

their lips—and not all of them came back.

If Hitchens has lately seemed to waste his great gifts on projects like getting his “back, sack and crack” waxed for the entertainment of *Vanity Fair*, that has been our loss as well as his. In 1995 he wrote, “I had the privilege of meeting Justice Richard Goldstone, the man who has done more than perhaps any other to save the remnants of South Africa’s legal system from degradation.” Operation Cast Lead, Israel’s three-week assault on Gaza in 2008–09, provoked from Hitchens only a single, feeble “plague on both your houses” column in *Slate*. In 2010, when Goldstone was vilified for his damning report on Israel’s conduct in Gaza, Hitchens had nothing to say.

To measure his loss, and ours, look at *Prepared for the Worst*, a collection of his early

work published in 1988, or his superb, and sadly still pertinent, book on Cyprus from 1984. Or read his *Nation* column from May 2001 on Bob Kerrey’s lasting culpability for a massacre in Vietnam. Hitchens was teaching at the New School at the time, making Kerrey, he wrote, “my president”; yet the piece, incandescent with moral outrage, is never callous or crude. “If you look back on the essays that made his name,” Hitchens writes about Noam Chomsky, “you will find a polemical talent well worth mourning, and a feeling for justice that ought not to have gone rancid and resentful.” I wish Hitchens a speedy recovery, a long life and as much celebrity as he wants. But it’s the Christopher with a feeling for justice I mourn. I miss him very much. ■

Devanter retired and was succeeded by the Southern liberal Hugo Black, Roosevelt’s first appointment. A 5-4 conservative bench suddenly became a 6-3 Roosevelt bench. Ends trumped means, and the New Deal was safe.

The reasons for the bill’s failure prompt a cynical appraisal of whether law is anything more than politics by another name. Roberts swore that he hadn’t caved in to political pressure, but nobody believed him. His dramatic reversal—known as “the switch in time that saved nine”—occurred in *West Coast Hotel Co. v. Parrish*, a case involving a constitutional challenge to Washington State’s minimum wage law. Roberts had supplied the fifth vote to strike down a nearly identical New York law less than a year earlier on the rationale that it interfered with employees’ and (mostly) business owners’ liberty of contract—a favorite doctrine of the Court’s conservatives. But he did an about-face and voted to reject the constitutional challenge in *Parrish*, elating the administration and confounding his brethren. The public did not know at the time that the Court actually held its initial conference and vote on *Parrish* two months before Roosevelt announced his Court-packing bill, so perhaps Roberts’s decision was not political. Then again, Roosevelt and his allies had been stridently criticizing the Court for months, and various other reform packages had already been introduced in Congress; many historians believe that this steady drumbeat influenced Roberts. He voted with the liberals in the two big remaining cases of the 1936–37 term, rejecting challenges to the National Labor Relations Act and the Social Security Act.

The Court-packing plan and “constitutional crisis” of 1937 are not well-known outside political history circles and first-year law classes. But Jeff Shesol, in his superb book *Supreme Power*, reminds us of the episode’s historical and contemporary resonance. The showdown was “one of the most ferocious, unpredictable, and consequential fights of the Roosevelt presidency,” he writes. In addition to its legal significance, the Court battle diminished Roosevelt’s prestige: he was proven to be fallible, and his support within the Democratic Party slipped. The episode also serves as a warning that future presidents who mess with the Court will get burned. In its analysis of the lead-up to and fallout from Roosevelt’s scheme, *Supreme Power* is remarkably assured and eminently readable; Shesol, a former speechwriter for Bill Clinton, has synthesized decades of scholarship to produce a fluid, entertaining yet tremendously perceptive book. Although Shesol focuses more on politics and public relations than legal



The “Nine Old Men” of the Supreme Court, 1932

A Wedge Against Tyranny

by MICHAEL O’DONNELL

The uproar over Franklin Roosevelt’s Court-packing scheme of 1937 highlighted two perennial tensions in our public life: ends versus means and law versus politics. Roosevelt sought to curb an activist Supreme Court that had brazenly overturned nearly every progressive law that came its way. The National Industrial Recovery Act, the Agriculture Adjustment Act, pension laws, workplace regulations—all were designed to ease the suffering and unemployment of the Great Depression, and in 1935 and 1936 all were invalidated by the Court. By February 1937 Roosevelt had seen enough and introduced the Judiciary Reorganization Bill, which permitted the

Supreme Power

Franklin Roosevelt vs. the Supreme Court.

By Jeff Shesol.

Norton. 644 pp. \$27.95.

president to appoint one new justice for every justice who remained on the Court after age 70. If enacted by Congress, the bill would have enabled Roosevelt to add six justices, obviously all liberals, thereby enlarging the Court from nine to fifteen members and reshaping it from a dangerous foe to a formidable ally. Roosevelt’s domestic agenda would have been spared, but only after a major blow to judicial independence, a cornerstone of the separation of powers in American government. But Congress rejected the bill, which had lost all momentum after swing Justice Owen Roberts began voting with the Court’s liberals and conservative Justice Willis Van

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analysis, his accounts of the principal cases are clear and accurate. *Supreme Power* should bring the Court-packing plan to a broader audience than ever before.

Shesol explains that the Court's rulings against Roosevelt created a persistent legal uncertainty that not only inhibited the delivery of government aid but also revived the intense disrespect for federal law that had prevailed during Prohibition. Acts of Congress were presumed unconstitutional and flouted openly until proven otherwise in Court. Even in 1933,

The cry was not "justice" but "relief." What was at stake was not simply the eventual return of prosperity. It was the survival of democracy. Could representative government, with its checks and balances, with its suspension and fragmentation of power, respond quickly and effectively to mass hunger, unemployment, desperation, and rage? And if not, could such a system endure much longer?

These are not idle superlatives. When the Court struck down its first New Deal law in January 1935—a provision limiting the sale of illegal crude oil in order to raise prices—Chief Justice Charles Evans Hughes conspicuously waited to announce the decision until the financial markets had closed for the day. While the administration waited nervously to learn whether the Court would uphold Roosevelt's decision to void all clauses in private and public contracts that guaranteed payment in gold, "Officials from the Treasury and the Securities and Exchange Commission were stationed in the Supreme Court marshal's office, with a line open to the SEC's chairman, Joseph P. Kennedy, who was empowered to shut down the stock market if things came to that." (The Court ultimately ruled in favor of the administration.) Shesol recounts scenes in which Roosevelt, Attorney General Homer Cummings and West Wing staff sat in the White House reading aloud Supreme Court opinions fresh from the bench and analyzing them line by line. The Court had severely disrupted public business. Roosevelt determined to act.

Despite the abrupt manner in which he announced the Judiciary Reorganization Bill, Roosevelt had spent two years casting about for ways to rein in the Court. His staff considered all options, including outright defiance. Shesol excerpts a spooky memo, "for use if needed," in which Roosevelt would have told the nation he was disregarding a hypothetical Su-

preme Court decision because it would "so endanger the people of this Nation that I am compelled to look beyond the letter of the law" to sources such as "the Golden Rule," the "precepts of the Scriptures and the dictates of common sense." Various bills and constitutional amendments were also considered: to allow Congress to override Supreme Court decisions, to require a supermajority vote to invalidate an act of Congress, to create a mandatory retirement age for justices. All were rejected as unworkable and slow, but the last proposal gave Cummings the idea that germinated into the Court-packing bill. Deliciously, a similar suggestion had been made decades earlier by archconservative Justice James McReynolds—one of the Four Horsemen, as Roosevelt called the Court's conservative bloc—when he was attorney general.

Changing the size of the Supreme Court does not require a constitutional amendment; an act of Congress will do. The Constitution states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"; it says nothing about the number of justices. Congress sets that number and has changed it throughout the years—sometimes for nakedly political reasons—from as few as five members to as many as ten. For example, the number was expanded from nine justices to ten in 1863 to protect Abraham Lincoln's war policies from the Court, and returned to nine in 1866 to prevent Andrew Johnson from appointing a justice. Such efforts have always been regarded as an affront to the judiciary, but their constitutionality has not been seriously questioned. (In any event, it is doubtful anyone would have standing to bring a challenge except a justice, who would have to take the extraordinary and probably futile step of suing to protest the dilution of his or her vote.)

Roosevelt decided to spring the Court-packing plan shortly after his re-election in 1936, which was an unprecedented landslide. And therein lay his first problem. After he made his stunning announcement in early 1937, voters howled about a double cross: if he had intended all along to take such a radical step, he should have campaigned on it. He also foolishly decided not to involve Congress, briefing House and Senate leaders a mere hour before going public, and thereby alienating many allies. Most disastrous, though, was his patently disingenuous rationale for expanding the Court's size: the issue, he said, was not a hostile Court but one composed "of aged or infirm justices." According to Roosevelt, new members were needed

because old justices were falling behind in their work, clogging the dockets and taking on too few cases. In private, his best advisers, including his future Court appointees Felix Frankfurter and Robert Jackson, deplored this cheap pitch and urged Roosevelt to confront the Court head-on, without guile. In Jackson's words, "nobody ever yet went into a fight over a set of statistics.... Instead of talking about the cases the court would not take, let us talk about the cases they did take." Roosevelt eventually followed this advice, but only after Congress and the public closed ranks against his plan.

Amusingly, Shesol takes a certain professional umbrage at this shoddy salesmanship. Regardless of the bill's merits (of which he is skeptical), he thinks Roosevelt and Cummings lost because they "fell victim to their own cleverness." The conflict "brought out some of [Roosevelt's] most destructive tendencies. His love of the covert; his preference for the sly over the straightforward; his occasional vindictiveness; his eagerness to astonish—all these came together in the Court-packing plan." In a press conference about the new bill, Roosevelt winked and chuckled with reporters; all present knew that this age business was nonsense. The pretense deeply offended the justices—they all opposed the plan—and it gave Roosevelt's opponents grounds to question his motives in all areas of policymaking. In what seems like a prelude of the recent battle over healthcare, Tea Party types compared him to Hitler and Stalin and denounced the bill as the end of liberty. But the Republican leadership wrangled its members and shrewdly kept mum, allowing the Democrats to kill the plan themselves, and to splinter irrevocably in the process.

The internecine battle within the Democratic Party that followed was bitter and ugly. William Leuchtenburg contends in *The Supreme Court Reborn* that "FDR's message generated an intensity of response unmatched by any legislative controversy of this century," except possibly the fight over joining the League of Nations. Southern Democrats feared that an expanded liberal Court would give rights to blacks; progressives saw an assault on the branch responsible for protecting civil liberties; moderates who had always mistrusted Roosevelt now had proof of his treachery. Liberal institutions wrung their hands over what to do; *The Nation* tore itself apart over the issue. Executive editor Freda Kirchwey strongly backed the Court-packing bill, publishing an editorial titled "Purging the Supreme Court," which called the plan "a brilliant tour de

force” and praised the president for “giving the Supreme Court judges a dose of their own medicine.” Oswald Garrison Villard, the magazine’s legendary former publisher, disagreed vigorously with this editorial position, as did publisher Maurice Wertheim, who ended up selling the magazine several months later, citing the Court-packing split as an irreconcilable difference.

Before the high drama of Roberts’s switch in time, two remarkable events prefigured the demise of Roosevelt’s bill. First, during Senate hearings, Senator Burton Wheeler, the progressive leader of the anti-Court-packing movement, revealed with a flourish a formal letter from Chief Justice Hughes proving that the Court was not behind in its work and that justices’ productivity did not decrease with age. It was the first and only public statement by a justice that expressly discussed the Court-packing plan. Hughes, a former governor of New York, played his hand masterfully, writing on behalf of himself, Justice Louis Brandeis and Justice Van Devanter in a formal, aloof and utterly devastating manner. Instead of enlisting the entire Court—several of whose members might not have signed on—Hughes cleverly created the appearance of unanimity by including Brandeis, the Court’s legendary liberal whom Roosevelt fondly called Old Isaiah. Hughes, Roosevelt conceded, was “the best politician in the country.”

The second setback came during the frantic final push to herd the caucus and pass the bill. Senate majority leader Joe Robinson, who led the fight for reform and had been promised a seat on the Court, died suddenly of exhaustion and heart failure. (He was 64, a decade younger than Chief Justice Hughes, one of the Court elders FDR insinuated was infirm.) In scenes that make current Washington squabbles seem tame by comparison, Shesol recounts how members of Congress worked one another over on the train to Robinson’s funeral in Little Rock, Arkansas. Wheeler went so far as to blame Robinson’s death on Roosevelt, prompting outrage from the New Deal camp. A week later, on July 22, 1937, the Senate voted 70-20 to return the bill to the Judiciary Committee, in effect killing it. But by that time Roberts was voting with the Court’s liberals and the conservative Van Devanter was soon to be replaced with Black. The bill was no longer needed.

Reading *Supreme Power* amid the death-panel and treason talk of 2010, one wonders how President Obama would react if the Supreme Court were to strike down his signature healthcare reform. Would he try

to pack the Court? If so, would the current Court react like the Hughes Court? On the one hand, Obama would have just as cagey an opponent in Chief Justice John Roberts as Roosevelt faced in Hughes. And Justice Anthony Kennedy—the Court’s current swing voter—would almost certainly shelve his grandeur and roll over like Owen Roberts probably did in 1937. But on the other hand, it’s hard to imagine Obama pulling such a stunt: he is a former law professor and a student of the Court, and would doubtless recoil from such tactics, as serious legal thinkers did in Roosevelt’s time. He has nominated two young, moderate liberals to the Court in as many years, demonstrating his apparent plan to outflank the conservatives in the traditional way—by attrition. In contrast to this patient legalism, Roosevelt “had a tendency to think in terms of right and wrong, instead of terms of legal and illegal,” observed Robert Jackson. “Because he thought that his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them.”

The better question is whether George W. Bush considered packing or otherwise curbing the Court in response to a string of devastating decisions about detainee policy from

2004 to 2008. No evidence has emerged that he did. But even if only hypothetically, the “war on terror” is a useful parallel to the 1937 crisis, for both presented situations of true exigency—an economic depression and a war—and involved the Supreme Court’s frustration of the president through a stunning assertion of judicial power. Some might reject the comparison on the grounds that the Great Depression was a true calamity, while the “war on terror” is a fraudulent construct. But the question is one of structure, not substance: does an administration’s power expand and contract like an accordion in times of emergency? Can the executive branch arrogate “supreme power,” to quote Shesol, at the expense of another coequal branch of government? The answer must be no. Such shenanigans dangerously concentrate power in one branch and undermine the authority of the Supreme Court, leaving it weak at those moments when we sorely need it—like during a Bush presidency. Targeting the Court for political reasons is also usually self-defeating. Two of the Four Horsemen, Justices Van Devanter and George Sutherland, had planned to retire in 1932, and their departure might have spared the country the entire Court-packing fiasco. But they

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changed their minds and decided to stay on the bench because Congress halved the amount of judges' pensions.

Shesol is right to conclude that the struggle of 1937 reveals the Supreme Court to be neither a group of divine oracles nor a pack of political hacks, but a little of both. Of course the justices are influenced by politics, and for that reason they can never be completely above it; when the Court stops a president in his tracks, it should expect some heat. But

to concur with a cynical view of the Court on the order of Roosevelt's plan—to browbeat the justices like a group of freshmen Congress members until they get in line—is to assume that it is *only* political. The ideal of an independent judiciary does not mean zero political interference—that would be impossible. Instead, it strives for as little interference as can be achieved. Such standards may not always be expedient, but they turn out to be an excellent wedge against tyranny. ■

The High Wire

by PETER C. BAKER

In the closing pages of Deborah Eisenberg's *Collected Stories*, a woman describes her afternoon in a museum:

Looking at a painting takes a certain composure, a certain resolve, but when you really do look at one it can be like a door swinging open, a sensation, however brief, of vaulting freedom. It's as if, for a moment, you were a different person, with different eyes and different capacities and a different history—a sensation, really, that's a lot like hope.

Much the same could be said of the collection's twenty-seven stories, which are long and knotty, and yield their transfiguring riches only to the diligent. It has become commonplace for critics tackling this richness to describe it by reference to novels: the stories are "novelistic in all but...length," "as full of life and of lives lived as a novel" and "as unafraid of digression as most novels." Eisenberg herself has called her creations "vertical novels."

The reflex is understandable. Consider her 1997 story "All Around Atlantis": the narrator, a fiftysomething named Anna, has just attended the funeral of someone named Lili, where she saw but did not speak to a man named Peter, first identified only as the author of a book about someone named Sándor. And away we go, pirouetting forty years into a past where Anna, Lili and Sándor shared a small apartment, with Peter as an ever-present guest. No sooner is the scene set than Eisenberg shoots decades forward, into Anna's marriage and its failure, to a visit to her son in Los Angeles, then back to Lili's funeral. At the same time, back in that small apartment, young Anna is trying to conjure up images of the Holocaust in Hungary. She, Lili and Sán-

The Collected Stories of Deborah Eisenberg

By Deborah Eisenberg.
Picador. 980 pp. Paper \$22.

dor escaped it—she's figured that much out—and she and Peter are too young to have witnessed it. But what exactly was it? The same Holocaust she's learning about in school?

The details of these characters' intertwined relationships become clear only by implication—even the fact that Lili is Anna's mother is not obvious for several pages. Rather than pausing to spell out the basics, Eisenberg lets them emerge as nodes on a crisscrossed, decades-blurring network of Anna's memories and imaginings. The invocation of "novelism" to describe this approach, though obviously meant to compliment Eisenberg's scope and economy, is misleading. Novels support their length with a certain sort of architecture—with footholds, landings and rest stops that allow the reading experience to be spread out across a few sittings. In this sense they are the opposite of poems, which rarely tolerate even a bathroom break. On this spectrum, Eisenberg's stories sit closer to poems. Reading "All Around Atlantis" requires holding several strands of silk in the mind's eye simultaneously, each being spun at a different speed and to a different thickness, some tangled together. Put the story aside to answer the phone and Anna's not-yet-complete web of associations—her experience—collapses beyond repair. Novelistic? Not at all. It's a short story on a high wire: it displays and demands an intense faith in the form's decidedly non-novelistic potential.

Eisenberg started publishing in the mid-1980s, when she was 38 and working as a waitress in New York. Her earliest stories, collected in *Transactions in a Foreign Currency* (1986), feature female narrators who define

themselves through unhappy attachments: to men they follow around the country (to Canada, even) at a moment's notice; to reliably mercurial, effortlessly hip roommates they both worship and despise; to Manhattan social life. These women are keen observers of the world and its foibles but keener chroniclers of their own flaws. They know exactly what sort of trouble they're bound up in, and they generally watch themselves stay bound up in it. They find the way that people talk to be foolish—which only encourages them to agonize over their own every utterance. "Everything looks so good," one of them says at a bakery counter, then thinks to herself, "Surely that was an appropriate thing to say—surely people said that."

Though markedly less complex than "All Around Atlantis," the best of these early stories are equally driven by an interest in our tendencies to descend into ourselves—our private histories, imagined counterlives and possible futures—with the greatest of ease, and at the slightest provocation. Here is the beginning of "Flotsam," Eisenberg's first published story:

The other evening, I was having a drink with a friend when the sight of two women at the next table caused me to stop speaking in midsentence. Both of the women were very young, and fashionable to an almost painful degree. They were drinking beer straight from the bottle, and they radiated a self-conscious, helpless daring, as if they had been made to enter some baffling contest and all eyes were upon them.

"Earth to Charlotte," my friend said. "Everything all right?"

"Fine," I said, and it was, but for a moment that seemed endless I had been pulled down into a forgotten period of my life when I, too, had strained to adhere to the slippery requirements of distant authorities.

I had just come to New York then....

Eisenberg doesn't return to "the other evening" of the first sentence. But from the start there are, in effect, two protagonists. There's young Charlotte, freshly transplanted to the East Village from upstate. And there's older Charlotte, pulled spontaneously into her past. Older Charlotte never sullies young Charlotte's perspective with wisdom-imbued interjections. But we feel her watching young Charlotte with us, and her compulsion to finger the contours of days past.

This sort of architecture helped to distinguish Eisenberg's stories early from the