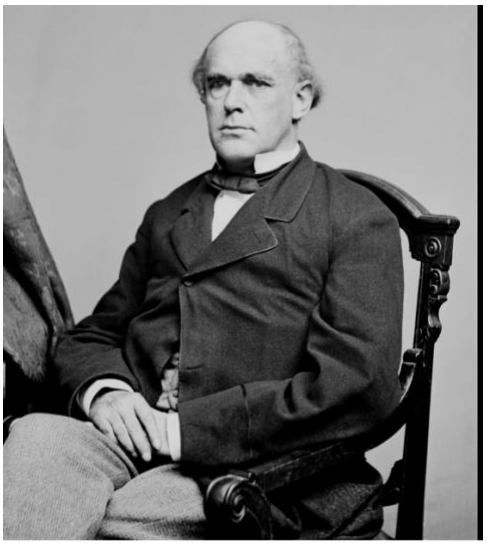
Supplemental Notes to Lecture 14: Nine is (Not) Enough. Part I

I. "Good Behaviour"

As stated in Lecture 14, according to Article III, Section II of the US Constitution, "judges, both of the supreme and inferior courts, *shall hold their offices during good behaviour* [emphasis added]." To date, that language has been interpreted to mean federal justices remain on the bench until they choose to retire—unless they are removed from office, which can happen only if they are impeached by the House of Representatives and convicted of "treason, bribery, or other crimes and misdemeanors" in the Senate. Although Article III makes no explicit mention of impeaching justices, the latter are included among the "civil officers" of the United States who,

along with the President and Vice-President, can be impeached, as stated in Section IV of Article II.

Indeed, less than two decades after the Constitution was ratified, Justice Samuel Chase was impeached by the House, though there were not enough votes in the Senate to convict him, which established the precedent that a justice could not be impeached primarily for political reasons.



(A Federalist, Chase's ideological beliefs were diametrically opposed to those held by President Thomas Jefferson and his congressional allies, heirs of the Antifederalist tradition who formed what was then called the Democratic-Republican Party). As the official Senate Historical Office puts it: "The Senate thereby effectively insulated the judiciary from further congressional attacks based on disapproval of judges' opinions."

Chase was the last member of the Supreme Court to have been impeached, though in 1969 Justice Abe Fortas might have been, had he not resigned in the face of allegations of financial impropriety.

More recently, a major investigative piece published in *The New Yorker* that details the political activities of Virginia Thomas has prompted some to call for the impeachment of Clarence

Thomas, on the grounds that he has on several occasions refused to recuse himself from hearing cases (e.g., the travel ban President Trump imposed in 2018 via Executive Order on travelers from seven countries, five of them with majority Muslim populations) in which his spouse, Virginia or Ginni Thomas, actively supported one of the parties involved in the litigation.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IS GINNI THOMAS A THREAT TO THE SUPREME COURT?

Behind closed doors, Justice Clarence Thomas's wife is working with many groups directly involved in controversial cases before the Court.

By Jane Mayer
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However, law professor Bruce Green of Fordham acknowledges that "in the twenty-first century, there's a feeling that spouses are not joined at the hip." In other words, contemporary conceptions of marriage that emphasize the independence of each spouse make it unlikely that any sort of formal charges could be brought against Thomas. Even the *appearance* of impropriety is unlikely to receive much media attention, though that is primarily because there is currently a 6-3 conservative majority on the Court, and in that sense Thomas's vote is not decisive. (When John Roberts was nominated to be a justice, his wife resigned from her leadership position in Feminists For Life, an anti-abortion group.) We should note that, as journalist Michael Kranish put it in a report for the *Washington Post, "Justices essentially decide*

for themselves whether they have a conflict of interest." Congress has no official say in the matter.

II. The Lochner Era

In the landmark case of *Lochner v. New York,* the Supreme Court struck down a state law, which was unanimously approved by both houses of the New York Legislature, that capped the number of hours per week (60) and per day (10) that bakers could work. Citing the 14th Amendment's Due Process clause, the bakery owner claimed the statute infringed upon his freedom to enter into contracts with his employees.

Though the Court acknowledged states may utilize their police powers to protect the safety, health, welfare, and morals of its citizens (a power that we studied in Lecture 3), Justice Rufus Peckham, writing for the majority, also asserted, with apparent sarcasm, that "clean and wholesome bread did not depend upon whether a baker worked only ten hours a day or sixty a week."[1] Though meant to underscore the absurdity of the law, Peckham's statement actually reflects the extent to which the Court viewed questions concerning public health with an eye on the citizen-consumer rather than on the citizen-laborer. In fact, the New York statute that appeared before the court was not ultimately regarded as a matter of public health at all; instead, it was deemed an "illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best."

In reaching that determination, the justices were guided by an abstract if not illusory conception of the labor contract that assumes the respective parties to an employment contract confront one another as simply as equals. (Similarly, consider the "at-will" employee who, though free to quit

[1] In 1938, Roosevelt signed into law the Fair Labor Standards Act (FLSA), which among other things mandates that employees receive overtime pay if they put in more than 40 hours in a 168-hour period (averaging 8 hours a day for five days). As stated on the OSHA website: "For adult employees, there is no legal limit to the number of hours that one can work per week, but the Fair Labor Standards Act dictates standards for overtime pay in both the private and public sector." There is, however, a long list of exemptions for "industries and professions that are more suited to overtime work." On that list appear, to cite just a few examples: doctors, nurses, police officers, farmworkers, and "certain skilled computer professionals."

at any time, may also be fired for any reason. Seen from the perspective of a worker, such "freedom" means little, given the precarity of the employment situation, particularly in the service industry. Note, however, that throughout 2021 and into the first months of 2022, there were widespread reports of labor shortages, even in the notoriously low-paying retail sectors, creating a situation in which "at-will" workers gained a little more leverage over setting the terms of their employment—at least for the time being.)

To return to *Lochner:* in his dissent, Justice Harlan (who, as you may remember, wrote the majority opinion in *Jacobson v. Massachusetts,* a case also involving the police powers of the

state that was decided the same year as Lochner[2]) declared that justices should not second-guess state regulations of the economy, so long as they are "reasonable." Focusing upon the worker instead of the consumer, Harlan argued the state had a legitimate interest in enacting laws that were designed to protect bakery employees from working excessively long and strenuous hours under poor conditions.

As stated in Lecture 14, *Lochner* set a precedent for the *Tipaldo* ruling, in which the Court struck down a state minimum wage law established for women and children. Writing for the majority, Justice Pierce Butler maintained that the state was "without power by any form of legislation" to modify labor contracts freely entered into by employer and employee. In his dissent, Justice Stone offered that "there is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together." Stone's dissent was not a lonely one. The Court's ruling provoked an outpouring of opposition from the media and leading members of both parties—including former President Hoover.

III. The Legacy of the Circuit Riders

As discussed in Lecture 14, throughout the nineteenth-century, US Supreme Court justices "rode circuit" in designated areas, in order to serve on appellate courts. With the establishment of the Circuit Courts in 1891, Supreme Court justices no longer rode circuit; to this day, however, each justice presides over a certain circuit, which means they are responsible for ruling on motions that are filed within their assigned circuits, including emergency applications to the court involving, for instance, time-sensitive requests for stays of execution, as discussed on page 468 of our text. As shown in the table below, there are now thirteen circuits, including the District of Columbia Circuit and the roving Federal Circuit:

[2] Note that in *Jacobson*, the court upheld the police powers of the state—primarily because in exercising them to promote the public welfare, the state did not infringe upon employers' freedom of contract, *something that a majority of the justices deemed essential to defend, unlike the principle of bodily integrity*, a liberty that was sacrificed in the name of protecting the publi'sc health in *Jacobson.*

SCOTUS Circuit Court Assignments		
Federal Circuit Court	**Justice**	**States**
District of Columbia Circuit	Chief Justice John G. Roberts	District of Columbia
First Circuit	Justice Stephen Breyer	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second Circuit	Justice Sonia Sotomayor	Connecticut, New York, Vermont
Third Circuit	Justice Samuel Alito	Delaware, New Jersey, Pennsylvania, Virgin Islands
Fourth Circuit	Chief Justice John G. Roberts	Maryland, North Carolina, South Carolina, West Virginia, Virginia
Fifth Circuit	Justice Samuel Alito	Louisiana, Mississippi, Texas
Sixth Circuit	Justice Brett Kavanaugh	Kentucky, Michigan, Ohio, Tennessee
Seventh Circuit	Justice Amy Coney Barrett	Illinois, Indiana, Wisconsin
Eighth Circuit	Justice Brett Kavanaugh	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth Circuit	Justice Elena Kagan	Alaska, Arizona, California, Guam, Hawaii, Idaho, Oregon, Montana, Nevada, Northern Mariana Islands, Washington
Tenth Circuit	Justice Neil Gorsuch	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
Eleventh Circuit	Justice Clarence Thomas	Alabama, Florida, Georgia
Federal Circuit	Chief Justice John G. Roberts	The Federal Circuit's jurisdiction is determined by the subject of the lawsuit, not geographical location.

This arrangement was cited, half-heartedly, as the pretext for the 2021 Judiciary Act. How so? Representative Jerry Nadler of New York, one of the bill's sponsors, offered the following: "Nine justices may have made sense in the nineteenth century when there were only nine circuits and many of our most important federal laws—covering everything from civil rights to antitrust, the internet, financial regulation, health care, immigration, and white collar crime—simply did not exist, and did not require adjudication by the Supreme Court. But the logic behind having only nine justices is much weaker today, when there are 13 circuits." Such a justification is about as convincing as FDR's initial claim that the court-packing plan was merely a procedural reform, presented in order to increase the Court's efficiency.

IV. Notes on the New Deal Coalition and the Specter of the American Dictator

- The Democratic "supermajorities" FDR enjoyed in both Houses of Congress were not nearly as solid as a contemporary reader may suppose, since the Democratic Party at the time included both liberals (some of whom critiqued FDR from the left) and conservative southern Democrats, who, like Josiah Bailey of North Carolina and Tom Connolly of Texas, opposed Court-Packing primarily because they feared a liberal majority on the Court would strike down Jim Crow laws.
- In the excerpt from the radio address that we heard in Lecture 14, FDR attempted to dismiss the charge that court-packing would give the president dictatorial powers, a demagogic claim that was employed frequently on the Senate floor. (Perhaps no one did so quite as vociferously as Democrat Burt Wheeler of Montana, who declared: "there are courts in [Hitler's] Germany, there are courts in [Mussolini's] Italy . . . and men are placed on them to meet the needs of the times as the dictators see the needs.") In response to such hyperbolic statements, Attorney General Homer Cummings echoed a point made by FDR in the radio address: namely, that it was "preposterous" to refer to court-expansion as a "power grab, since no president could fill the Court with loyal stooges without the assent of the Senate and the appointees themselves." Nonetheless, the court-packing plan was not put forward in order to improve the court's efficiency, or out of a concern that too many justices were no longer up to the job. It was introduced in order to get New Deal legislation passed—in other words, in order to enable the Roosevelt Administration to wield more political power.

Quiz Question 5: What important precedent did the acquittal of Justice Samuel Chase set?

Quiz Question 6: Who ultimately decides if a Supreme Court justice should recuse themselves from a case on account of a conflict of interest?

Quiz Question 7: Are you eligible for overtime pay in your current or most recent work situation? If not, do you think you should be eligible? Briefly explain why or why not. If you are: do you think the overtime pay is adequate? Briefly explain why or why not.