

Designing Men, Dangerous Innovation: The Judiciary Act of 1925

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Abstract

Passed in the waning days of the lame-duck 68th Congress by seemingly uncontroversial votes in both the House and the Senate, the Judiciary Act of 1925—the Judges’ Bill—began a revolutionary transformation of the Supreme Court’s appellate jurisdiction. Why did Congress erase a constitutional norm that had existed since 1789, grant the Court almost complete discretion over its docket, and open the door to the fundamental reshaping of the balance of power among the judicial and legislative branches of government?

Standard accounts of the enactment of the Judiciary Act of 1925 contend that Congress deferred to the Court’s proposal because Chief Justice Taft’s lobbying message struck a responsive chord with members. Taft and the American Bar Association argued that the Judges’ Bill was too technically complex for members of Congress to question or amend. More recent accounts add an attitudinal interpretation to the standard account, contending that the ideological alignment of the policy preferences of justices and members of Congress also contributed to the enactment of the Judges’ Bill.

I argue that neither of these accounts, by itself, provides a satisfactory explanation. Employing a theoretical approach rooted in historical institutionalism, I illuminate the powerful political factors (including the critical juncture formed by the electoral landslide of 1924) that compelled and empowered Coolidge Republicans in Congress to grant the Supreme Court policy-making power. I also raise fundamental questions about the legitimacy of the legislative process that led to the enactment of the Judges’ Bill and put the Supreme Court on a path to an agenda-setting power from which it has not strayed in ninety years.

“...the arts of designing men... occasion dangerous innovations in the government....”

The Federalist Papers, No. 78

In the waning days of the lame-duck session of the 68th Congress, the House, by voice vote, and then the Senate, by a vote of 76 to 1, approved the Judiciary Act of 1925.¹ The overwhelming vote for what became known as the Judges’ Bill (Frankfurter and Landis 1928) masked what Alexander Hamilton would have considered the “dangerous innovation” wrought by the Act and designed by the artful, political entrepreneur Chief Justice Taft (1966).

As signed into law by President Calvin Coolidge, the Judiciary Act of 1925 was “radical reform” (Sternberg 2008, 2). It authorized a fundamental constitutional transformation—the revolutionary reshaping of the Court’s appellate jurisdiction (Perry 1991). It granted the Court “a far-ranging power to pick and choose which cases to decide” (Hartnett 2000, 1644). Its passage has been characterized by some scholars as the birth of the modern day Supreme Court (O’Brien 1986) and a watershed event in American political development (Buchman 2003).²

The enactment of the Judges’ Bill began a transformation of the institutional role of the Supreme Court that, over time, has essentially erased the central constitutional tenet of the separation of powers among the three branches of government. From 1789 through 1925, the Supreme Court was compelled to hear all cases within its constitutionally and congressionally mandated jurisdiction (Rehnquist 2001).³ This responsibility was a fundamental obligation of the Court and an organizing principle of the federal judicial system. The Supreme Court was the Court of last resort. It did not possess the power to pick and choose which cases to hear. Its duty was to serve as the final arbiter of all cases within its jurisdiction. This was the role and

institutional responsibility of the Supreme Court, and for one hundred and thirty-six years that role was clear.

In 1925, with seemingly uncontroversial votes in both houses, Congress granted the Supreme Court discretionary power over its docket, revolutionizing the Court's role and power in the American constitutional system and empowering it with the "absolute and arbitrary discretion" that former President and Chief Justice Taft had sought for years (Taft 1916, 18).⁴

Why did Congress erase a deep-seated, constitutional norm and grant the Court almost complete discretion over its docket? The power to select cases is the power to set an agenda. Agenda-setting power "defines and orders" alternatives and, in so doing, determines outcomes (Perry 1991, Schattschneider 1960). Agenda-setting power is a legislative policymaking power, not a judicial rule-interpreting authority. By imbuing the Supreme Court with the power to select which cases to hear, Congress not only upset the carefully crafted set of checks and balances at the heart of the American constitutional system of government, it also empowered a rival to its own legislative power.

While the transformation of the Court was not immediate, the Court's agenda-setting power grew through use and the institutional acquiescence of Congress and the President over time. Its developmental arc mirrors the growth of the power of judicial review documented by Graber's (1999) historical institutional analysis and led Justice Thurgood Marshall to note a mere fifty years after the passage of the Judges' Bill that "deciding not to decide is...among the most important things done by the Supreme Court" (Tushnet 2001).

The question of why Congress enacted the Judges' Bill with nary a whimper of opposition is not new. Legal scholars and political scientists have produced detailed descriptive studies of the Judges' Bill that endeavor to explain its passage (Hartnett 2000; Mason 1983;

Murphy 1973; Sternberg 2008). These efforts follow the brief history of the bill, focus narrowly on leading agents involved in its enactment, and use the documents, letters, speeches, and actions of these agents as the sole source of their accounting. In this novelistic approach, Chief Justice Taft, a gifted political entrepreneur, provides a compelling and convenient leading man through which to tell the story. But a myopic focus on Taft and his machinations is misleading. While there is no doubt that Taft's strategizing and lobbying played an important role in the passage of the Judiciary Act of 1925, I argue that a singular focus on Chief Justice Taft produces a great man account that misses important parts of the story that led to the bill's lightning quick consideration and passage in the lame-duck session of the 68th Congress after nearly three years in congressional purgatory.

To illuminate the rest of the story of the bill that opened the door to the modern era of the Supreme Court, I apply an analytical approach rooted in historical institutionalism. Historical institutionalism is at the center of American Political Development. It is an atheoretical alternative to rational choice theory and sociological institutionalism (Fioretos 2011, 368). Historical institutionalists ask how and why institutions are formed, develop, and change. They focus "on explaining variations in important or surprising patterns, events, or arrangements, rather than on accounting for human behavior without regard to context or on modeling a very general process presumed to apply to all times and places" (Pierson and Skocpol 2001, 696-97). The level of analysis is either elite (top-down development), social movement or group level (bottom-up), or a mixture of the two (Sanders 2006). The scope of analysis is not limited to a specific person, institution, event, or point in time. Historical institutionalists "take time seriously," studying sequences of events over time and analyzing "the combined effects of

institutions and processes rather than examining just one institution or process at a time” to answer “big, substantive questions” (Pierson and Skocpol 2002, 695-96).

In terms of the Supreme Court, institutionalists have examined the development of the Court’s rules, norms, traditions, and precedents, its continually evolving institutional relationships with Congress and the executive branch of government, and the co-dependent growth of the Court, the federal government, and American capitalism (Gillman 1999, 235-36).

Applying the lens of historical institutionalism to the Supreme Court and the judiciary has yielded new insights into its development and institutional role in America. From our understanding of the establishment judicial review (Graber 1999), the growth of the Court’s prestige and the constitutive power of the law on social movements and politics (Brigham 1991, Brigham 1996), the relationship between capitalism and the Court (Gillman 1999), and how doctrine develops and changes on the Court (Kahn 1999), to the Supreme Court’s collaborative and confrontational role in constructing American political order (Tushnet 2006), analyses rooted in historical institutionalism have enabled a broader and deeper inquiry of the role of the Supreme Court in American political development.

Applying a historical institutional lens to the Judiciary Act of 1925, I contend that the enactment of the Judges’ Bill represents a critical juncture in American political development (Pierson 2004).⁵ That juncture was riven by the landslide election of 1924 and the politics of power and retribution it unleashed in the lame-duck session of Congress that followed. Debate and deliberation were cast aside in the House and Senate during the lame-duck session. They were replaced by the political demands of the Republican victors and their drive to exact revenge on Progressives who had held the balance of power in Congress since the 1922 elections,

stymied Republican legislative initiatives for years, and defected from the Republican Party in 1924.

Without Taft's involvement, the Judges' Bill would not have passed. However, without President Coolidge's landslide victory over Progressives, who defected from the Republican Party (Maxwell 1967; Nye 1951; Ross 1994; Zieger 2015), and the passage of the Judiciary Acts of 1875 and 1891, I argue that Taft's bill would have remained in legislative limbo and the technical need to manage the Supreme Court's workload more efficiently would have likely been resolved later by other less revolutionary means.⁶

Theoretically, the Judiciary Act of 1891, which established an intermediate federal appeals court to relieve the Supreme Court's workload (McCloskey 2010; Murphy 1973; Segal Spaeth and Benesh 2005), opened an alternative "branching tree" path (Capoccia and Kelemen 2007, 342; Collier and Collier 2002) for the institutional development of the federal judiciary.⁷ This legislation, also known as the 1891 Evarts Act, "preserved access to the Court" but "for the first time gave the Court the power of discretionary review" (O'Brien 1986, 161). President Coolidge's landslide victory over Progressives produced a critical juncture that enabled a jump from the established, institutional trajectory of the Court to this new alternative path—the nascent, revolutionary construct of an agenda-setting Supreme Court at the heart of the Judges' Bill, which Harnett dubbed the birth of the "modern Supreme Court" (2000, 1644).

My examination of the rest of the story behind the enactment of the Judges' Bill begins with a critique of the descriptive scholarly accounts of the passage of the Judges' Bill and a review of a recent attitudinal addition to this literature (Buchman 2003). Then, I undertake a historical institutional investigation of the Judges' Bill, expanding the unit of analysis beyond Taft, other justices of the Supreme Court, and a few leaders in Congress to include the president,

the political campaign of 1924, and the politics of hegemony, discipline, and retribution that together led to the institutional transformation of the Supreme Court's role. I conclude by examining whether historical institutional theory provides a more comprehensive explanation of the enactment of the Judges' Bill and if some of the particulars unearthed by this broader examination add to concerns (Tushnet 1977) about the propriety of the legislation on which the modern Supreme Court's power and prestige rests.

Descriptive Accounts of the Judges' Bill Enactment

The leading descriptive accounts (Hartnett 2000, Mason 1983, Murphy 1973) of the passage of the Judiciary Act of 1925 contend that Taft's masterful political strategy and the lobbying message of the American Bar Association won the day. These accounts argue that Congress approved the Judiciary Act of 1925 with little debate because it was perceived by Congress as a technical solution to the growing backlog of Supreme Court cases that was too legally complicated for members to debate or question without looking ignorant and embarrassing themselves (Hartnett 2000, 1696). While this explanation is tidy and contributes to the hagiography of Chief Justice Taft, it overlooks important facts and anomalies.

First, these descriptive case studies gloss over the three years (1922-1924) between the introduction of the Judges' Bill and its passage in the lame-duck session of Congress in 1925. During these three years, the bill languished in Congress. It was the subject of one brief "desultory" hearing in the Committee on the Judiciary in the House⁸ and just one hearing in front of a three-person Subcommittee of the Committee on the Judiciary in the Senate (Murphy 1973, 140).⁹

The first session of the 68th Congress ended on June 7, 1924, and the Judges' Bill seemed once again destined to remain in legislative limbo. Chief Justice Taft's persistence and the

ABA's lobbying campaign cannot by themselves explain the remarkable transformation of the Judges' Bill from a legislative orphan—ignored by the House Committee on the Judiciary and apparently unable to withstand the scrutiny of a hearing in front of the full Senate Committee on the Judiciary in the first session of the 68th Congress—into a congressional imperative when the lame-duck session convened six months later.

Second, in Hartnett's exceptionally detailed case study, the potency of the ABA's lobbying message in the lame-duck session is asserted, but not convincingly proven. While Hartnett contends that the lobbying message of the ABA stopped members of the House from questioning the Judges' Bill, he offers little proof of this assertion other than the observation that few member of Congress questioned the bill.

The lack of questioning of the Judges' Bill by members of Congress is not necessarily a product of the ABA's lobbying message. All members of the Committee on the Judiciary in the House and Senate were experienced lawyers. Several had been judges. Moreover, a contemporary analysis of the Judiciary Act of 1925 enactment, written in 1928 by future Supreme Court Justice Frankfurter (1928) questioned the ABA's assertion that members of Congress lacked the technical competency to understand and debate the bill. Members of Congress had delved into and debated the technicalities of judicial acts numerous times before (Frankfurter and Landis 1928a; Frankfurter and Landis 1928b; Gillman 2002; Hartnett 2000).

Members of Congress may avoid exposing themselves to detailed debates over policies beyond their realm of knowledge. They may also depend on other members with special expertise and knowledge to lead debates and inform them of the consequences of particular policies (Krehbiel 1992). But when a policy fire alarm is rung (Epstein and O'Halloran 1995) or the politics of challenging a particular bill—no matter how technical its content—are

advantageous, members of Congress are likely to take action. The expertise to question the Judges' Bill resided among many members of Congress, but the political need to debate it did not.

For almost three years, members of Congress ignored the Judges' Bill. Then, it became a legislative imperative that members avoided challenging. The ABA's lobbying message is an unlikely candidate for dissuading members from questioning the Judges' Bill or transforming it overnight from an ugly duckling to a statutory swan. If red flags had been raised about the bill by committee member experts, or there were clear political advantages to objecting to the Judges' Bill, members of Congress—especially Progressives—would have certainly done so.

Finally, descriptive accounts fail to explain the rapid, post-election evaporation of congressional opposition to the Judge's Bill by Progressives in the House and Senate. The Progressive's wholesale capitulation in Congress after the general election was not the result of Taft's lobbying or political strategy. From 1922 through the general election in 1924, the political influence of Progressives, who comprised the balance of power in the Senate and the House, kept the Judges' Bill in legislative limbo. After the general election, Progressives still maintained their numerical advantage in the lame-duck session of Congress, but their resolve and ability to oppose or stop legislation like the Judges' Bill had seemingly vanished.

Murphy's case study of the Judiciary Act of 1925 concludes with this observation: "After almost four years of relative indifference to the Judges' Bill, Congress suddenly began to move swiftly" (1973, 145). The interesting question left unexamined by all the leading descriptive analyses of the enactment of the Judges' Bill is, quite simply, why? Why did Congress suddenly move swiftly to pass the Judges' Bill after years of indifference?

The Attitudinal Account of the Puzzling Passage of the Judges' Bill

More recent scholarship on the Judiciary Act of 1925 questions the singular focus of leading descriptive case studies on the “lobbying-legislator relationship” and asks “...why [did] legislators behave in ways that appear anomalous?” (Buchman 2003, 2). This research defines anomalous behavior as the uncontested grant of new, sweeping authority to the judiciary by Congress in the Judges' Bill.

This recent account offers three possible explanations for congressional approval of the Judges' Bill. First, it speculates that members of Congress might have shared the justices' concern with docket overload at the Supreme Court and wanted the judicial system to run more efficiently. This alternative is summarily dismissed as “implausible because legislators who value efficiency above other considerations are a rare breed, if they indeed exist” (Buchman 2003, 7).

Next, it considers the possibility that congressional support for the Judges' Bill was a response to interest group lobbying. But the one-sided lobbying for the Judge's Bill, by the ABA and Chief Justice Taft is dismissed as insufficient to win congressional approval because the benefits to legislators of judicial reform were too diffuse (Buchman 2003).

Finally, this new account explores an attitudinal explanation for the behavior of Congress. It concludes that it was the lobbying campaign's message, as well as the ideological alignment of the policy preferences of conservative justices and Coolidge Republicans Congress, that led to the enactment of the Judges' Bill (Buchman 2003). Thus, using Sunkin's (1994) approach, the passage of the bill was both politically and Court inspired.

While the attitudinal account of the passage of the Judiciary Act of 1925 adds to our understanding—undoubtedly the bill could not have passed without the ideological congruence

of congressional and Court majorities—it also forthrightly acknowledges that the lack of Progressive opposition to the Judges’ Bill is a puzzle that “remains difficult to explain” (Buchman 2003, 17). Why didn’t Progressives, who had worked tirelessly to rein in the judiciary and stood foursquare against the Court’s anti-regulatory jurisprudence, vigorously oppose the Judges’ Bill in the lame duck session of Congress after the 1924 elections? And why did the ideological congruence between the conservative majority on the Supreme Court and Coolidge members of Congress make a difference in the lame-duck session of the 68th Congress, but not in the three years prior to the 1924 election? The answers to these questions can be found by using historical institutional methods to expand the scope of inquiry beyond attitudinal and great man explanations.

A Historical Institutional Account of The Supreme Court’s Path to Power

The descriptive accounts and attitudinal explanation of the enactment of the Judges’ Bill leave in their wakes puzzles unexplained and events unexamined. A historical institutional examination of the bill’s passage sheds light on these puzzles and finds that the Judges’ Bill is not an anomaly; it is part of an alternative judicial trail that began in 1875 and became the new institutional path for the Supreme Court and the federal judiciary in 1925.

The Path

The Judiciary Act of 1925 is not an only child. It is one of a series of judicial legislation that began in 1875 and was followed by the Evarts Act of 1891 and the 1914 and 1916 Judiciary Acts (Gillman 2002; Hartnett 2000). Like the Judges’ Bill, both the 1875 and 1891 Judiciary Acts were passed in lame duck sessions of Congress after important elections. Unlike the Judges’ Bill, these acts were enacted after significant, Republican electoral losses as a way to entrench conservative power in an expanded federal judiciary (Gillman 2006).

While the Judges' Bill does not represent the logical, preordained conclusion of the branching judicial path that began with the Judiciary Act of 1891, its design and passage were made possible by the successive legislative choices made in prior judiciary acts. Together, the passage of these acts established an alternative institutional path for the federal judiciary and the Supreme Court. The critical juncture, created by the sweeping defeat of Progressives in the 1924 elections, quelled Progressive opposition in Congress and provided the opportunity to jump to the new path. The ideological congruence between the Court and congressional majorities added political impetus. And the ground work laid by Chief Justice Taft from 1921 to 1924 established, in the Judges' Bill, a policy landing place.

The Judiciary Act of 1875 created the policy need for the Judges' Bill. It expanded the jurisdiction of federal courts, greatly increased the number of cases heard by the federal judiciary, and inevitably created the Supreme Court docket bottleneck the Judiciary Act of 1925 was ostensibly designed to alleviate. In historical institutional terms, it was an institutional branching moment for the federal judiciary (Collier and Collier 2002; Mahoney 2001).

Just 16 years later, the Evarts Act of 1891 created an intermediate appellate layer of circuit courts, placing them between federal district trial courts and the Supreme Court, greatly increasing the capacity of the federal court system and, in essence, elevating the Supreme Court one step higher in the judicial hierarchy. The Supreme Court remained the Court of last resort, but most appeals from trial courts went first to what are now known as the U.S. Circuit Courts of Appeals. The days of justices of the Supreme Court riding a judicial circuit around the country to hear appeals were gone. The justices now sat atop a federal judicial institutional pyramid.¹⁰

For decades, as an alternative institutional path for the federal judiciary was laid and bolstered, Progressives opposed what they viewed as the growing, unconstitutional power of the

federal judiciary embodied in the Judiciary Acts of 1875 and 1891, actualized in the *Lochner* “liberty of contract” doctrine in 1905,¹¹ and expanded by the Judiciary Acts of 1914 and 1916.¹² As the election of 1922 approached, Progressive leader Senator Robert La Follette called for taking away “the usurped power of the federal courts...[in] one stroke...federal judges must be made responsive to the basic principle of this government” (Ross 1994, 193). In 1923, after Progressives won important victories in the 1922 general election and became the balance of power in both the Senate and the House, the legislative attack on the Supreme Court intensified (Ross 1994, 219). Senator Borah, a Progressive who served on the Committee on the Judiciary, introduced a bill requiring a super majority of seven votes on the Supreme Court to invalidate an act of Congress (Ross 1994, 218). Senator La Follette made curbing the power of the federal judiciary a central Progressive demand of both the Republican and Democratic parties. And in 1924, when Republicans and Democrats refused to include Progressive judicial proposals in their party platforms, the Progressives launched a third party campaign for president. Sen. La Follette became its standard bearer and the institutional role and power of the Supreme Court in American democracy became a key point of debate in the 1924 election (Ross 1994, 254-55).

The 1924 Election

President Coolidge, his running mate Charles Dawes, the Republican Party campaign operation, and the Republican-leaning print media used La Follette’s court reform proposal as a cudgel throughout the campaign (Ross 1994). Beginning with his convention acceptance speech, Dawes attacked La Follette’s court reform proposal as “extreme radicalism” (“Text of Dawes’s Speech” 1924). President Coolidge began the fall campaign by excoriating La Follette’s court reform plan and warning it would lead to “the confiscation of property and the destruction of liberty” (“Coolidge Assails” 1924). Throughout the campaign, Republicans argued that a strong

Supreme Court was a bulwark against communism and a protector of constitutional liberty against majority tyranny and the political whims of Congress. Republicans stood four square behind the Constitution, the Court, and liberty. They attacked La Follette's court reform proposal alleging that it would empower Congress to "tear out the Bill of Rights and every guarantee of the security of the citizen" (*New York Times* 1924).

Republican messaging in the 1924 campaign, extolling the Supreme Court as an impartial legal arbiter of cases, constitutional controversies, and policy disputes, tapped the unique American preference for non-political, mechanistic solutions to policy problems that avoid political conflict (Morone 1990), the growing, cult-like image of the Court's justices as non-political diviners of fundamental law (Brigham 1991), and the extant fear of the threat Communists and Socialists posed to American liberty. The Republican message on the Supreme Court became an important component of the frame through which many voters viewed the 1924 election. The empowered Supreme Court, supported by Coolidge and the Republicans, protected Americans. The constrained and reformed Court advocated by La Follette and Progressives imperiled them.

Propelled by the staunch defense of the Supreme Court, Republicans won a landslide victory in the 1924 general elections. This set the stage for the lame-duck session of Congress with the legislative orphan known as the Judges' Bill (legislation that mirrored the Coolidge Republican's campaign advocacy of a strong Supreme Court) conveniently waiting in the wings to be adopted.

The Chief Justice

Chief Justice Taft played a singularly unique, entrepreneurial role in the passage of the Judiciary Act of 1925.¹³ Never before had a chief justice served as the policy architect,

legislative strategist, and lead lobbyist of a piece of legislation put before Congress. Never since Taft's campaign for the Judges' Bill has a chief justice so embroiled himself and the Court in lobbying Congress, persuading the president, and playing interest group and electoral politics to advocate for legislation that expanded the Court's power. Taft's maneuvering is an excellent example of Riker's (1986) theory of heresthetics, which posits that through the political manipulation of policy choices and a deft structuring of the policy agenda, apparent losers can secure policy victories.¹⁴

The overloaded Supreme Court docket was a well-known policy problem when Taft was named chief justice by President Harding. It was the policy explanation for the 1875, 1891, 1914, and 1916 Judiciary Acts with political retrenchment, after electoral losses in 1874 and 1890, providing the impetus (Gillman 2006). Those acts, however, had not resolved the Court's docket problem. At the very beginning of the Court's October 1921 term, just two months after his appointment, Taft convened a committee of justices to write a bill to ease the Supreme Court's docket woes by giving it the discretionary power to choose which cases it heard (Hartnett 2000, 1662).

There was no shortage of plans in development for correcting the docket overload confronting the Court. Senator Cummins, the third ranking member of the Senate Committee on the Judiciary, was developing legislation to resolve the issue. And the ABA's Committee on Jurisprudence and Law Reform had already considered and favored a plan "increasing the number of justices to twelve" (Hartnett 2000, 1668). Under this plan, which was also preferred by Solicitor General James Beck, six justices would constitute a quorum of the Court of whom five would be needed to render a decision (Hartnett 2000, 1668-69).

Both Senator Cummins' and the ABA's proposals were an anathema to Taft's aspirations for the Court. As early as 1916, Taft had argued the Supreme Court must have "absolute and arbitrary discretion with respect to all business but constitutional business" (1916, 18). Through lobbying, personal and political connections, and disingenuous messaging, Taft surgically removed these potential competitors to his policy alternative from the agenda.¹⁵ The choice to fix the well-recognized docket overload problem at the Supreme Court would not be a debate about different options; instead it would focus on the option developed by Taft and the Court.

Taft's leadership and the Court's development of the Judge's Bill, however, confronted barriers in Congress. First, Taft had enemies on Capitol Hill. His leadership in advocating for the bill ("Taft Backs Bills" 1922) provoked their opposition. Taft solved this problem by lowering his public profile in 1923 and 1924, when the bill was under consideration, while maintaining an intensive, behind-the-scenes lobbying campaign. Second, the bill's origin in the Supreme Court made it a legislative orphan, with no real champions in the House or the Senate and a formidable core of opponents (Progressives) working to curb the power of the Court, not grant it additional authority.

Taft solved some these political problems by retooling his lobbying strategy and reframing the purported genesis of the bill. In testimony before the friendly three-person Subcommittee of the Senate Committee on the Judiciary in 1924, Taft made sure other Court members, including newly confirmed Justice Sutherland, who had been a member of the Senate Judiciary Committee, testified in support of the bill. In this hearing, the justices testified that the bill was drafted by the justices at the request of the Senate Judiciary Committee—a fact the justices may have believed, but that Taft knew and the historical record shows was false.¹⁶

Taft obfuscated the locus of the bill because of the strategic political advantages of the committee considering a bill that was thought to be drafted at its behest. As such, the Court was no longer seeking through its own initiative a change in jurisdiction. Instead, the Judges' Bill was the result of a humble Court rapidly responding to a request from Congress.

The chief justice managed the campaign for the Judges' Bill like a skilled political operative whose activities were not constrained by notions of judicial propriety or restraint and whose network of political connections extended well beyond those of any chief past or present. As the only former president to serve as chief justice of the Supreme Court, Taft was not uncomfortable or hesitant to use political power to achieve his desired outcome. As the former president of the ABA, he did not hesitate to prevail upon the ABA to change its stated policy concerning the Court and lobby for the Judges' Bill. But Taft's skill, connections, and unique entrepreneurial approach to the attaining his political "dream of government by the judiciary" still fell short (Murphy 1973, 173).

Before the 1924 election, the Judges' Bill was left for dead. Even Thomas Shelton, who was leading the ABA effort to win the bill in Congress, was despondent about its future, confessing to have "almost lost my faith in Congress" (Mason 1983, 112). The results of Coolidge's landslide victory in the 1924 election changed everything. Political entrepreneurial innovation is a key contributor to institutional change that challenges "jurisdictional monopolies, [and] chang[es] the boundaries of institutional authority" (Sheingate 2003). But without an environment conducive to making change, entrepreneurs like Taft—no matter how gifted—often fail.

The Lame-Duck Congress

President Coolidge not only won in a landslide on November 4, 1924, his victory produced “strong coattails” (Jenkins and Stewart 2008, 55) that left the Progressive opposition in Congress in tatters and their opposition to the Judge’s Bill politically untenable. Coolidge won 35 states and 382 Electoral College votes. La Follette won only 1 state and 13 Electoral College votes. Coolidge Republicans added four senators to their ranks and twenty-two members in the House of Representatives. Progressives, whose extensive campaign victories in 1922 had catapulted them to balance of power hegemony in both Houses of Congress (Nye, 1951, Zieger 2015),¹⁷ lost that important political advantage and clout. Coolidge Republicans would have “a working majority in the upcoming 69th Congress without having to cooperate with Progressives...[and] saw this as an opportunity to tighten the party bond and force Progressives to fall in line” (Jenkins and Stewart 2008, 55).

Progressive Democratic Senator John Shields, a Judges’ Bill opponent serving on the Committee on the Judiciary, had already lost in a 1924 primary.¹⁸ Progressive Republican Senator and member of the Judiciary Committee William Borah of Idaho, who was asked by Coolidge to run for vice president,¹⁹ won reelection to the Senate handily, but Coolidge defeated the Progressive presidential ticket in his state. And the leading Progressive opponent of the Judge’s Bill, Democratic Senator and member of the Committee on the Judiciary Thomas Walsh of Montana, won reelection with just fifty-three percent of the vote as Republicans swept every statewide office in Montana, took over the state legislature, and won the popular presidential vote.²⁰

House and Senate Progressives were severely chastened by the results of the 1924 general election and by the shifting political dynamic nationwide. No longer the balance of

power in the House or Senate, Progressives became the target of party discipline, payback, and power politics by the newly empowered Coolidge Republicans. And as critical juncture theory predicts, the improbable quickly became possible: “After almost four years of relative indifference to the Judges’ Bill, Congress suddenly began to move swiftly” (Murphy 1973, 145).

In the House of Representatives, rumors that Progressives would be excluded from the Republican caucus began circulating “almost immediately after the November elections” (Jenkins and Stewart 2008, 54-55). As the lame-duck session convened in early December 1924, “the Republican Senate leadership moved rapidly to punish La Follette for his insurgent presidential campaign, stripping him and Senators Brookhart, Ladd, and Frazier of committee assignments and membership in the Senate Republican Caucus” (Maxwell 1967; Palmer 2006, 131). President Coolidge went on the offensive too. In his State of the Union address, delivered on December 3, 1924, he called for “immediate favorable action” on the Judges’ Bill (1924).²¹

The great dissenter, Justice Brandeis, who had been unwilling to support the Judges’ Bill when asked by Taft in 1923 (Murphy 1973, 141), moderated his stance immediately after the 1924 elections. Brandeis had been asked by La Follette to run for vice president on the Progressive ticket in 1924. Brandeis was a long-standing supporter of La Follette’s presidential ambitions, beginning with his first campaign for president in 1912 (Paper and Press 1983, 172). While Brandeis turned down La Follette’s request, he continued to support his presidential bid quietly. After La Follette’s sweeping loss, Brandeis agreed that Chief Justice Taft could claim publicly that the “Court approves the bill,” as long as he did not say that Brandeis supported it (Hartnett 2000, 1684).

The House Committee on the Judiciary, which had taken no action on the Judges’ Bill after its hearing in the 67th Congress (Murphy 1973) and had not convened a hearing on it in the

first session of the 68th Congress, took up the bill just two weeks after Coolidge's State of the Union address (Hartnett 2000). In the hearing, what was described as the favorable report of the Senate Judiciary Committee on the Judges' Bill played an important role in answering questions and preempting possible opposition to the bill (House Committee on the Judiciary 1924). On January 6, 1925, the House Committee on the Judiciary favorably reported out the Judges' Bill for consideration by the House of Representatives (HR 1925).

In the Senate, Coolidge Republicans worked persistently to bring the Judges' Bill to a vote on the floor in spite of some opposition from Progressives. From the beginning of the lame-duck session until January 31, 1924, the Judges' Bill was brought up for consideration and then held over several times. For example, on December 30, 1924, Progressive Senator Walsh, a member of the Committee on the Judiciary, objected to the Republican effort to bring the bill up for consideration under the five-minute rule and forced it to be held over. He argued, "the bill makes very important changes in the jurisdiction of the courts, particularly of the Supreme Court of the United States, that require, I think, very serious consideration by the Senate and call for a full debate on the bill" (*Congressional Record* 1924, 980). On January 26, 1925, Senator Overman, a member on the Subcommittee of the Committee on the Judiciary that had reported favorably on the bill, requested that it be passed over because "it is a very important bill, and I think there is some opposition to it by senators who are not here; therefore I think it better that it should go over" (*Congressional Record* 1925, 2447).

After slowly pushing for consideration of the Judges' Bill for weeks, Senator Cummins, Taft's friend (Murphy 1973, 134) who chaired the three-person subcommittee which held hearings on the bill and reported it out favorably, moved on Saturday January 31, 1925, for the Senate to consider the bill. Senator Cummins's action precipitated a series of pointed questions

on the Senate floor about the legitimacy of the process by which the full Senate Committee on the Judiciary approved the bill. During this questioning, Cummins claimed not to remember how long the full committee considered the bill, who was present when it was considered, and even the date when the Judges' Bill was taken up by the full committee (Congressional Record 1925, 2754-55). Senator Cummins stated, "All I know is that there seemed to be no opposition to it among the members who were present" (*Congressional Record* 1925, 2755).

Senator Reed, also a member of the Committee on the Judiciary, immediately questioned Senator Cummins's recollection, stating, "It was called up one day and opposition at once appeared. There was some slight discussion of the bill, but no attempt at a real analysis, because it would take many hours to analyze the bill... My recollection is that the bill then went over. I was not present at the meeting when the bill was reported out and had no idea that it was here on the calendar" today (*Congressional Record* 1925, 2755). Senator Cummins responded, saying, "every member of the committee who was present when the bill was ordered reported was in favor of it" (*Congressional Record* 1925, 2755).

Committee member Senator Walsh then interrupted to add, "I very much regret that I never had any opportunity to join in any consideration of it by the Committee on the Judiciary. [And] I had no kind of idea that the bill was going to be reported to this body" (*Congressional Record* 1925, 2756). Walsh went on to ask that the bill be recommitted to the Senate Committee on the Judiciary "and let us take it up... and see if we can work it out in a satisfactory way" (*Congressional Record* 1925, 2757). Knowing that the bill would die if it went back to the committee, Senator Cummins refused and made sure the bill would be taken up by the Senate three days later.

During the debate, no member of the committee rose to defend Sen Cummins and say they attended the meeting when the Judges' Bill was reported out favorably. The existence of a favorable vote by the Senate Committee on the Judiciary on the Judges' Bill rests, therefore, on the word of one man, Senator Cummins, who could not recall when and where the vote was taken and who on the committee voted to report the bill out for consideration by the Senate.

The day before the Senate again took up the Judges' Bill, the House moved to consider it.²² The chairman of the House Committee on the Judiciary introduced the bill. The clerk read it and the House of Representatives proceeded with almost no debate except for a stunning set of comments from Representative Blanton of Texas. Representative Blanton, a Democrat who had been censured by the House in 1921, asked the Speaker "how on earth may we expect to frame sane legislation under the present surroundings. This is a most important bill, which changes the procedure of the courts of the country... and yet I dare say there are not five men here who have heard the bill read or have heard any discussion of the amendment offered" (*Congressional Record* 1925, 2879).²³ Blanton continued, "...it is impossible to pass sane legislation when we are in turmoil such as we are now in, with nobody in order, not even the person trying to speak being in order" (*Congressional Record* 1925, 2880). Then, railing against the process about to unfold on another bill, Blanton described how the legislative business of a House out of order was now conducted, "...the Speaker will recognize the gentleman because he wants to, and the Speaker wants to because the Republican steering committee wants him to do so, and the Republican steering committee wants such action taken because it believes that the bill will meet with the approval of the president" (*Congressional Record* 1925, 2880).

On January 29, 1925, the chairman of the Republican steering committee announced that it would bar Progressives rebels from its caucus ("Republican Caucus" 1925). On February 2,

1925, Republican leaders continued playing power politics on the floor of the House, ramrodding through legislation with little concern for institutional propriety or constitutional consequences. Republican House leadership wanted the Judges' Bill and, House order notwithstanding, the House summarily passed the Judges' Bill by voice vote (*Congressional Record* 1925, 2876-80). Legislation that did not even warrant a hearing in the first session of the 68th Congress passed in the lame-duck session in less than seven weeks.

When the Senate took up its version of the Judges' Bill the next day, Senator Walsh was left to fight the Judges' Bill alone. Progressive Senators on the Committee on the Judiciary, including Norris, Caraway, and Shields, were not in attendance. In poor health, Senator La Follette was also absent. After winning with Senator Copeland a few minor amendments on the bill, Senator Walsh capitulated remarking, "... I have been accused of standing in the way of a good many of these proposed statutes that are asked for by the Supreme Court of the United States, and I do not feel like standing alone on the matter" (*Congressional Record* 1925, 2926). The toll of the election, the apparent dissembling political maneuvering of Senator Cummins, and the power politics of the lame-duck session had worn down the last Progressive voice opposing the Judges' Bill. The Judges' Bill passed the Senate 76-1 (*Congressional Record* 1925, 2928). On February 4th, the House concurred with the Senate amendments and the Judiciary Act of 1925 became law (*Congressional Record* 1925, 3005). The very next day, the Republican revolution continued as Harlan Fiske Stone's nomination to the Supreme Court was confirmed 71-6.

**Critical Juncture, Historical Institutionalism, and
Questions Concerning the Legitimacy of the Judges' Bill**

The passage of the Judges' Bill was not preordained by the 1924 election results. The election of 1924 created a critical juncture formed not only by Coolidge's sweeping victory, but

also by how Old Guard Republicans won the victory. The landslide of 1924 and Coolidge's coattails created a legislative opportunity, shackling Progressives, empowering Republicans, and providing the political impetus for the attitudinal alignment of conservatives on the Court and in Congress to occur through the enactment of the Judges' Bill. While the 1875 and 1891 Judiciary Acts were rear guard responses to significant electoral losses by Republicans, the 1925 Judges' Bill was one of several legislative statements of political power made after the significant electoral victories won by Coolidge Republicans in 1924 general election.

The fundamental institutional change of the Supreme Court's role in American democracy, which began in earnest after the bill's passage, was unanticipated collateral damage. As historical institutionalists have demonstrated time and again, unintended consequences are common products of critical junctures (Fioretos 2011). Congress did not vote to grant the Supreme Court powers that would transform the constitutional role of the Court and infringe on its own legislative monopoly. The Republicans in Congress were simply following the demands of an empowered president and party leadership bent on the enforcement of party discipline, the exercise of raw political power, and the sweet employment of political punishments and retribution.

The jump from the constitutionally mandated and established path that the Supreme Court had trod for 135 years to the new judicial trail was possible because the Judiciary Act of 1875 created a need for it, and the Judiciary Act of 1891 opened a path to it. The Judiciary Act of 1925 was a waiting-in-the-wings legislative vehicle developed by Taft that provided the means for vaulting from the established judicial path to the new role he envisioned for the Supreme Court in which justices had "a far-ranging power to pick and choose which cases to decide" (Hartnett 2000, 1644).

The jump to the new institutional path for the Court did not reshape the constitutionally mandated balance among the three branches of government overnight. Rather it made the long institutional trip toward the modern, agenda-setting court of today possible—a path that was abetted by the expansion the federal government and the logic of political entrenchment in the judiciary (Gillman 1999; Gillman 2002; Gillman 2006).

Conservative Republicans were ascendant. The Coolidge Republicans in Congress were primed and had the power to pay back the weakened Progressives for their defections in 1924 and years of determined opposition. As the lame-duck session of the 68th Congress ensued, the Republicans began to exercise their newly acquired power to push through legislation bottled up by Progressives and make political examples of Progressive defectors. The legislative orphan known as the Judges' Bill was simply one of the beneficiaries of the critical juncture opening created by the results and political ramifications of the 1924 election.

This is the interpretation of the enactment of the Judges' Bill through the expansive lens of historical institutionalism. But do the particulars of the Judges' Bill passage fit the theory and does the explanation based on the theory shed more light on the particulars? First, by definition a critical juncture is “brief relative to the duration of the path dependent process it initiates” (Capoccia and Kelemen 2007, 350). There were exactly three months between Election Day 1924 and the passage of the Judges' Bill. The path dependent judicial process initiated by the bill—a Supreme Court with agenda-setting powers—remains today, ninety years later.

Second, the growth of the Supreme Court's power, through its exercise by the Court in the ninety years since the Judges' Bill was passed, is an excellent example of the path dependent process of increasing returns that is a key component of historical institutional theory. The post-1925 history of the Supreme Court—from the symbolic building of its marble palace (Brigham

1991) to its rapid incorporation of the Bill of Rights, overruling of the New Deal,²⁴ overturning of separate but equal (*Brown v. Board of Education* 1954), ruling on the outcome of a presidential election (*Bush v. Gore* 2000), granting of free speech rights to corporations (*Citizens United v. Federal Election Commission* 2010), and ruling on the constitutional legitimacy of the Affordable Care Act (*King v. Burwell* 2015)—is a judicial example of the increasing returns of exercising agenda-setting power. The new equilibria established by the Judges' Bill has been institutionalized and increasingly entrenched through action by the Court since the bill was enacted.

Third, during critical junctures, “structural and institutional constraints on action” are relaxed “for a short period of time,” increasing the “range of plausible choices open to powerful actors ...substantially” as well as making “the consequences of their [actors] decisions potentially much more momentous” (Capoccia and Kelemen 2007, 343). In the lame-duck session of the 68th Congress, institutional norms and constraints fell by the wayside replaced by the raw exercise of political power. One outcome of that unfettered exercise of that power was the passage of the Judges' Bill which represented a radical and momentous departure (Sternberg 2008) from the original constitutional design of the federal judiciary.

Fourth, during a critical juncture, a “particular option is adopted among two or more alternatives—defined by antecedent historical conditions” (Capoccia and Kelemen 2007, 347). “According to [existing] theory” the alternatives “should have been adopted” (Mahoney 2001, 513) instead of the option chosen. Congress had two other viable alternatives that made more sense theoretically than the Judges' Bill. For example, instead of granting the Supreme Court new powers, which rivaled the legislative power granted to Congress under the Constitution and created a potential legislative competitor to it, the Senate and the House could have taken no

action. The Supreme Court's docket overload was not a congressional problem *per se*, and Congress had no institutional need to fix it (Buchman 2003). Alternatively, Congress could have expanded the number of justices on the Supreme Court to twelve and set a judicial quorum at six to double the capacity of the Court to hear cases. This was the alternative originally favored by the ABA until Chief Justice Taft and his brother eliminated it. This alternative would have expanded the institutional capacity of the Supreme Court without expanding its institutional authority. Both alternatives offered Originalist solutions to the Court's docket problem that did not encroach on the legislative power of Congress. Institutionally, these alternatives should have been preferred by Congress.

The particulars of the passage of the Judges' Bill comport well with the theoretical expectations of historical institutional analysis. Examining the Judges' Bill with a wide angle institutional lens also illuminates the politics of power and retribution overlooked by descriptive and attitudinal accounts. Power politics drove the enactment of the Judges' Bill and led to the unintentioned, unexpected, and outsized historical ramifications the bill has had on American political development. Finally, a historical accounting of the Judges' Bill unearths questions about the legitimacy of the legislative process followed to pass the bill that descriptive accounts ignore, minimize, or bury. The answers to these questions, found through a close examination of the historical record, form a disturbing fact pattern that points inexorably to this conclusion: The legislative process that led to the enactment of the Judges' Bill was at a minimum flawed and quite possibly fraudulent. Tushnet wrote, "I have serious doubts about the propriety of the process that lay behind the previous major modification of the Court's jurisdiction, the Judges' Bill of 1925, which was drafted by a committee of the justices" (Tushnet 1977, 364). Tushnet's doubts are well founded.

At a minimum, it is certain that a hearing on the Judges' Bill by the full Senate Committee on the Judiciary was never held. If it had been, the Progressives on the Committee on the Judiciary would have steadfastly opposed the bill. As Chief Justice Taft and other Old Guard Republicans knew all too well, Progressive Senators on the committee, including Borah, Norris, and Walsh, formed a reinforced roadblock standing in the way of the Judges' Bill (Hartnett 2000, 1663). These and other Progressives on the committee would have scuttled the bill in a full committee hearing.²⁵ Chief Justice Taft was so concerned about the dominance of Progressive's on the committee, he had written Senator Brandegee, the chairman of the Judiciary Committee, in 1921 asking him to add another staunch Republican to the committee. Senator Brandegee sent back a stinging reply, upbraiding Taft for his improper request and denying it (Murphy 1973, 135).

After the 1922 elections, Progressive Senators held the balance of power in the U.S. Senate (Maxwell 1967; Zieger 2015). They were dead set opposed to increasing the power of Taft's Supreme Court (Ross 1994). In February 1923, Senator Borah even proposed legislation to make it more difficult for the Supreme Court to invalidate acts of Congress (Ross 1994, 218). Any hearing in front of the full Committee on the Judiciary would have been contentious and left the Judges' Bill in political tatters.

A formal discussion by the full Senate Committee on the Judiciary on the Judges' Bill and recorded vote was also, in all likelihood, never held. Sen Cummins's inability to recall when, where, and for how long the bill was discussed in a meeting by a quorum of committee members, as well as who attended that quorum when the bill was ostensibly reported out favorably (*Congressional Record* 1925, 2754-55), raises red flags about the legitimacy of the full committee process. The lack of any committee member defending Cummins and stating on the

Senate floor that he attended the full committee meeting and voted in favor of the bill further erodes the credibility of Sen. Cummins' account. And the comments by Senators Walsh and Reed, both members of the Committee on the Judiciary, who stated of the floor of the Senate that they were not aware that a vote was taken by the committee, complete the unsavory picture.

There is no public record of a full committee meeting, recollection of when it occurred, witness (beyond Senator Cummins) that the meeting in fact occurred, accounting of who attended, or tally of the committee's vote on the bill. If perchance some members of the full committee did meet at some point between the subcommittee hearing and the published "report" of the full Committee, as Senator Cummins would have history believe, the meeting was rigged with Progressive opponents of the Judges' Bill excluded from it.

The one written report on the Judges' Bill that is purportedly from the full committee is notable for its brevity—especially given Senator Reed's recollection of the very contentious nature of the one brief discussion of the Judges' Bill held by the full committee and his assertion that a full analysis and discussion of the bill by the committee would be a complex and arduous task (*Congressional Record* 1925, 2755). The author of the report is, of course, Senator Cummins. The date of the report is April 7, 1924. The content of the report is one short paragraph, which states, "The Committee on the Judiciary to whom was referred the bill (S. 2060)... report favorably thereon with the recommendation that the bill do pass with an amendment" (*Congressional Record* 1925, 2755). A one sentence amendment follows. The rest of the document is a three-page summary of the report of the three-person subcommittee that held the hearing on the bill to the full committee. Senator Cummins's name is the only name attached to what is said to be the full committee's one paragraph favorable report. The chairman of the Judiciary Committee, Senator Frank Brandegee, is absent.²⁶ The second ranking member,

Progressive Senator Borah, is missing as well. No other committee member's name appears on the report.²⁷

The date of the report is two months after the three-person subcommittee held its brief, one-day weekend hearing on the Judges' Bill. A straw poll of the full committee, conducted by the ABA and sent to Chief Justice Taft after the subcommittee hearing, revealed that only six members of the full committee favored the bill. Four members were firmly against it and another six were uncommitted, including the Progressive leader Senator Borah who had introduced a bill in 1923 to circumscribe the power of the Supreme Court to invalidate acts of Congress (Ross 1994, 219).

Thus, Senator Cummins expects history to believe that in less than two months, with no recorded meetings or hearings (other than the one short, contentious meeting reported by Senator Reed) the six in favor, four unfavorable, and six uncommitted straw vote reported by the ABA had miraculously transformed into a favorable committee vote with no opposition. This stretches the bonds of credulity past the breaking point.

The Progressive members of the committee were dedicated to curbing the power of the Supreme Court. Their commitment to restricting the power of the Supreme Court was so steadfast that some defected from the Republican and Democratic parties and formed a third party challenge to President Coolidge during the three months immediately following the purported committee vote on the Judges' Bill and Senator Cummins's report. Progressive Senators who possessed enough conviction and will to take the political risk of defecting from their party and waging a third party fight in the 1924 presidential election would simply have not shied away from scuttling the Judges' Bill in a much lower stakes committee meeting where they held the balance of power

While the provenance of the committee's favorable report on the Judges' Bill is at best dubious and at worst reeks of impropriety, the importance of it to the enactment of the bill cannot be underestimated. The Senate Committee on the Judiciary's reported support for the bill was an important factor in the House Committee on the Judiciary's hearing on December 18, 1924. In fact, the three-page report summary was relied on by the House Judiciary Committee. The Senate Judiciary Committee's alleged support of the bill was also cited in the brief debate on the bill by the House (*Congressional Record* 1925, 2876-80). More importantly, even though the critical juncture produced by the 1924 general election led to a relaxation of institutional constraints during the lame duck session of the 68th Congress, the Judges' Bill would never have been considered by the Senate if it had not been reported out favorably by the Senate Committee on the Judiciary.

Circumventing Progressives on the committee was the sine qua non to winning enactment of the Judges' Bill. Legitimately or not, Senator Cummins bypassed Progressives and other opposition to the bill on the committee and pushed it forward. The leadership of the House ramrodded the bill through. The Senate followed, with Senator Walsh's final acquiescence. And the Judges' Bill became the law of the land. The era of the modern, agenda-setting Supreme Court began. It has not ended.

Conclusion

Alexander Hamilton's observation that "the arts of designing men...occasion dangerous innovations in the government...." (Hamilton, Madison, Jay, and Fairfield 1966, *Federalist* 78) is a prophetic description of Chief Justice Taft's intention to reshape American government so that it was run by the judiciary (Murphy 1973, 137). The constitutional affront of such a notion is ironic given the Supreme Court's responsibility to uphold the Constitution. And though Taft's

dream was not fully realized by the innovations wrought by the Judges' Bill, the "post-1925 version of the Court is... an extreme departure from the prior version of the Court" (Sternberg 2008).

The questionable genesis of the Judges' Bill makes the increasing path dependent transformation it has visited on American constitutional government even more egregious. While we are now accustomed to the Supreme Court acting as though it were an independent legislative body, the jump of the Court from its constitutionally established path to an agenda-setting policymaker was neither necessary nor inevitable. Other options, including the ABA's plan to increase the number of justices on the Court which Taft deftly scuttled, were viable alternatives to the Court's docket problems.

Taft's dangerous innovation, the Judges' Bill, became law because of a critical juncture in American history where political power dominated, institutional constraints were relaxed, and a political commitment to the rule of law enshrined in the Constitution was in short supply.

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¹ The House passed H.R. 8206 on February 2, 1925; the Senate passed S. 2060 on February 3, 1925; and the House agreed to the Senate version of the Judges' Bill (S. 2060) on February 4, 1925 (*Congressional Record* 1925, 2876, 2916, 3005).

² Hartnett notes that shortly after the passage of the Judiciary Act of 1925 "the Court began the process of incorporating the Bill of Rights against the states, starting with the First Amendment's free speech clause *Gitlow v. New York*." One year later, legislation authorizing the construction of the Court's "own marble palace" was enacted by Congress (Hartnett 2000, 1644).

³ Important changes to the jurisdiction and structure of the federal court system made by Congress, after the Civil War and preceding the enactment of the Judges' Bill, include the Judiciary Acts of 1875, 1891, 1914, and 1916.

⁴ Murphy wrote, "Taft's dream... [was] a government of the judiciary." The Judiciary Act of 1925 was a step toward the realization of that dream (Murphy 1973, 137).

⁵ For discussions of the role of critical junctures in institutional development also see Capoccia and Keleman (2007), Collier and Collier (2002), Hacker (2004), Pierson (2000), Pierson and Skocpol (2002), and Shepsle (1989).

⁶ For example, the initial plan to relieve the Supreme Court's docket problem, recommended by the American Bar Association's Committee on Jurisprudence and Law Reform, called for increasing "the size of the Court to twelve, with six to constitute a quorum and five necessary to concur in a decision" (Hartnett 2000, 1673).

⁷ The Judiciary Act of 1875 had greatly expanded the jurisdictional responsibilities and workload of the federal judiciary creating the need for an intermediate federal appeals court (McCloskey 2010; Segal, Spaeth, and Benesh 2005).

⁸The hearing was held on two days—March 30 and April 8, 1922. After the hearing, the bill was ignored by the House of Representatives—even though Chief Justice Taft personally lobbied for it and wrote to the Speaker of the House and the chairman of the Rules Committee imploring them to take action and move the bill forward (Murphy 1973, 140). The Judges’ Bill was “not even reported from committee” (Hartnett 2000, 1671) during the 67th Congress. The next hearing on the bill in the House Committee on the Judiciary occurred on December 18, 1924 in the lame-duck session of the 68th Congress a few weeks after the Republican general electoral landslide.

⁹ The subcommittee hearing was held on Saturday, February 2, 1924 and heard testimony from just four speakers including Mr. Shelton from the ABA and Justices Van Devanter, McReynolds, and Sutherland. The membership of the subcommittee was stacked with supporters of the Judges’ Bill. All three senators on the subcommittee (Cummins, Overman and Spencer) were supporters of the bill according to a straw poll of the full committee conducted by the ABA (Murphy 1973, 143-44). The record of the hearing can be found at: Senate Committee on the Judiciary, Subcommittee, *Procedure in Federal Courts: Hearings on S.2060 and S.2061*, 68th Cong., 1st sess., February 2, 1924, 1. Murphy’s account of the Senate hearing on the Judges’ Bill makes it seem as though the hearing occurred in front of the full Senate Committee on the Judiciary (Murphy 1973, 142). It did not.

¹⁰ The shape of the pyramid was also minimally altered by the Judiciary Acts of 1914 and 1916.

¹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

¹² See Chapters 1-9 of *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* by William G. Ross (1994) for an excellent discussion of Populist and Progressive concerns about the growing, undemocratic path of the federal court system.

¹³ Without Chief Justices Taft's entrepreneurial leadership and political manipulation from 1921 through 1924, it is unlikely that the Judges' Bill would have been ready for consideration by Congress during the critical juncture lame-duck session.

¹⁴ Epstein (2002) applied Riker's theory to examine whether Chief Justices of the Supreme Court employ heresthetical approaches or "the art of political manipulation" to structure judicial choices in their favor. Epstein's game-theoretic modeling, which was also applied to Chief Justice Burger's actual behavior, concluded that Riker's theory was so descriptive that it "can serve as the foundation of a new theory of politics" (Epstein and Shvetsova 2002).

¹⁵ Taft told Senator Cummins his proposal was "unnecessary because it was already covered by existing authorities" and claimed that the Court had been working for a long time on its own bill to deal with the docket problem (Hartnett 2000, 1663). Neither of these statements was accurate. Taft later testified in front of the House Committee on the Judiciary that the Supreme Court committee that produced the Judges' Bill had been established by his predecessor—another specious claim (Hartnett 2000, 1663-64). He also earwigged his brother Henry Waters Taft into presenting a revised ABA proposal that dropped all mention of increasing the number of justices (the plan initially favored by the committee), replacing it with a revised proposal that supported the chief justice's plan to give the Court control of its docket. The chair of the ABA committee, who had authored the initial plan, was conveniently absent from the meeting where the revised proposal was considered, and the ABA approved the alternative favored by the brothers Taft (Hartnett 2000, 1673-74). The last-minute, legerdemain substitution of the approved committee section calling for an increase in the number of justices on the Supreme Court with Taft's alternative is still obvious today. While the copy in the section had been changed to comport with Chief Justice Taft's plan, the section heading had not and read "Increasing the Number of

Judges in the Supreme Court” (Hartnett 2000, 1675 footnote 149)—the title of the original plan Taft despised.

¹⁶ Supreme Court Justice Van Devanter testified that he and other justices on the committee that drafted the Judge’s Bill “only took the matter up because they were asked to so do by ‘some members’ of the Senate and House Judiciary Committees” (Senate Committee on the Judiciary, Subcommittee, *Procedure in Federal Courts: Hearings on S.2060 and S.2061*, 68th Cong., 1st sess., February 2, 1924, 1). It appears that Van Devanter, who had been appointed to the Supreme Court by Taft when he was president, had been led to believe this by the chief justice (Hartnett 2000).

¹⁷ The November 11, 1922 issue of *Labor*, the newspaper of railroad union workers, described the 1922 election as “a progressive triumph, such a victory as the Progressives have not won in this country in many a day. It was gloriously nonpartisan.”

¹⁸ Senator Shields was one of several Progressives who were missing when the final debate and vote on the Judges’ Bill took place on the Senate floor on February 3, 1925.

¹⁹ Senator Borah was Coolidge’s first choice for vice president, but Borah demurred.

²⁰ Senator Walsh had also been attacked at home by the ABA whose Montana membership had voted to censure him (Mason 1983, 112).

²¹ Coolidge said, “The docket of the Supreme Court is becoming congested. At the opening term last year it had 592 cases, while this year it had 687 cases. Justice long delayed is justice refused. Unless the Court be given power by preliminary and summary consideration to determine the importance of cases, and, by disposing of those which are not of public moment, reserve its time for the more extended consideration of the remainder, the congestion of the docket is likely to increase. It is also desirable that the Supreme Court should have power to improve and reform

procedure in suits at law in the federal courts through the adoption of appropriate rules. The Judiciary Committee of the Senate has reported favorably upon two bills providing for these reforms which should have the immediate favorable consideration of the Congress.”

²² The House version of the Judges’ Bill was H.R. 8206.

²³ The one amendment to the Judges’ Bill that was offered was summarily dispatched within a few minutes by voice vote.

²⁴ Until the “Switch in Time That Saved Nine” (McCloskey 2010).

²⁵ As Murphy reported, Taft told an old friend: “Of course Norris and Borah and Johnson and La Follette are all against it [the Judges’ Bill], as they are against everything I like, partly because we do not agree on anything, and partly because they like to defeat a measure of which I am a sponsor (Murphy 1973, 140). Senators Norris and Borah were both on the Senate Judiciary Committee as were three other senators Taft detested—Walsh, Shields and Caraway (Murphy 1973, 135). Please note: Murphy lists Senator Spencer as one of the five Judiciary Committee members despised by Taft. This is likely an editing mistake. Spencer supported the Judges’ Bill. Shields, a Progressive, firmly opposed it.

²⁶ Senator Brandegee committed suicide on October 14, 1924—six months after the report was filed. Senator Cummins was Chief Justice Taft’s choice to manage the Judges’ Bill through the Senate Committee on the Judiciary and on the Senate floor. It is unclear what, if any role, Sen. Brandegee played in the consideration of the Judges’ Bill. Taft was unsure of Brandegee’s position on the bill (Murphy 1973, 142).

²⁷ The names of the two senators who served on the subcommittee with Senator Cummins are included in the heading of that report which was attached to the Committee’s one-paragraph document.