July 23, 2010

Book Review: SUPREME POWER by Jeff Shesol. New York: W.W. Norton Press, 2009.

Craig L. Jackson

THE MID-THIRTIES: A PERIOD WHICH CHANGED AMERICAN LAW AND POLITICS FOREVER

By Craig Jackson[1]

SUPREME POWER by Jeff Shesol. New York: W.W. Norton Press, 2009. 656pp. Hardcover. $27.95. ISBN: 9780393064742.

American Constitutional Law courses and professors have taught students for some time now that the events regarding the Supreme Court during the mid to late 1930s were of monumental importance, so far as to suggest that the seeds of the modern Court's jurisprudence were laid at this time. Jeff Shesol, who is not a lawyer, adds an historian's gloss to this legend suggesting in addition that the seeds to modern political ideology were laid at this time as well. His book, Supreme Power, is a meticulously described account of the law, politics, and insider maneuverings that surrounded President Franklin Delano Roosevelt's attempt to change the structure of the Supreme Court—to pack it with six additional judges over the traditional (though not constitutionally required) nine to counter Court rejections of key New Deal legislation felt by Roosevelt to be crucial to the nation's recovery.

The book reads as well as a cautionary tale, or as a curiosity of comparisons, unstated, to the atmosphere surrounding present day politics during the era of the Obama presidency. Time Magazine's photo-shopped cover of its post election edition of Obama riding in an open air 30s era sedan, fedora, cigarette holder and Rooseveltian smile all on display perhaps describes how Shesol approached his historical analysis.[2] This does not diminish the quality of the work on display in the 535 page book. Indeed it enhances its importance.

The actual historic story has the ingredients of good literature—perhaps a bit too pat for great literature. By the election of FDR in 1932 the United States was at its knees suffering from the worse depression of its history. The profound effect of the Depression is not lost on those of us raised by parents from that era. A meltdown of crucial sectors of the American economy had been met by President Herbert Hoover who was in his first year of his first term when the stock market crashed in 1929 by limited government action in the form of seeking pledges from business sector leaders to maintain wages, pushing for increased capital liquidity to spur activity especially in the construction, and little in the way of

---

[1] Professor of Law Thurgood Marshall School of Law, Texas Southern University; Visiting Scholar in History, Rice University. B.A. Rice University; J.D. The University of Texas School of Law; graduate studies, the Johns Hopkins Nitze School of Advanced International Studies.

[2] TIME Nov. 24, 2008, at Cover.

government spending.[3] Some economic historians have laid the worsening of the Depression following the Crash at the feet of this policy, as well as at the feet of tight monetary policies, a reduction in consumption, and trade protectionist policies that were intended to keep jobs in the United States.[4] By the end of Hoover's only term as President, the country was suffering through 25% unemployment and little if any of the safety nets that later generation Americans take for granted. Roosevelt, on the other hand, campaigned on a platform of government intervention both in terms of regulation and spending, the latter finding its intellectual foundation in demand side policies that later became identified with the theories of British economist John Maynard Keynes.[5] Regulation meant setting goals for economic reform and developing precise rules for accomplishing those goals. If Roosevelt wins the election, the country would be subjected to a level of government regulation over private enterprise and spending never before seen in country's history.

He won, and the beginning of the modern alignment of right left politics could be seen in the politics of that day. Roosevelt's "New Deal"—a series of legislative initiatives drawn up, for the most part within the White House, was met from the right with cries denouncing the policies as socialism and communism. Muted, though not non-existent were cries that Roosevelt sought dictatorial power. These would develop into a roar later. Much more so than today, regulations, under a system of industry codes established by government and industry partnerships, were enforceable by criminal and civil sanctions. Needless to say, this was met by court challenges, many of which eventually found their way to the Supreme Court.

Meanwhile, the United States Supreme Court, by 1934, the year the cases against federal legislation and similarly focused state legislation began arriving for consideration, was perhaps in its 30th year of a period of sustained economic conservatism based in large part on a familiar theme—limited government. This is not a reckless philosophy, but as employed by the Court since the 1903 notoriously landmark *Lochner v. New York*[6], the economic version, laissez faire, served to scuttle significant federal and state regulatory legislation even before Roosevelt's presidency. The decisions overturning the legislation was based on the notion that liberty included the right to freely contract without government interference, and that commercial regulatory authority of Congress was limited to those affairs that had a direct affect on the flow of goods and services across state lines. As a result, legislation mandating limits on worker hours interfered with the worker's right to contract to work as long

[3] Albert U. Romasco, THE POVERTY OF ABUNDANCE, HOOVER, THE NATION, THE DEPRESSION. (1965).
[4] Jim F. Couch and William Shughart II THE POLITICAL ECONOMY OF THE NEW DEAL 11-18. (1998).
[5] John Philip Jones KEYNES'S VISION: WHY THE GREAT DEPRESSION DID NOT RETURN 168, 179. (2008).
[6] 198 U.S. 45 (1905).

as he or she liked (or as long as the employer required)[7], and that regulation against the sale of goods made by child labor usurped Congress commercial regulatory authority because manufacturing at best indirectly affected interstate commerce.[8] It was this jurisprudential environment that the New Deal faced when the first pieces of legislation were passed by a Democratic Congress.

Shesol follows the lead of many constitutional scholars in both law and history that argue that the conservatives on the Court were continuing the Lochnerian tradition of legislating from the bench, a charge lodged against judicial liberals today.[9] The argument in its simplest form is that judges read into the Constitution what they want to see and refrain from simply calling balls and strikes to borrow from the current Chief Justice's baseball metaphor for judicial decision making. Though there is a lot of room for legitimate judicial decision-making between these two polar opposites, one of Shesol's points is that the 1930s Court was particularly engaged in such methods when dealing with economic matters. For example, the Court overturned a state attempt to raise wages for women and minors on freedom of contract liberty grounds in 1936, presumably assuming that during a depression women and children would lose liberty if they could not sit across a boardroom table and negotiate with captains of industry over their hourly wage.[10] Furthermore, the notion is not in the Constitution nor in any of the accepted sources of interpretation of the liberty found in the Due Process clauses of the Fifth and Fourteenth Amendments.[11] The other area of economic conservative decision making is the position that the authority of Congress to regulate interstate commerce is limited to those matters directly affecting interstate commerce is not so easily dismissible. The language of the Commerce Clause does not really give a hint as to how regulation of commerce "among the several states" is to be accomplished, and the phrase is not amenable to the kind of philosophical handwringing surrounding the term liberty. In other words, the power of commercial regulation can be interpreted credibly as broadly or narrowly as one might wish. Hence the true liberal critique of the narrow interpretation relies on the view that the Framers of the Constitution left enough room in many of its descriptions of government power to allow flexibility to meet the demands of a

---

[7] Id.

[8] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[9] Michael J. Gerhardt , *REVIEW ESSAY: THE ART OF JUDICIAL BIOGRAPHY Learned Hand: The Man and the Judge. By Gerald Gunther; Justice Lewis F. Powell, Jr. By John C. Jeffries, Jr. ;Hugo Black: A Biography. By Roger K. Newman.* 1995. Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987).

[10] *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[11] *Lochner*, Id at 75(Holmes, J. dissenting). Holmes warned against using social and economic theory, based upon the philosophies in vogue among some during the late nineteenth and early twentieth centuries popularized by economist Herbert Spencer's book, Social Statics, described as Darwinian in its approach to social policy. See Herbert Hovenkamp, *The Political Economy of Substantive Due Process* 40 Stan. L. Rev. 379, 418 (1988).

particular period. At a time when the national economy was far more intertwined than the isolated regional and state economies of the past—so much so that a depression of the magnitude facing the country at the time was possible, an interpretation of the Commerce Clause recognizing this reality was not only permissible, it was essential.

Wedded to these older notions, a Court comprised of four hard conservatives (the Four Horsemen tandem of McReynolds, Sutherland, Van Devanter, and Butler) two moderate conservatives (Chief Justice Charles Evans Hughes and Owen Roberts), and three liberals (Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone), invalidated key portions of the New Deal programs such as the National Recovery Act, the Agricultural Adjustment Act, as well as state minimum wage legislation, among others. The year of the worse bloodletting was in 1935, though the onslaught continued through most of 1936. In the midst of all of this there were rumors, discussions, rumors of discussions, and actual proposals to turn the tide by doing something to the Court. Following the landslide of Roosevelt and the Democratic Party in the 1936 election, the rumors grew to the point that Roosevelt finally released a plan to pack the Court with additional justices based upon the number of justices remaining on the Supreme Court bench over the age of seventy.

Shesol's book does not start at this point. To its credit it provides rich detail of the inner workings of the three branches in the years leading up to this showdown. He even goes far enough back into history to give the context of the issues, characters (as many of the players were), and jurisprudence. His is not a law book. In fact it is better than a law book because the canons of legal interpretation employed by legal scholars in law books perhaps presumes a purity of process that is often belied by the historian's investigative reporting. This is not to say that all of the motivation for judicial decision making can be surmised by examining personal papers, conversations, and public speeches. The justices most certainly had articulate judicial philosophies that directed much of their decision-making. But as is often the case today, the results of these articulations comport nicely with the social and economic philosophies of the judges and to believe these to be merely coincidental is to believe in fairy tales. Shesol offers examples of this culled from public statements of the justices as well as private correspondences that were made available to him in the research for his book. So the justices were not without social, political, and economic philosophies—not a startling finding except for those who view Supreme Court jurisprudence with ecclesiastical regard. How does one reconcile the coincidence of Justice Sutherland's oft stated view that thrift and hard work were the central qualities of a good life with his participation in decisions that invalidated government assistance to those he might have viewed as not exhibiting those central qualities?

The answer is that the only reconciliation is in acknowledging the obvious. Personal views matter. Rare is the case that does not call into question or confirm some personally held view on life. While acknowledging the complexities of getting to judicial motivation in his epilogue, Shesol does provide an ample compendium of evidence that the justices who tried to block the New Deal were not simply motivated by the science of judicial decision-making, assuming that there is such a thing.

Indeed, the matter of motivation gets stretched a bit with what has come to be known as the "switch in time that saved nine". But first a bit of background is in order. Following the announcement of the Court Reform Bill—the "Court Packing plan"—two decisions were announced that appeared to signal a change in direction of the Court. The liberals on the Court, Brandeis, Cardozo, and Stone were hardly rubber stamps for the New Deal. At times each of them voted to invalidate a New Deal law.[12] Many of the laws that were presented to the court were poorly conceived and acknowledged even by the drafters, according to Shesol, as being of questionable constitutionality. But they tended to be supportive of government intervention either as a matter of social or political philosophy or because of a judicial philosophy of deference to the legislature.[13] To get a majority of five, two conservatives would have to come over to their side in support of New Deal legislation. The Chief Justice, a moderate conservative, had been a reformer in an earlier tenure on the Court and in political life. Yet even now, he was capable of a surprise or two on economic legislation—occupying the kind of role that Justice Anthony Kennedy is known for today.[14] In addition to Hughes, a majority in favor of New Deal legislation would require an additional vote, and that vote came at the beginning of 1937 from Owen Roberts. A year after he voted against the constitutionality of state minimum wage legislation, in *Tipaldo*, he voted in favor of a federal version of it in *West Coast Hotel v. Parish*.[15] Later that term the Court held that an integrated industrial operation would be susceptible to Congressional regulation under the Commerce Clause

---

[12] Justice Cardozo wrote the lone dissent in *Panama Refining Co. v. Ryan* 293 U.S. 388 (1935), a case involving a presidential power under the National Industrial Recovery Act to criminalize overproduction of petroleum finding it an unconstitutional delegation of law making power from the Congress to the President. Consider also *Schecter Poultry v. United States* , 295 U.S. 495 (1935), in which a unanimous court found that portions of the NIRA regulating local poultry sales was not within the power of Congress or the President.

[13] *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 495 (1935). The five justice majority ruled that regulating retirement was outside of the Congress power under the commerce power. Chief Justice Hughes wrote a dissent in which Cardozo, Brandeis, and Stone joined. Also consider Carter v. Carter Coal Co. 298 U.S. 238 (1936), a 6-3 decision of the Court ruling that congressional regulations of the coal industry were not authorized under the Commerce Clause. Justice Cardozo, writing in dissent on the substantive law with Justices Stone and Brandeis joining, argued that the Congress was authorized to engage in wage and price regulation of the industry.

[14] Well before the Court Packing Plan was developed, the Chief Justice Hughes lined up with the liberals on the Court in holding that a state law allowing for modification of mortgage debt payments through court determined extensions, as well as a redemption period extensions was constitutional. *Home Building and Loan Ass'n v. Blaisdell***,** 290 U.S. 398 (1934).

[15] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

because events in one part of the company would have an effect on the operation's interstate activities.[16]

Why the switch? Shesol provides an interesting clue.

First of all, *West Coast Hotel* was announced after the Court packing plan was announced. The common misconception that holds today is that the Court backed down in face of this threat to its independence. But the common counter argument recalls that the case was already decided months before the Court bill was announced. But then again, the common, and most likely correct counter to this is that the calls for reform, so thick in the air, especially following Roosevelt's remarkable landslide victory over Republican Alf Landon actually did lead to the back down on the part of the Court or at least Roberts and to a lesser extent, Hughes. Shesol lends credence to the latter theory with a tantalizing story of a visit in 1936 to the Hughes family summer home by Justice and Mrs. Owens. Shesol reports that during the visit Hughes and Roberts spent a good deal of time together in private discussions and walks through the grounds virtually abandoning the wives in what appeared to be discussions about law and the Court. This account is not mentioned again in the book, which is itself remarkable since the obvious implication is that Hughes and Roberts were in deep contemplation over the future of the Court in light of attacks against the institution. It probably is not a huge stretch to assume that the switch was being deliberated during the visit. But because nothing else is available on those conversations, the account serves as a curiosity to the reader.

Yet, ample foundation is laid about the developing atmosphere of the time. Debates among Democrats focused on whether to rein the Court in via legislation or constitutional amendment. Roosevelt made opaque allusions to such a sentiment, though he stayed away from the issue throughout most of the campaign. Nonetheless, Shesol paints a picture of a political environment in which it was all but certain that some measures would be attempted to punish the Court for its handling of New Deal legislation. So much so that it would hardly matter whether *West Coast Hotel* was decided before or after Roosevelt's formal announcement on February 7, 1937.

The rest of the book focuses on what would have been Roosevelt's political downfall had it not been for his personal political skills, resignations on the Court and the appointment of replacements that were philosophically more in tune with Roosevelt's own goals, European events, and his decision to run for an unprecedented third term. Shesol's narrative does not explain the reason for the extraordinary level the general disaffection among political elites, and eventually across the country for the Court packing plan. How does the environment go from one so thick

[16] *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

that a credible argument could be made of apprehension among some members of the Court, to one with significant hostility against the President's efforts to curtail the Court, including hostility from the Democratic Party? Indeed it is not clear whether the majority of Americans opposed the plan or whether the opposition was limited to those political elites who were becoming the President's worst political enemies.[17]

The opprobrium faced by the President that came from within his own party, began before the Court bill by insurgent Democrats calling themselves the American Liberty League, whose opposition really began with Roosevelt's economic program in the first term, which appears much like the Tea Parties of today in the virulence of their rhetoric and total disdain for the policies of the President. After a period in which the League was discredited, the mantle of intraparty opposition to Roosevelt was taken over by members of Congress lead by Democrats who viewed the Court bill as a power grab. The rhetoric during this period is described as hyperbolic, frequently drawing comparisons to the European despotism of the time.

The fact that these sentiments were expressed by mainstream players would not be easily understood by readers today if Shesol was less adept at conveying the sense of desperation felt during the Depression. Though not discussed in the book, but necessary for context was the role the world economy played in the descent into dictatorship that engulfed Germany and Italy in the 1930s. That omission is surprising, though not fatal to the domestic context that is described in the book. All sides of the economic and court debate feared the next shoe fall. Roosevelt feared the reaction of the economically depressed if the Court was allowed to continue stonewalling the New Deal. Conservatives saw in the New Deal economic heavy handedness. Conservative Democrats, even those that supported the New Deal, and there were few who did not, feared that the economic desperation was a pretext for a power grab by Roosevelt and approached their opposition to the Court packing plan as a matter of principle. Nothing is offered by Shesol to suggest that Roosevelt's efforts were anything other than principled themselves and there has otherwise been no credible evidence that the President harbored dark thoughts about power. What is remarkable about this period is that these fears existed at all, away from the fringe. Yet when one considers that these fears occurred at a time when countries of greater diplomatic standing than the United States, which was not the premier superpower that it is today, were facing hegemonic threats from within or without, perhaps such fears can be understood.

[17] Shesol mentions contacts from the public to Congressional and White House offices, with those contacts to Congress being overwhelmingly against the plan, while White House correspondence was light. However these results are not offered as a scientific poll of the American people. At 305.

Even the dramatic has its meticulous details, and retelling of the efforts to pick apart the plan is certainly meticulous. As a record of the Congressional fight, Shesol provides the appropriate detail. But the story does bog down at this point—and this in a book that does not really address the actual Court packing plan until the latter quarter—a testament to Shesol's skill in keeping readers involved in his narrative. Yet the killing of the bill was a slower paced, drawn out and detailed story of vote counts, meetings, strategy sessions and repetitive accounts of positions staked by various members of Congress, the press, and White House aides—which is no doubt how matters progressed in the months that it took from the proposal to the death of the bill. It might not make for the most scintillating reading when compared to the rest of the book, but this is the part of history that often gets summarily dismissed in accounts of the "failed Court packing plan". How it failed and the maneuverings tell a lot about the players and Roosevelt's stubbornness and his vulnerability despite his modern legend of invulnerability.

Roosevelt's legend comes from the fact that he presided over two of the four most frightening periods in American history. If the Revolution and Civil War were the first two, certainly the Great Depression and World War II are good as the second two. The country survived the Depression, and won the war (arguments are made that it was not economic policy but world war that got the country out of Depression)[18]. What is missing from the legend are the political events and the loss of political capital after what was at that time the country's greatest electoral landslide victory and the fears entertained about the President's motive. The story is of course subject to many interpretations depending upon one's political views. One interpretation is that the President inherited an irresponsibly managed economy which required extraordinary measures to fix while naysayers with no alternative plans layered opprobrium and invective against the President and his policies. On top of that, opposition forces did all that was possible to undermine the attempt for an economic fix forcing the President to personally get involved in the fight by delivering a fully constitutional yet risky plan of action to get the program through. Another interpretation is that a president with a social and economic agenda to change America for all time seized on the economic circumstances of his election to catapult the country in a dangerous direction that it did not want or need to go.

Sound familiar?

[18] Michael A. Bernstein, The Great Depression as a Historical Problem, in THE ECONOMICS OF THE GREAT DEPRESSION 83-84(MARK WHEELER, ED., 1998)