
Franklin D. Roosevelt and the Transformation of the Supreme Court. Edited by Stephen K. Shaw, William D. Pederson, and Frank J. Williams. Armonk, NY: M.E. Sharpe, 2004. Pp. 271.

Review by:

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French political philosopher Alexis de Tocqueville (1956 [1835-40], p. 74) once remarked that “scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question.” As such a kind of litigation has usually ended up before the highest bench, the Supreme Court has had a deep impact on U.S. politics since it claimed the right to invalidate statutes that are contrary to the Constitution in 1803. At no time, however, was the political saliency of the Supreme Court more relevant than during the New Deal, when it first restricted, and then extended, the perimeters of governmental authority in the field of economic regulation (Maidment 1991; Leuchtenburg 1995; Cushman 1998). Drawing upon papers presented at the conference “FDR After 50 Years” held at Louisiana State University in Shreveport in September 1995, the masterly-edited collection of essays under review here analyzes the role of President Franklin D. Roosevelt in the shift in jurisprudence from conservatism to liberalism on the part of the Supreme Court.

Of course, Roosevelt’s 1937 “Court-packing” plan is central to the book. In particular, Barbara A. Perry and Henry J. Abraham examine the image of the Supreme Court, as shaped by both the media and the institution itself, in the eyes of the public opinion. In their view, it was the widespread perception of the Supreme Court as the defender of the Constitution that alienated a majority of Americans from the president’s proposed reform and contributed to the defeat of Roosevelt’s scheme. Similarly, focusing on forty-six selected newspapers in the state of Kansas

as a case study, James C. Duram highlights the campaign of the press to prevent Roosevelt from having his reorganization of the judiciary passed. However, contrary to the thesis that the president's "Court packing" bill precipitated the shift toward liberal rulings (Corwin 1941, pp. 64-65), Roger W. Corley argues that 1937 did not mark a significant constitutional revolution. Not only did the justices cast the critical votes that upheld a Washington State minimum wage act and, thereby, tolled the knell for the principle of governmental noninterference in the market economy shaping previous jurisprudence on December 19, 1936, namely almost three months before Roosevelt unveiled his Judicial Reform Bill on March 9, 1937. But Corley's deep scrutiny of all decisions from 1921 to 1937 also reveals that the Supreme Court slowly began to sustain state legislation regulating the economy as early as 1930, after Charles Evans Hughes replaced William H. Taft as chief justice. In Corley's view, the implications of the 1937 rulings were confined primarily to the extension of such jurisprudence to federal laws. Moreover Corley's interpretation corroborates the hypothesis that the Supreme Court is generally responsive to the outcome of elections or even forerun it (Gates 1992), as opposed to the argument that the nine justices are often lukewarm toward voters' realignments and usually latecomers in adhering to the reshuffles of political majorities at the polls (Funston 1975; Beck 1976).

A few prominent justices themselves are similarly of interests to some of the contributors to the volume. Specifically, Kenneth M. Holland highlights the many constitutional disagreements and few agreements between Chief Justice Hughes and President Roosevelt. Elaine T. King relies on a perusal of the *Shreveport Journal* and the *Shreveport Times* in order to detail the controversial appointment and confirmation of Hugo L. Black, a staunch supporter of both the president and the New Deal legislation in the Senate, to the Supreme Court despite evidence of his previous and short-lived membership in the Ku Klux Klan in Alabama. James L. Moses examines the ill-fated attempts at slating William O. Douglas for vice president on the 1944 Democratic ticket in the effort to position him as Roosevelt's political heir in the White House. But, contrary to other historians (Simon 1980, pp. 257-75), Moses maintains that Douglas

never sought the nomination and had no presidential aspirations or political ambitions at all. William D. Bader explains prominent New Dealer Felix Frankfurter's apparent inconsistency of liberal activism in his pre-Court years and judicial restraint on the bench in terms of the justice's high regard for legal principles.

Bader points to Frankfurter's opinions validating state regulations that made flag salute compulsory in *Minersville School District v. Gobitis* (1940) and *West Virginia Board of Education v. Barnette* (1943) as examples of the justice's advocacy of restraint in cases involving individual liberties. However, one can reasonably suggest that Frankfurter's stand on *Gobitis* and *Barnette* may also have resulted from the wartime hyper-zealous patriotism of a foreign-born justice who hardly missed an opportunity to show off his great love of his adoptive country (Baker 1984, pp. 364, 407).

Closer attention to the war years would have also provided further insights into the transformation of the Supreme Court during the Roosevelt administration. In the aftermath of the end of World War I, future Chief Justice Hughes cast doubts on "whether constitutional government as hitherto maintained in this Republic could survive another great war even victoriously waged" (as quoted in Corwin 1947, p. 3). The Supreme Court, under Hughes' successor Harlan Fiske Stone, had the opportunities to play a key role for the preservation of "government under law" after the United States entered World War II when the justices took cases involving civil-military relations (Konefsky 1945, pp. 235-54). However, by upholding the legitimacy of the military commissions that tried German saboteurs operating in the United States, by sustaining curfew orders for Japanese Americans, a majority of whom were U.S.-born and citizens, in *Kiyoshi Hirabayashi v. United States* (1943), and by validating the mass internment of Japanese Americans in *Toyosaburo Korematsu v. United States* (1944), the Supreme Court impaired civil liberties out of military necessities (Bittker 1997; Wiecek 2002; Irons 1983). Indeed, while the country was at war with the Axis Powers in order to defend the

principles and ideals of democracy, a replica of the mid-1930s standoff with the Roosevelt administration would have been most harmful to the cause of the United States.

Hirabayashi and *Korematsu* are listed in a useful digest at the end of the volume. But no essay discusses these cases and their implications. Actually, the contributors tend to overlook the Court's response to wartime issues. When the contributors do not focus on the rulings on the New Deal legislation, they prefer to analyze the postwar legacy of the Roosevelt Court as for civil rights (Donald W. Jackson and James W. Riddlesperger Jr.), freedom of religion (Stephen K. Shaw), and labor rights (Harvey G. Hudspeth). Specifically, this latter scholar outlines the transition of the Supreme Court from prewar economic liberalism to postwar social conservatism and identifies such a turning point with the 1947 decision to sustain the conviction of labor leader John L. Lewis for contempt on the grounds that he had ignored a court injunction to call off a coal miners' strike.

Both the guilty verdict and its subsequent upholding suited the needs of the Truman administration, which had initially asked for the restraining injunction in the wake of a strike-ridden 1946 (Phillips 1966, pp. 122-25). Indeed, as other chapters in the third section of the volume, Hudspeth's essay, too, stresses the components of the Court's opinions resulting from applied politics. Against this backdrop, an examination of the extrajudicial activities of some of Roosevelt's appointees on behalf of the federal administration – Douglas, Jackson and especially Frankfurter secretly advised the president on a number of relevant issues, while Frank Murphy was even commissioned a lieutenant colonel in the army at wartime (Murphy 1982, pp. 186-303; Urofsky 2002) – may have cast additional light on the reasons for the alignment of the Court's rulings with the stand of the U.S. government after 1937. Similarly, Jackson and Riddlesperger Jr. overlook *Smith v. Allwright* (1944), which invalidated the white primary disfranchising African Americans in Texas. Yet Roosevelt's unwillingness to follow Attorney General Francis Biddle's advice to profit from *Smith v. Allwright* and challenge the white primary in Alabama, too (Kennedy 1999, pp. 774-75), would have offered an additional and illuminating example of

what the two scholars call the president's "reluctance to take bold initiatives on civil rights" (p. 185).

In the closing essay, Hudspeth refers to 1937 as a "revolution" (p. 217). That he provides a different understanding of the 1937 events than Corley's interpretation a few chapters earlier well epitomizes the multifaceted perspectives of this anthology, which helps make these essays a most rewarding reading.

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