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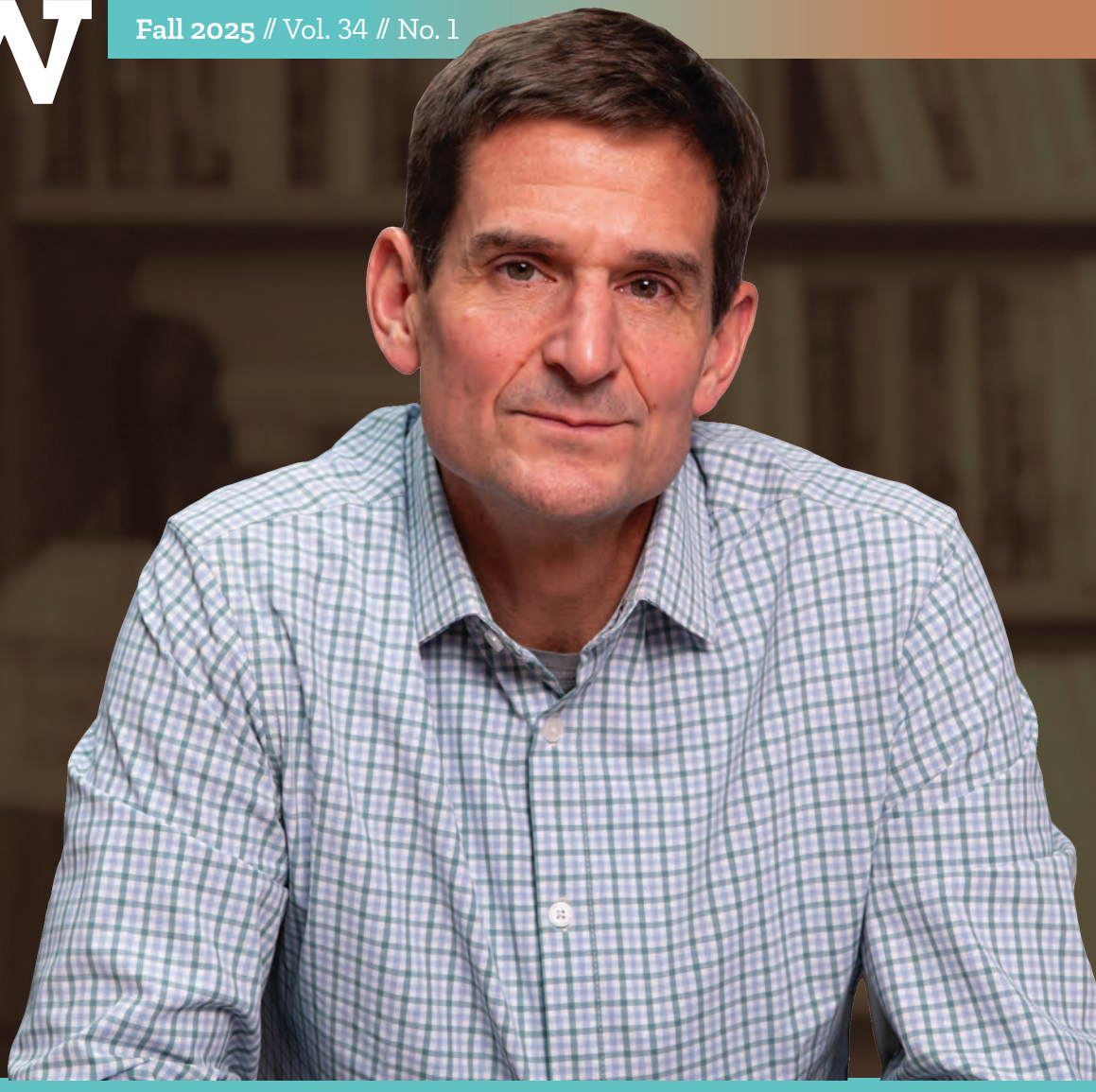

Our Court: A New History of the United States Supreme Court

An Interview with ABF Research Professor Christopher W. Schmidt

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When the first United States Supreme Court met soon after the ratification of the Constitution, it was a minor player on the national political scene. In its early years, presidents struggled to persuade potential nominees to join the Court, and justices sometimes left for more interesting work. There was little for the Court to do.

As a result, for most of its history, the Court registered only faintly in the lives of most Americans. It was powerful and important, but its workings were largely hidden from public scrutiny.

Today's Court is very different. Appointments of justices to the Court have become extremely contentious and thoroughly politicized media events. Presidential candidates emphasize the political balance of the Court as a key issue for voters to consider. People from across the ideological spectrum look to the Court to play a leading role in the nation's most divisive political disputes—regulation of abortion, access to the vote, transgender rights, religious liberty, the boundaries of executive authority, and so many other hotly debated issues. Hardly a week goes by without another news headline about the doings of the Court and its members.

Supreme Court justices themselves have never been more well-known to the public. Ruth Bader Ginsburg, who served on the Court from 1993 until her death in 2020, became a pop-culture icon during her tenure on the Court. Her likeness appears on countless tote bags, t-shirts, and mugs. Her life inspired two major motion pictures, a comic opera, a workout book (authored by her personal trainer), and countless SNL sketches. Ginsburg isn't the only justice to become the subject of public interest—a majority of the current Court have written books about their lives and their approach to judging, and several justices have had their own pop-culture turns.

American Bar Foundation Research Professor Christopher W. Schmidt is at work on a book that will offer a fresh perspective on the evolution of the Court's place in American political and cultural life. His book will examine how, over the past century, politicians and activists have advanced their own interests by elevating the place of the Court in American politics, persuading the American people that they have a responsibility to shape the composition and direction of the Court. The efforts of these

people operating outside the Court, combined with the Court's own ambitious forays into contentious political and cultural issues, transformed the place of the modern Supreme Court in American life.

In addition to his work at the ABF, Schmidt is a Professor of Law at Chicago-Kent College of Law, where he also serves as Codirector of the Institute on the Supreme Court of the United States. He served as the editor of the ABF's research journal, *Law and Social Inquiry*, from 2013 to 2024.

Schmidt has long been fascinated by the Supreme Court and its history. He wrote his dissertation on *Brown v. Board of Education*, and his first book, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* (University of Chicago Press, 2018), includes a chapter focused on the Court's consideration of cases arising from the criminal prosecutions of student protestors.

His most recent book, *Civil Rights in America* (Cambridge University Press, 2021), recounts the struggle over the term "civil rights" throughout American history and considers a series of nineteenth-century court rulings as central to this history.

Schmidt's new book, tentatively titled *Our Court: A New History of the United States Supreme Court*, will take a deep look at America's changing perception of the Supreme Court. His current research considers how everyday people, activists, interest groups, and a wide range of individuals have played significant roles in shaping America's relationship with the Court at key moments in its history.

In the following interview, Schmidt speaks with the ABF about his book project, Court reforms, and why a historical perspective matters.

This interview has been edited for clarity and length.

From left to right: Christopher W. Schmidt, Carol A. Heimer, Jothie Rajah, and Anna Reosti

ABF: What makes the Supreme Court so interesting to you?

Christopher W. Schimdt: I've always been struck by people's deep interest in and curiosity about the Supreme Court and its history. It's powerful and mysterious. There haven't been all that many members of the Court, and many of them have been quite interesting characters. Through my historical scholarship, I've been able to give my readers an idea of what happens behind the curtain at the Court. I show that the members of the Court are very human, with very human foibles, flaws, and strengths—that they, like everyone else, have always been moved by their own principles and politics. The Court's history contains countless fascinating stories.

But even as I have sought to show humanity operating within the Court—the personalities, politics, and strategizing that go into the Court's rulings—I also believe that we can't understand the Court if we see it as just another political institution. Politics shapes the Court. Politics infuses many of the rulings the Court makes. The Court cannot be understood as anything other than an actor on the political scene. But—and here is the key point that is often hard to see in the midst of our heated battles over the Court—the Court operates differently in meaningful ways from the political branches of government.

The law plays a role. The Court's history and the justices' consciousness of that history plays a role. And the justices have an institutional sensibility that channels their personal ideological commitments in ways that are different from other political actors. Capturing this complex dynamic and how it has evolved across history has been a central goal of my scholarly career.

ABF: You've written about the Supreme Court for many years. What is motivating you to write this book about the Supreme Court now?

CS: I've long thought about writing a book centered on the Supreme Court. General interest in the Court has increased over time, as has the intensity of the feelings expressed by the public, activists, and political leaders toward the Court. There were events in recent years which convinced me that it was time to take on this challenge and begin this book.

A lot of these events have taken place in the last ten years. By blocking President Obama's nominee to fill the seat that opened when Justice Scalia died in February 2016, Republicans sought to turn the 2016 presidential election into a referendum on the future of the Court. The confirmation hearing for each of President Trump's three nominees were deeply divisive political events, attracting political campaign–like attention and money. People have been talking about "Court-packing"—adding justices to the Court to change its ideological balance—an idea that most observers believed had been thoroughly discredited after Franklin Roosevelt's failed effort to pack the Court in 1937. And then came the monumental and monumentally controversial 2022 *Dobbs* opinion overturning *Roe v. Wade*.

There is so much going on at the Court, so much interest in the Court, and so many strong reactions to what the Court is doing. Now more than ever, we need perspectives on the Court that move beyond current headlines and offer a deeper historical perspective on how the Court and the nation arrived at this point. This is what I hope my book will accomplish.

ABF: Your current research looks at how the Supreme Court evolved from an institution generally understood as standing apart from society—a distant force exerting its authority over the American people and government—to an institution treated by politicians and the American public as a component of political and cultural life. Can you take us through some of the key inflection points in changing expectations toward the Court?

CS: My book opens in early 1930, the beginning of a momentous decade in the history of the Supreme Court. Chief Justice William Howard Taft was in rapidly failing health and had just

announced his intention to step down from the Court.

President Herbert Hoover named as his replacement Charles Evans Hughes, who was as qualified and respected a lawyer as could be found in the nation. Hughes has already served on the Court from 1910 to 1916, when he stepped down to run for president on the Republican Party ticket. He accepted Hoover's offer of the chief justiceship nomination only after the president assured him that the Senate would confirm him "without a scrap." But there was a scrap. This came as a surprise to Hoover, Hughes, and members of the press, who had all predicted an uneventful confirmation.

What happened? In a word, politics. Supreme Court nominations have been political from the beginning, but now the politics surrounding the Supreme Court were beginning to change.

The Senate through the nineteenth century regularly blocked nominations on purely partisan grounds. But in the late nineteenth and early twentieth centuries, a new norm solidified, one in which senators largely accepted the presidents' prerogative to select the members of the Court. (There were occasional exceptions: most notably, a months-long debate over Woodrow Wilson's appointment of Louis Brandeis in 1916). The Hughes confirmation signaled the arrival of a new era, and this new era was made possible by a seemingly minor procedural change the Senate had recently adopted. Previously, the Senate debated Court nominees in executive sessions, closed to the press and to the public. The Hughes nomination was the first Supreme Court nomination to take place in open session. The senators now had an audience.

A bipartisan group of progressive senators who were frustrated by the Court's recent conservative rulings (they were particularly exercised by now-forgotten Court rulings limiting federal authority to set railroad rates) took full advantage of this new opportunity. These senators believed that Hughes, who had spent recent years as a corporate lawyer, would be another pro-business vote on the Court. They launched an assault on the nominee and the Court's conservative majority.

The debate is striking for the starkly ideological terms in which these senators spoke about the Court and the nominee. One senator declared himself "wearied by this doctrine of a sacrosanct judiciary." At issue was not Hughes's integrity, another senator emphasized, but "his general qualifications to represent the people of the United States on that great court." Note this senator's assumption that members of the Supreme Court—an unelected institution designed to be insulated from political pressure—should be understood as *representing* the American people. Another concluded, "I do not approve of his economic views, and I am not going to be a party to placing him upon the Supreme Court of the United States of America."

The opposition movement never had the votes to defeat the nomination, but they eventually secured twenty-six no-votes (eleven Republicans, fifteen Democrats), a remarkable number for a nominee of Hughes's credentials and stature.

ABF: How do things escalate from there for the Court?

CS: As noteworthy as all this was, it was just a prelude to the even more dramatic Supreme Court confirmation battle that took place only months later, when an opposition movement secured the votes to defeat a nominee in a floor vote—the first time this had occurred in almost four decades.

The victim in this battle was John Parker, a judge on the US Court of Appeals for the Fourth Circuit.

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"The confirmation battles of 1930 thus signaled a key first step in the emergence of what I consider to be the modern Supreme Court. This was a Court that was more directly integrated into the operation of the political branches. Politicians and activists felt more responsible for shaping the Court's direction. The American people were more interested in and invested in the composition of the Court."

As with the battle over Hughes, Parker's ill-fated appointment was infused with politics. But in this case, it was a rawer form of politics.

Whereas the debate over Hughes was primarily about foundational political principles—a struggle between human rights and property rights, as Hughes's opponents framed the issue—the debate over Parker amalgamated principle, partisan calculations, and political self-interest.

One line of opposition to Parker focused on the bald partisan calculation that made Parker the nominee in the first place. Parker had solid qualifications, but Hoover's other options were generally considered as having more outstandings credentials. A Parker nomination had a distinctive benefit for the administration, however: Hoover sought to solidify advances his Republican Party had made in the upper South, and selecting Parker, a North Carolina Republican, might serve this cause.

Two other lines of opposition ultimately proved more consequential. Labor groups came out against Parker because he had written an opinion upholding "yellow-dog contracts"—contracts that require employees to not join a union as a condition of employment. Parker's defenders argued that he was doing nothing more in this case than applying Supreme Court precedent. Although this was a fair enough reading of the record, labor leaders refused to back down. They insisted that Parker had shown himself to be anti-labor and threatened electoral consequences to senators who voted to confirm the nominee.

The National Association for the Advancement of Colored People (NAACP) also came out against Parker. The racial justice organization had learned that Parker gave a speech denouncing Black voters when he ran for governor of North Carolina in 1920. The NAACP launched a national campaign against Parker's nomination, targeting their efforts on senators whose reelection would depend on the support of Black voters. Senators were subjected to what NAACP Executive Director Walter White proudly described as an "avalanche" of "telegrams, letters, petitions, long distance telephone calls, and personal visits."

These forces of opposition combined with the progressives who had mobilized against Hughes, producing a dramatic scene in the Senate. The galleries filled with the press, the public, and even fascinated House members, who watched the four-day debate over Parker's nomination. Parker eventually came up short by a single vote.

ABF: What do you see as the larger significance of these two dramatic 1930 confirmation battles?

CS: The Court was becoming politicized in ways it hadn't been before. By this, I don't mean what people typically mean when they say the Court is politicized, which is that justices were deciding contentious cases in ways that aligned with their political or ideological beliefs. They were doing this, but this was nothing new. Rather, I mean that the politics surrounding the Court were changing.

Appointment to the Court had always involved a good deal of politics, but this had tended to be politics of the inside-the-beltway, smoke-filled-room sort. Nominations typically came from personal connections and political back-scratching. Presidents recognized that appointing justices from particular regions of the country or from the opposing political party could have political benefits. But in 1930 we see signs of

something quite different from what came before—something much closer to what we have today.

Senators used the battle over Hughes as an opportunity to speak to the nation about the direction of the country. Hoover saw the appointment of Parker as an opportunity to win votes. Interest groups saw in the battle over Parker an opportunity to demonstrate their influence over American politics. The politics surrounding the Court were becoming more democratic, and the Court was becoming more relevant to more people, even when it was not making news by dispensing rulings on legal disputes.

The confirmation battles of 1930 thus signaled a key first step in the emergence of what I consider to be the modern Supreme Court. This was a Court that was more directly integrated into the operation of the political branches. Politicians and activists felt more responsible for shaping the Court's direction. The American people were more interested in and invested in the composition of the Court. The Court had, in effect, moved closer to the American people.

ABF: How does President Franklin Roosevelt's failed effort to "pack" the Supreme Court fit into this story? Was this motivated by the shifting politics surrounding the Court?

CS: Roosevelt's 1937 Court-packing plan is the subject of my book's second chapter. By advocating that Congress pass legislation that would add additional justices to the Supreme Court, FDR placed the Court into a political maelstrom that dominated newspaper headlines for months.

FDR claimed that his plan was designed to relieve an aging and overworked Court, but everyone knew his goal was to shift the ideological balance of a Court that had become a major obstacle to his ambitious New Deal package of economic reforms. In my book, I describe how various groups responded to FDR's proposal by trying to rally the American people to defend the Court.

Opponents of FDR's Court-packing plan constructed an idealized version of the Court that was designed to energize everyday Americans to rally around the Court. As Senator William Borah, one of the leading opponents of the Court-packing plan, put it, "If this isn't a people's fight, it is lost."

To make it a people's fight, Court-packing opponents had to make a case for the Court that would resonate with the people: Without a free and independent Court, Americans' ability to speak freely and to practice their religions would be put at risk, they argued. Listen to the language in this article published in the *American Bar Association Journal*: "Always, against attempts to violate the rights guaranteed the citizen, whether by acts of Congress, by acts of a state legislature, by ordinance of a city council or by whatever authority, the Supreme Court has extended its protection to the humblest citizen. Always it has been the final refuge for the oppressed...."

This portrait of the Court was hardly accurate. The Court up to that point had at best a mixed record when it came to protecting individual rights; its record was particularly unimpressive when it came to the rights of the most vulnerable

groups of Americans. The accuracy of the portrait was less important, however, than its inspirational potential. Roosevelt had told the people that the Court was controlled by the aging voices of a bygone era, that the Court stood in the way of his efforts to meet their needs. But here was a quite different image of the Court, one in which the Court alone stood up for their most fundamental liberties.

FDR's challenge to the Court is often portrayed as a moment of extreme vulnerability for the Court. It was this. Many at the time felt that the future of the Court as an independent branch of government was at stake. But viewed in the long term, the effect of the Court-packing battle was to make the Court more powerful and more insulated from political constraints. Rhetoric deployed by politicians and interest groups to fend off the Court-packing plan created new lines of defense for the Court. It also created new expectations around the Court.

ABF: As much as this kind of idealism about the Court doesn't capture the reality of what the Supreme Court was doing in this period, there soon came moments in history when the Court seemed to live up to this idealized image as a protector of liberty. *Brown v. Board of Education* obviously comes to mind. How did this case further shape the perception of the Court in the minds of Americans?

CS: *Brown* was a monumental moment in history not only for the Court's transformative reading of the Fourteenth Amendment's Equal Protection Clause but also for what it did for the image of the Court in the popular imagination.

The NAACP showed that a long-range, focused litigation campaign could change the Constitution. Before the mid-twentieth century, the only interest groups that achieved significant success in the courts were business advocates. The NAACP showed the possibility of outsider groups using the courts to amplify their voices and change the law. Thurgood Marshall became a national celebrity because of his courtroom victories.

This new role for the Court came with costs. One was that the Court came under attack by those who disagreed with the direction it was moving the nation. My chapter on *Brown* gives considerable attention to the segregationist backlash the *Brown* ruling sparked. Efforts by white southerners to avoid, undermine, or defy the Supreme Court's school desegregation rulings—often referred to as "massive resistance"—took an array of forms, from night-cloaked acts of racial terrorism to resolutions declaring noncompliance official state policy.

In 1956, most southern members of Congress put their names on the "Southern Manifesto," in which they denounced *Brown* as an "unwarranted decision" and a "clear abuse of judicial power." They vowed to "use all lawful means to bring about a reversal of this decision." Southern state legislatures offered their own statements of defiance to *Brown*, passing resolutions that advanced theories of "interposition" and "nullification," premised on the idea that a state that believed an action of the federal government violated the Constitution had the authority to

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interpose its own constitutional interpretation between the federal government and its people, thereby nullifying federal policy. These official proclamations of defiance transformed scattered discontent and uncertainty toward *Brown* into a united movement. In response to *Brown*, southern politicians learned how to leverage attacking the Court for political benefit.

In the end, the backlash to *Brown* made the Supreme Court stronger. Politicians, activists, the press, and legal scholars came to the Court's defense, armed with arguments for a boldly independent Court. These were formative years in the solidification of the idea of judicial interpretative supremacy—the idea that the courts have the final say on the meaning of the Constitution.

During this period when the Supreme Court was under the leadership of Chief Justice Earl Warren, from 1953 to 1969, it pushed constitutional law in new directions in support of the civil rights movement and other progressive causes. The *Brown*-inspired image of the Supreme Court as boldly staking out the moral high ground motivated generations of justices, lawyers, and law professors.

Brown also served as an inspiration for rights movements beyond the African American freedom struggle, including campaigns for equal rights for other racial or ethnic groups, for women, for gays and lesbians, and for people with disabilities. To those who want to disrupt the status quo and advance a particular cause, *Brown* represents a basic, tantalizing idea: that a carefully crafted litigation campaign might produce a major Supreme Court victory that would make a breakthrough for their cause.

Yet the most fervent proponents of this new image of the Court were destined to be disappointed. The structure and tradition of the Supreme Court have always limited its ability to lead social change. *Brown* itself failed to break down patterns of racial segregation in the nation's schools; abuses in the criminal justice system survived the Warren Court's ambitious criminal justice rulings. Even relatively straightforward rulings such as the Court's banning of prayers in public schools were met with widespread defiance.

In sum, *Brown* and other Warren Court decisions raised the expectations of people who previously had little reason to expect much of the Court. Many more interests now looked to the Court to advance their causes. But when the Court failed to deliver (as it often did), these raised expectations produced disillusionment, anger, and frustration. The political stakes surrounding the Court were also elevated. For ambitious politicians looking to win elections and advance their agendas, this meant that the Court had become a more significant issue.

ABF: In the years since the *Brown* decision, how have politicians used the Court as a campaign issue?

CS: The best example of this is the 1968 presidential election, when Richard Nixon used a critique of the Warren Court as an effective campaign issue. In June 1968, in the middle of the campaign battle, Chief Justice Warren announced his intention to retire. Senate Republicans blocked President Lyndon Johnson's effort to replace Warren with Abe Fortas, who was then an associate justice on the Court, which meant that the winner of the election would have the opportunity to name a new chief justice.

Nixon took advantage of the situation. He attacked the Court's decisions under the leadership of his longtime political adversary Warren, and he promised the American people that, if elected, he would appoint justices who would turn the Court in a more conservative direction. A presidential candidate had never before made so explicit the connection between the votes cast by the American people on election day and the composition and direction of the Supreme Court.

Nixon and his allies presented voters a narrative that emphasized the centrality of the Court to American life. They insisted that problems they saw in their daily lives—particularly concerning crime and their children's education—could

be traced to the decisions of the Supreme Court. They urged the American people to take responsibility for ensuring that the Court protected their interests.

That year's election revealed a new kind of presidential politics, one in which a winning candidate effectively made the direction and composition of the Court into a ballot issue.

ABF: It certainly seems like the attitude that Nixon took to the Court in his campaign continued to impact presidential campaigns for decades afterward. Do you see your historical analysis weighing in on today's debates surrounding the Court?

CS: Absolutely. Although my book charts a long history of political battles over the Court, these tended to be episodic, with moments of controversy and contention followed by extended periods in which the Court receded from the front lines of political debate. Controversial confirmations were followed by a string of routine appointments to the Court; most presidential campaigns, even after 1968, did not feature the Court as a major issue. But in recent decades something fundamental has changed about the place of the Court in American politics.

The 2016 presidential election was a critical moment in this story. Much like 1968, this election took place with a seat on the Court up for grabs—a product of Justice Antonin Scalia's death in February 2016 and of the refusal of Senate Republicans to consider President Barack Obama's nominee to replace him. Presidential candidates, for the first time in history, embraced "litmus tests," openly promising to appoint justices who would rule a certain way in particular cases. Donald Trump even circulated lists identifying who he would consider for the open seat if he won.

The shattering of norms constraining the way politicians talk about the Supreme Court and the heightened salience of the Court for the electorate fueled a fire of controversy surrounding the Court. What used to be episodic is now the norm: confirmation hearings are transformed into existential decisions about the fate of our constitutional democracy. The Court has added fuel to fire, issuing a string of significant decisions on divisive issues, none more significant or more divisive than its 2022 ruling overturning *Roe v. Wade*. Several justices have been accused of ethical improprieties in recent years, attracting even more public attention to the Court. Polls show that, compared to past decades, people feel more strongly about the Court, that attitudes toward the Court are more sharply divided along partisan lines, and that overall confidence in the Court has declined.

To understand the extraordinary prominence of the Supreme Court in political debates today requires an understanding both of long-term historical trends and of how recent developments mark sharp breaks from past practices. This is the story *Our Court* seeks to tell.

ABF: In explaining how the Court got here, you're telling a story of the Court that, to some readers, may look very different than the story they're used to hearing. Are there certain ways in which people talk about the Supreme Court and its history that you hope to correct in this book?

CS: I want this book to be a source of information and guidance for people who want to move beyond the headlines and hyperbole and to think seriously about the Supreme Court—the Court as it has evolved across history and the Court we have today.

One of my concerns is that in the current sharply polarized political environment, commentary on the Court immediately gets put into one of two categories: you're either building it up or you're knocking it down. In this book, I seek to do neither. I want to better understand how we arrived at this moment. I want to write a book that can speak both to those who love what the Court has been doing in recent years and those who hate what the Court has been doing.

This is one reason I start when I do, in 1930. Critical commentary on the Court tends to trace

its current troubles to more proximate points in history: the *Dobbs* ruling; the 2016 election; *Bush v. Gore* (2000); the 1987 defeat of Court nominee Robert Bork. All these moments feature prominently in my book. But by pushing my starting point back to the 1930s, I'm able to better situate these more recent events, showing underappreciated continuities as well as dramatic departures from past practices.

By going back in history to a point well beyond where commentators locate the roots of today's political battles over the Court, I'm able to better demonstrate what I believe is a critically important but too often overlooked development in this story: how, over time, politicians and interest groups learned to make the Court an effective political issue, and they did this by persuading the American people that the job of the Supreme Court was to advance their interests—that it was *their Court*—and that it was their responsibility to ensure that the Court fulfilled that role. Charting that development will be the primary contribution of this book.

I also want the book to be an engaging work of narrative history. Through extensive archival research, I've been able to craft richly detailed accounts of a series of struggles over the Court and its place in American life.

Each chapter features ambitious people who pursued their varied interests with passion and dedication and who, at some point, concluded that drawing public attention to the Supreme Court would help them achieve their goals. It's fascinating to see how different people—from powerful politicians to activist outsiders—at different points in history discovered the potential of the Court as a political issue and then tried to figure out how to make this issue work to their advantage. Their individual stories are important and compelling. And when you put them together into a single narrative—as I do, for the first time, in this book—the connections between these episodes become visible. The end result will be a readable narrative history that shows the reader how a memorable cast of characters across a century of history transformed the Court from an episodic to an integral feature of political debate.

I want *Our Court* to be a book that will be of interest to historians and legal scholars, but also accessible for a general audience. I know from giving talks about this project to different audiences that there are a lot of people out there who are interested in the Court and its history. I am writing this book for them as well as for my colleagues in the academy.

Schmidt plans to complete *Our Court* in 2027. He has several forthcoming articles, including "The Politics of Judicial Ideology," which will be published in *Tennessee Law Review*; "Rebuilding the Constitutional Right to Abortion After *Dobbs*," which will be published in *Oregon Law Review*; and "The Perils of Extrajudicial Discourse," which will be published in an edited volume titled *Extra-Judicial Communication: Perspectives and Practice*.

Christopher W. Schmidt at the 2025 Law and Society Association Annual Meeting in Chicago

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