The Court and Politics: What Is The Lesson of FDR's Confrontation with the Court?

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Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. The Supreme Court** (2010).

For decades after Alexander Bickel's work, concern with the "countermajoritarian difficulty"– the question of how to justify judicial review in a democratic society–dominated American constitutional scholarship. In recent years, a number of commentators and legal scholars, most significantly my colleague Barry Friedman in his magisterial recent book, *The Will of the People*, have sought to dissolve this question or suggest it is passé. They argue that there is, as a matter of history and fact, no countermajoritarian difficulty about which to worry. The Supreme Court cannot and does not stray too far from "mainstream public opinion." If it does, larger political forces bring the Court back into line; the Justices, knowing this, do not wander far. And a central chapter in this new story is the Court's dramatic confrontation with the New Deal, in which the Court eventually bowed in the face of the New Deal's transformative constitutional vision.

"The lesson of 1937" is central to modern American constitutional history, as well as to the self-understanding of constitutional law and theory today. But what exactly is that lesson? The conventional takeaway is that public opinion controls the Court. I would recast that wisdom by building in many more qualifications: in a sustained conflict, concerning the most momentous issues of the day, between the Court and an overwhelming consensus across the political branches and the public, the Court will eventually lose if a President gets enough appointments to seize control of the Court. The importance of Jeff Sheshol's engrossing new book, **Supreme Power,** is that it shows just how importantis each and every one of those qualifiers. Sheshol's book has received plenty of (deservedly glowing) attention already, but I write about it here because I do not think its implications for understanding the relationship between the Court and politics have been properly appreciated. Far from confirming the conventional view about "the lesson of 1937," **Supreme Power** can be read as turning that lesson on its head: **Supreme Power** shows that judicial review can remain remarkably independent and countermajoritarian, for only a concatenation of the most extraordinary circumstances will provoke politics and public opinion into imposing major constraints on the modern Court.

First, **Supreme Power** reveals (or teaches us) just how breathtaking was the Court's challenge to the political branches. We are all aware of the major highlights–the Court's invalidation of the National Industrial Recovery Act (NIRA) or the Agricultural Adjustment Act (AAA). But consider the range of national and state legislation or Presidential action the Court held unconstitutional in one seventeen-month period starting in January, 1935: the NIRA, both its Codes of Fair Competition, and the President's power to control the flow of contraband oil across state lines; the Railroad Retirement Act; the Frazier-Lemke Farm Mortgage Moratorium Act; the effort of the President to get the administrative agencies to reflect his political vision (*Humphrey's Executor*); the Home Owners' Loan Act; a federal tax on liquor dealers; the AAA; efforts of the new SEC's attempt to subpoena records to enforce the securities laws; the Guffey Coal Act; the Municipal Bankruptcy Act, which Congress passed to enable local governments to use the bankruptcy process; and, ultimately in *Morehead v. Tipaldo,* minimum-wage laws on the books in a third of the states, in some cases, for decades (some of these decisions have withstood the test of time, but most, of course, have not). In the summer of 1935, Shesol notes, more than 100 district judges held Acts of Congress unconstitutional, issuing more than 1,600 injunctions against New Deal

legislation. Moreover, at least some of these issues cut to the bone of the average person; a window into the salience of the Court's actions is provided in the comments of the founder of the ACLU, at a town meeting, who said: "Something is seething in America today. . . . We are either going to get out of this mess by a change in the Court or with machine guns on street corners." What would the modern Court have to do, and in what context, to come close to all this?

Yet even so, **Supreme Power** provides a rich retelling of how vehement, geographically widespread, and bipartisan the resistance was to FDR's legislative assault on the Court. FDR's Court-packing plan was in dire shape politically long *before* the Court's "switch in time" took the last wind out of that effort–despite the fact, as well, that the plan was the first piece of legislation FDR put forward after having just won the biggest landslide in American history. Two-thirds of the newspapers that had *endorsed* FDR came out immediately and vociferously against the plan. The most common charge was that FDR was seeking "dictatorial powers," a particularly resonant charge. Telegrams to Congress, a leading gauge of public opinion at the time, flowed overwhelmingly, and with passionate intensity, against the plan. Some leading Progressive Democrats in the Senate, like Hiram Johnson and George Norris, quickly bolted from FDR and defended the Court's independence; conservative Democrats wanted no part of the plan; a leading Western Democrat, Senator Wheeler, announced he would lead the fight against the plan; FDR's Vice President did little to conceal his disdain for Court packing; Republicans sat silently and let the Democratic Party tear itself apart. And the Court, too, has tools to fight back: Chief Justice Hughes sent a letter, with devastating effect, to the Senate Judiciary committee that took apart FDR's justifications for Court-packing.

We cannot know, of course, whether FDR would ultimately have prevailed, had the Court's decisions not started to change course. But more remarkably, here was the most popular President in history, with a Congress his party controlled overwhelmingly, confronted by the most aggressive Court in American history – and yet, it is entirely plausible that FDR's legislative challenge to the authority of the Court would have failed, given how deep the cultural and political support was for the Court's institutional authority, even as the Court issued one unpopular decision after another.

And finally, consider the aftermath of the confrontation: who won the Court-packing fight? The conventional wisdom among constitutional academics, focused narrowly on the Court itself, is that FDR lost the battle, but won the war, since the Court (assisted by 7 FDR appointments between 1937-43), acceded to the New Deal's constitutionality. But FDR's legislative assault on the Court destroyed his political coalition, in Congress and nationally, and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936. As a *Fortune* magazine poll in July 1937 put it: "The Supreme Court struggle had cut into the President's popularity as no other issue ever had." National health-care, the next major item on FDR's agenda, faded away. The progressive domestic policy agenda did not recover until 1964. Reflecting back, FDR's second Vice President, Henry Wallace, observed: "The whole New Deal really went up in smoke as a result of the Supreme Court fight." No rational politician, looking back at FDR's attempt to bring the Court into line, other than through the ordinary appointments process, is likely to repeat FDR's efforts.

Thus, in light of **Supreme Power,** one can read the 1937 experience as suggesting that, for better or worse, judicial independence and the authority of the Court have become so entrenched in America that even the most popular politicians play with fire if they seek too directly to take on the power of the Court. As indicated by the recent case, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), in which the Court held unconstitutional the bipartisan McCain-Feingold Act's restrictions on corporate electioneering, the Court retains far more latitude to act in countermajoritarian ways than overly reductionist versions of the "majoritarian" view of the Court might suggest. If a President is lucky to have enough appointments to control the Court, the Court will likely come to reflect the President's agenda; but that is a matter of luck, not inevitability, and short of that, it is far from clear how likely or

effective any other political attempts to hold the Court to account will be. **Supreme Power** is a galvanizing read, full of arresting detail about a subject I wrongly assumed I knew more than enough about, but it also poses a sobering challenge to the view that the Court is inevitably constrained to be a "majoritarian" institution.

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