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ACTIVISM V. RESTRAINT

By Jeffrey Toobin

Franklin D. Roosevelt, in his first term, went to war with the Supreme Court. Time and again, the Court's conservative majority declared that measures that the President regarded as vital in order to address the extraordinary perils of the Great Depression were unconstitutional. Emboldened by a landslide reëlection in 1936, he struck back at the "nine old men" by proposing a change in the structure of the Court: henceforth, the President would name an additional Justice for each one over the age of seventy. The justification was that the new appointees would assist their elderly colleagues with their work, but, as everyone knew, the real motive was to put enough F.D.R. appointees on the Court to allow the New Deal to proceed.

History's judgment of the court-packing plot has generally been harsh, but Jeff Shesol's new book on the subject, "Supreme Power," while acknowledging the conventional view that ego and emotion drove Roosevelt to act, notes that the plan "was also the product of reason." As late as 1937, the Depression still presented a risk of social and industrial collapse, "the very conditions that in other nations had hastened the slide into tyranny," Shesol writes. Court-mandated inaction, Roosevelt believed, was therefore not an option. He considered a proposal to amend the Constitution and add explicit authority for government intervention in the economy, but he chose the more moderate plan

of altering the makeup of the Court because he "was consistent in his belief that the real problem was not one of law per se, but of law being twisted by ideologically driven, outcome-oriented judges."

The forty-fourth President is now feeling the pain of the thirty-second. Barack Obama, like Franklin Roosevelt, took office at a time of economic crisis, pushed through a progressive legislative response, and now awaits a verdict on that response from a Supreme Court that is dominated by his political adversaries. Last week, he nominated Elena Kagan, the Solicitor General, a woman of impressive qualifications, if somewhat opaque views, as his second appointee to the Court. But Kagan would replace John Paul Stevens, a like-minded member of the liberal minority of four, so her arrival would extend, not change, the status quo.

Chief Justice John G. Roberts, Jr., and his conservative fellow-Justices, like their ideological kinsmen in the nineteen-thirties, are engaging in what's known as judicial activism. A few weeks ago, on Air Force One, Obama, a former law professor, gave a useful definition of the term, saying that "an activist judge was somebody who ignored the will of Congress, ignored democratic processes, and tried to impose judicial solutions on problems instead of letting the process work itself through politically." This is, indeed, what the Roberts Court is doing. Local elected officials in Seattle and Louisville created complex and nuanced strategies to achieve racial diversity in their schools; in 2007, in a decision written by

Roberts, the Court overturned the plans. The elected city council of the District of Columbia passed a strict gun-control law; in 2008, in a decision by Antonin Scalia, the Court vetoed it. Most notoriously, Congress passed the McCain-Feingold campaign-finance bill, which President Bush signed into law; earlier this year, in a decision by Anthony M. Kennedy, the Court eviscerated that legislation and decreed that corporations have the right to spend unlimited funds to elect the candidates of their choice. In that case, known as Citizens United, the majority also reversed two recent Court decisions. Roberts and his allies, like the conservatives of seventy years ago, profess to believe in judicial restraint (the opposite of activism) and respect for precedent, but their actions belie their supposed values.

The Obama Administration's initiatives face a number of Court tests. Next year, for example, the Court may take up the case of whether the Federal Communications Commission has the authority to mandate net neutrality. (A lower court has said no.) The securities industry's trade group has hired a leading Supreme Court litigator to find ways to test parts of the financial-reform legislation, even before it has passed into law. The biggest case pending is that of the health-care-reform law. Attacking the constitutionality of the law has already become a conservative crusade; thirteen Republican state attorneys general are planning a lawsuit that claims that the legislation falls outside the constitutional power of the federal government to regulate interstate commerce. Not coincidentally, this was the theory employed by the Court in the thirties to undermine the New Deal.

Under current doctrine, the challenges to health-care reform seem dubious in the extreme, because the federal government, through programs like Medicare and Medicaid, has been intimately involved with health care for decades. But, given how many areas of the law are changing under the Roberts Court, the

legislation may be vulnerable. It certainly will be if Clarence Thomas has his way. For nearly two decades, he has been waging constitutional war on the welfare state. Back in 1995, he wrote, "The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government." Thomas's approach is a legal recipe for a wholesale elimination of much of the United States government. The health-care litigation will show how many of his colleagues want to do just that.

Now it's the liberals who are touting judicial restraint, but of course there are also plenty of Court precedents that they would be happy, as Stevens wrote in another context, to see tossed "out the window of a fast-moving caboose." The civil-rights revolution of the Warren and Burger Courts, in the nineteen-sixties and seventies, was built on overruling the expressed will of the people, as when the Court rejected laws that prohibited racial intermarriage, or laws that banned abortion. Today, liberals applaud when the Supreme Court strikes down federal legislation restricting the rights of detainees at Guantánamo, or a state's limitations on gay rights, and if the day comes when the Court jettisons Citizens United liberals will be too busy celebrating to remember the primacy of stare decisis. As is so often the case, in courtrooms and elsewhere, the battle between Obama and the Roberts Court is as much about power as it is about principle; neither side is as concerned with abstract concepts like activism and restraint as it is with winning.

Roosevelt lost the court-packing battle, but he won the legal war over the New Deal. By the end of his long tenure in the White House, he had made eight Supreme Court appointments, and that is what guaranteed that the federal government was able to address the economic crisis. For Obama, then, the lesson of F.D.R. is simple. Kagan, plus Sonia Sotomayor, makes two appointments. The

President, to secure his legacy, may need a few more.

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