Attorney General over the financial affairs of the courts, but the situation is anomalous. It is unwholesome, and in theory, or in the event of a crisis in the country, or a hostile Attorney General who seriously doubted the advisability of the independence of the courts, he could cripple their independence and efficiency greatly, because of his power over the financial affairs of the courts....

That is a very anomalous situation, and it is a situation which does not exist in respect to the other two branches of the Govern-

ment. The Congress makes up its own budget through its committees, and presents it to the Appropriations Committees with proper recommendations for its own expenses. The executive branch submits its budget to Congress unrevised. It is true that the individual departments within the executive branch of the Government submit their estimates to the Bureau of the Budget, but that Bureau is subordinate to the President, as are all departments of the executive branch. . . . That is also true with respect to the Supreme Court of the United States, but it is not true with respect to the Federal courts generally.

It seems to me that is an anomalous and unnecessary and undesirable situation, that two executive departments of the Government should have a potential veto power over the estimates necessary for the support of the Federal courts. Certainly the courts must be and are wholly responsible to the wishes of the people, expressed through the Congress, so far as their needs and support are concerned; but it is anomalous and potentially unwholesome for the executive branch of the Government to be in charge, and effectively in charge, so far as possessing an antecedent veto power is concerned, of the business affairs of the courts, both administrative affairs and financial affairs. One can visualize the anomaly of the situation if the judiciary had an antecedent veto power over the administrative affairs of the executive branch or the Congress itself. . . .

It is not necessary for me to say to any member of this committee, but perhaps it is not inappropriate for me to state it for the record, that in a serious view it is particularly important at this time that the efficiency and independence of the Federal courts should be preserved. We are living in an age when the totalitarian system of government as distinguished from the limited theory, is in issue before the people. . . .

. . . I should say the efficiency and power of the Federal judiciary to accomplish its functions is dependent almost entirely in a democracy upon the confidence of the people in the courts. But even more fundamentally than that, they are dependent upon the confidence, indeed upon the pride of the people, in their efficiency and independence and effectiveness. . . .

I think that an efficient and clearly independent discharge of official business by the Federal judiciary is necessary and inescapable in a democracy. . . .

I think the independence of the Federal courts in this country is not questioned, but I think the efficiency of the Federal courts is under question, and properly so. . . . The judges should be responsible for correcting those defects, because that is their duty; but if they are to be held responsible, they should be given authority to accomplish the improvements which are necessary to the full effectiveness of the Federal judiciary. I think the judges, once given authority as well as responsibility in this matter, would be much more effective in their duties than they have been in the past because they would feel the responsibility, and having also authority to express it and to make the responsibility effective, they would be quickened to do it.

[Document Source: U.S. Senate, Subcommittee of the Committee on the Judiciary, *Administration of United States Courts*, Hearings on S. 188, 76th Cong., 1st sess., 1939, p. 29.]

Chief Justice Charles Evans Hughes, Support for Decentralized Judicial Administration, Conference of Senior Circuit Judges, September 30, 1938

The members of the Senate Judiciary Committee waited to hear the views of Chief Justice Hughes before they reported a bill to create a court administrator.¹⁰³

Hughes and the rest of the Supreme Court, while supportive of the plan in principle, questioned the degree to which authority over judicial administration would be centralized in the Chief Justice as the direct supervisor of the new administrator. After the controversies surrounding the Supreme Court in 1937, Hughes did not want the Court to be too closely linked with administrative matters in the lower courts or to a responsibility to the public to discipline trial court judges. He believed that he could individually have sufficient input into administrative matters through his position as presiding officer of the Judicial Conference of the U.S. Courts. When the Judicial Conference took up the bill again in 1938, Hughes explained that he and the Supreme Court, while officially silent, were opposed to the measure as written and recounted the objections of the jus-

103. Chandler, "Major Advances," 377–78.

tices to the centralization of authority in the Chief Justice. Much of the apprehension of the justices stemmed from their fear that increased administrative responsibility would lead to great public criticism of the Court.

• • •

While the director would be appointed by the Supreme Court, it would be impracticable for the court to have any direct supervision, and the bill contemplates that the supervision should be given by the Chief Justice, and he in any event would act as the administrative officer of the court.

The Judicial Conference consists of judges who are widely scattered, and the Conference meets but once a year; and the result would be that the judges would naturally look to the Chief Justice to determine any questions which might arise which had not been determined or settled to their satisfaction by the director, and a good deal of correspondence would probably result.

The establishment of this budgetary office was viewed by the judges with a great deal of apprehension. There again the responsibility, despite the intervention of the director and his subordinates, would rest with the Chief Justice, and if any matters . . . escaped his attention which should give rise to any scandalous comment, the criticism would be naturally centered on the Chief Justice as the responsible officer who apparently had been neglectful in a matter which did not seem important perhaps at the time, but later developed importance because of some irregularity that was disclosed.

The members of the court strongly opposed the imposition of that burden, with the resulting responsibility and possibly making the Chief Justice and the court itself, a center of attack. . . .

There is . . . another objective in the bill, and that is the provision of an organization for the supervision of the work of the courts, the discovery of the needs of the courts, not from merely an administrative point of view in its more restricted sense, but discovery of unnecessary delays, of inefficiency and of all the various matters relating to the work of the judges which may be regarded as important to a more ideal administration of justice in the federal courts. . . .

Now, there again, with that conception of the objective of the bill, the responsibility put upon the Supreme Court in selecting the di-

rector and assistant director and the responsibility imposed upon the Chief Justice are quite obvious. If this bill became a law, there is no doubt that the numerous complaints which are made of the action of judges would be brought directly to the Chief Justice, not as now by casual correspondence, but directly, because he would be the authority who can furnish whatever corrective measure is needed. And if he does not furnish that corrective measure, or see that it is furnished, why of course criticism for the deficiency will be put upon him....

... I think the difficulty in this present bill lies in an undue centralization; not but that every movement must have its head, and not but that there must be some centralized authority to deal with local differences. My thought is that along the way there should be a greater attention to local authority and local responsibility. It seems to me that, as we have the States as foci of administration with regard to local problems pertaining to the States, we have in the various Circuits of the country foci of federal action from the judicial standpoint for supervision of the work of the federal courts.

Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various Circuits,—immediate responsibility for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to insure competence in the work of all of the judges of the various districts within the Circuit....

The main point is that, instead of having immediately and at once and exclusively a central organization under the Supreme Court and the Chief Justice, ... you would have a de-centralization and a distribution of authority which I think will greatly promote efficiency and will put the responsibility immediately and directly where it belongs with respect to the administration of justice in the respective Circuits.

[Document Source: Transcript of September 30, 1938, pp. 177–92, Meeting of the Conference of Senior Circuit Judges, Records of the Judicial Conference of the United States, Records Relating to Meetings, 1922–1958, Box 14, RG 116: Records of the Administrative Office of the United States Courts, 1940–1992, National Archives and Records Administration, Washington, D.C.]

Attorney General Homer Cummings, Benefit of Circuit Councils and Conferences, *American Bar Association Journal*, November 1938

The lukewarm reception by the Judicial Conference and the Supreme Court of the bill submitted by Senator Henry F. Ashurst signaled that while administrative independence for the courts was foremost on the agenda, most judges hoped to avoid undue centralization of authority in Washington, D.C.

Two committees were created—one by the senior circuit judges, the other by the Attorney General—to work on new bills taking into account the criticism voiced by the Chief Justice. The committees ultimately conferred and produced a new bill, which was introduced in both houses of Congress in January 1939.¹⁰⁴ In the new bill, the director and assistant director of the Administrative Office would be appointed by the Chief Justice rather than the whole Supreme Court (this would later be changed back) and they would serve under the supervision of the Conference of Senior Circuit Judges, not the Chief Justice. The director was required to submit statistical reports to the Conference as well as to the individual senior circuit judges as to the state of business in their circuits. The director no longer was given authority to recommend to the Chief Justice assignments of trial judges, however.

Perhaps the most important change in the bill, which addressed the objections voiced by Chief Justice Hughes at the 1938 meeting of the Judicial Conference, was the stipulation that circuit judges in each circuit meet at least twice a year as a circuit council and that circuit and district judges, as well as practicing lawyers, be brought together annually in circuit judicial conferences.

A number of Senior Circuit Judges—Judge John J. Parker of the Fourth Circuit, Judge Arthur Denison of the Sixth Circuit, and Judge Kimbrough Stone of the Eighth Circuit—had been experimenting with meetings of district judges within their circuits since the mid-1920s. At these informal conferences, judges had a chance to discuss issues related to procedure, sentencing, courtroom practice, and administration. The Conference of Senior Circuit Judges in Washington endorsed these meetings in the early-1930s, though the belt-tightening of the Depression era slowed their expansion.¹⁰⁵

With the early conferences called by Parker, Denison, and Stone as a model, the revised Administrative Office bill formally incor-

104. S. 188 and H.R. 2973, 76th Cong., 1st sess. (1939).

105. Fish, *Politics of Federal Judicial Administration*, 145–52.

porated circuit conferences as a tool for strengthening interdistrict communication of statistics and best practices while strengthening decentralized administration at the circuit level.

The circuit councils were created as a more supervisory body to ensure that district courts carried out their judicial functions in a timely and effective manner. The council was to be an extension of the circuit judges' supervision of district judge judicial responsibilities; just as legal decisions could be corrected on appeal, circuit judges could admonish district judges for failing to manage their cases. Councils had broad powers to reassign district judges within a circuit, order judges to decide cases, and manage judge's vacations to ensure constant judicial action. The councils redistributed some of the powers that had been exercised by senior circuit judges alone.

At the end of 1938, Attorney General Homer Cummings wrote in the American Bar Association Journal of the potential of the circuit conferences for bringing greater efficiency to the judicial system and improving the public reputation of district courts.

• • •

Our Federal Judicial system is passing through a period of readjustment. Many changes have taken place that make for greater efficiency and still others are in the offing. There are certain difficulties, however, in attaining a satisfactory degree of unity and coordination. These difficulties, in part at least, grow out of the very structure of the system itself. Our Federal courts are not closely integrated. By and large the work and problems of our Federal district judges are little known to other judges even in nearby districts. In fact it could hardly be otherwise. Usually a Federal district judge is appointed to a particular district covering a specially segregated territory. In a certain sense it is a kingdom apart. There has been little impulse, at least until recent times, for the judge of one district to make it a practice to exchange confidences with a judge in another district. The Conformity Act was doubtless partly responsible for this relative isolation. The existence of forty-eight separate types of procedure constituted a disintegrating force, not a unifying one. Other factors, which it is unimportant for us to explore, also tended to divide the country into judicial water-tight compartments. It is an unwholesome situation and is recognized as such by some of our most eminent jurists. The need of a more homogeneous ar-

rangement has become increasingly evident, especially in the face of problems that have spilled over State lines.

A partial remedy was found in the creation several years ago of the Conference of Senior Circuit Judges....

I am fully persuaded, however, that it is not enough for the Senior Circuit Judges to meet in annual session. Quite apart from the need of legislation for a modernized Administrative Office for the Judiciary it is obvious that adequate contact between District Judges is sadly lacking and should be secured by the means now open to us. Only by such intimate counsel is it possible to develop an *esprit de corps*, to cultivate a national rather than a parochial point of view, and to bring to light and develop sound and practical measures for improving the administration of justice in all of the Federal districts. Today there is less justification than ever before for the judge of a particular district to isolate himself from his associates in other districts. Our Federal law is gradually becoming more uniform and procedural statutes of nation-wide application are growing in number. The statutes dealing with interstate crime, the Probation law, the recently enacted Juvenile Delinquency Act, the Criminal Appeals rules and the New Rules of Civil Procedure are illustrations of this unmistakable trend.

I have been particularly impressed with a device which has been employed in the Fourth Circuit....

Not only has the work of the Circuit been unified and many problems of administration solved in conference—not only has an *esprit de corps* been developed and a wider outlook on the administration of justice been attained, but a better understanding between bench and bar has been secured, a real study of the problem of procedural reform has been carried forward, and worth-while improvements in the administration of justice have resulted....

I am deeply impressed by the idea that nothing could be done for America that would improve the tone and temper of public life more than swift and speedy justice in our civil and criminal courts. I am convinced also that many of the defects connected with the administration of Federal justice are traceable to the fact that our Federal courts have been operating without sufficient statistical information, without comparative data, without coordination, and have been too long quarantined against the infiltration of new ideas and valuable experiences developed in other sections of the

country. I commend to bench and bar the methods employed in the Fourth Circuit under the wise leadership of Judge Parker, because unlike many experiments it has been subjected to the acid test of an eight-year trial and has proved its worth.

[Document Source: Homer Cummings, "The Value of Judicial Conferences in the Federal Circuits," *American Bar Association Journal*, November 1938, 979.]

Appendix

Major Legislation Related to the Judiciary, 1875–1939

Jurisdiction and Removal Act of 1875

Granted the U.S. circuit courts the jurisdiction to hear all cases arising under the Constitution and the laws of the United States, as long as the matter in dispute was worth more than \$500. The statute also made it possible for plaintiffs and defendants in cases before state courts to remove a case to a U.S. circuit court whenever the matter involved a question of federal law or if any members of the parties were from different states.

Judiciary Act of 1887–1888

Increased the amount-in-controversy necessary to enter federal courts from \$500 to \$2,000 and eliminated the ability of plaintiffs to remove a case they had brought in state court. The act also stipulated that cases based on diversity of citizenship could be brought only in the district of residence of the plaintiff or the defendant. The act was re-passed with a minor correction in 1888.

Circuit Courts of Appeals (Evarts) Act of 1891

Established a circuit court of appeals in each of the country's nine judicial circuits and established nine new circuit judgeships. The act authorized the circuit justice, the circuit judges, or district judges to preside over each three-person court of appeals. To limit the flow of cases to the Supreme Court, Evarts provided that all cases arising out of diversity of citizenship would be final in the new appeals courts, except where certiorari was granted by the Supreme Court or when an appellate court certified a question for consideration by the Supreme Court. To address worries about confusion over the interpretation of national law, the plan provided that litigants in cases involving federal questions (and a number of other categories) would have the right of a direct appeal from the trial courts to the Supreme Court.

Judicial Code of 1911

A revision and codification of all the statutory law governing the federal courts. The most important change incorporated into the Code was the abolition of the U.S. circuit courts and the transfer of their jurisdiction to the district courts. The Code bill also included an increase in the amount in controversy required to enter the federal district courts from \$2,000 to \$3,000.

Three-Judge Panels (Mann-Elkins Act), 1910

Provided that any petition to enjoin a state official from enforcing a state law or order of a state commission had to be submitted to a circuit judge and reviewed by a panel of three judges, at least two of whom had to be circuit judges. The law also provided that the governor, Attorney General, and official in question be notified at least five days in advance of a hearing on the petition.

Clayton Antitrust Act of 1914

Included provisions curtailing the power of federal judges to issue injunctions against workers involved in labor disputes. The act specified a number of acts that federal judges could not enjoin, including peacefully assembling, boycotts, union payment of strike benefits, and other acts “which might be lawfully done in the absence of” a dispute between employer and employee.

Judiciary Act of 1914

Altered the jurisdiction of the Supreme Court by allowing an appeal as of right in cases where a federal right was upheld in a state court and a statute was declared unconstitutional. Previous to this statute, the Supreme Court would only hear appeals as of right when a federal right was claimed but denied by a state court.

Judiciary Act of 1916

Abolished the Supreme Court’s obligation to hear appeals from circuit appeals courts under a host of specific federal statutes, including the Federal Employees’ Liability Act, and also expanded the Court’s discretion over appeals from the state courts. The act limited appeals as of right to two classes of cases: where a statute or treaty of, or authority exercised under, the United States was challenged as repugnant to the

federal constitution and the state court denied its validity, and where a state statute, or authority exercised under, was challenged as unconstitutional and it was upheld. Cases involving state court construction of a federal statute, or where a federal right was asserted without challenging the validity of a statute, were now subject to the Court's discretion to grant certiorari.

Act Establishing the Conference of Senior Circuit Judges, 1922

Provided for an annual meeting of the country's senior circuit judges, presided over by the Chief Justice of the United States, to report statistics about judicial business and make recommendations to Congress on the administrative needs of the courts. The Conference also used its statistics to make recommendations on the temporary transfer of judges by the Chief Justice to assist district judges with backed-up caseloads.

Judiciary Act (Judges' Bill) of 1925

Granted the Supreme Court greater control over its appellate docket by sending appeals on federal and constitutional questions from the district courts to the circuit courts of appeals and making appeals final there unless the Supreme Court granted a writ of certiorari. A select group of cases remained appealable directly to the Supreme Court from the district court: those involving the Sherman Antitrust Act or the Interstate Commerce Act; criminal appeals; and injunctions against state officers and the Interstate Commerce Commission. Appeals from the Court of Claims, the Court of Customs Appeals, and the Court of Appeals of the District of Columbia were also transferred to the discretion of the Court.

Norris-LaGuardia Act of 1932

Strengthened statutory limitations against federal court injunctions in cases involving labor disputes. The law included stringent procedural criteria for judges to meet before issuing an injunction in a labor dispute, including requiring judges to find that unlawful acts were threatened and would be committed in the absence of an injunction and that greater injury would be inflicted on the complainant if no injunction was issued than on the defendant if it was. The statute included a

broad statement of public policy in favor of workers' collective action in order to achieve favorable construction by the courts.

Johnson Act of 1932

Amended Section 24 of the Judicial Code to prohibit district courts from enjoining the orders and prescribed rates issued by state utilities commissions based on claims that they were repugnant to the Constitution.

Civil Rules Enabling Act of 1934

Granted the Supreme Court of the United States the authority to promulgate uniform rules of civil procedure for the federal district courts. Rules were drafted by a committee appointed by the Supreme Court and became active if not nullified by Congress within six months. The law also permitted the Supreme Court to end the distinction between law and equity jurisdiction within the federal courts and to establish rules for one form of civil action and procedure. The new rules of civil procedure drafted under the act became active in 1938.

Act Establishing the Administrative Office of the U.S. Courts, 1939

Granted administrative oversight of the federal courts to the newly established Administrative Office of the United States Courts. The Administrative Office was tasked with preparing the annual budget for the courts, disbursing funds appropriated by Congress, and gathering statistics and information on caseloads throughout the judicial system. The act established circuit judicial councils through which the courts of appeals judges would review the caseload reports of the Administrative Office and instruct district judges on what was necessary to expedite the courts' business. The act also mandated annual circuit conferences at which circuit and district judges would meet with members of the bar to discuss judicial administration.

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