

**Grading notes**  
**09/17 essay assignment**

What factors helped set up the 1936 election as a "triggering election," a sort of interim referendum, on the constitutionality of the New Deal? Discuss not just the issues at stake, but also the actions of politicians, officials, and supporters during period leading up to the election.

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Possible points to cover:

- Supreme Court's unanimous Schechter decision, striking down NIRA. A. notes that in other cases the liberals made some sympathetic noises, but credits them with drawing a sharp constitutional line so that the next election could serve as a referendum on changes.
  - Improper delegation of legislative power to the executive and the local boards
  - Violated commerce clause and 10th Amendment: Schechter's chicken sales were local not interstate commerce, with no "direct effects"
  - Note also the court took the case on expedited schedule (at Exec request).
- Thus the Court "challenged the President to run against the Court in the next election and seek to gain a mandate from the People in support of his corporatist initiative" (295)
- Admin response in constitutional terms. Discussion of FDR's "remarkable press conference," pp. 297-99, and the resulting headlines invoking explicit terms of constitutional confrontation (299-300 & fn 65)
- **Refinement & moderation of the proposal:** Admin adjusts, veering away in the Second Hundred Days from corporatist socialism of NIRA, and toward more restrained and specialized regulatory programs: Wagner Act, Social Security, etc. As evidenced by his re-nomination speech, "Roosevelt's watchword was now the rebirth of freedom, not the imperative of central planning" (310).
- The Court responded to these types of policies with varying outcomes, but still made clear the constitutional stakes, including, most significantly, Brandeis's opinion for a unanimous Court in *Radford*, striking down federal interference in foreclosures, "a very useful contribution" (305).
- Not only old-line and Hoover Republicans, but even moderate Republican nominee Alf Landon, oppose even the latter New Deal programs as unconstitutional excesses.

Essays were often unclear on Alf Landon's role. Very conservative? Moderate but unclear on how that entered into the result—need to say more about HOW he's moderate and how that can be compatible with the election being a clear choice.

The 1936 election is triggering not just because it was a landslide—that's important to the outcome, but isn't important in itself for higher lawmaking trigger purposes.

Many essays offered too broad a historical summary, not focused on this question.

Many essays summarized the Lochner era at length, which was not very helpful in addressing this question about 1936.