



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Economic Liberty and the Constitution, Part 11

by Jacob G. Hornberger

One of the important cases in the history of the U.S. Supreme Court involved Joseph, Alex, Martin, and Aaron Schechter, owners of two poultry firms in Brooklyn during the Great Depression — the A.L.A. Schechter Company and the Schechter Live Poultry Market, Inc. The Schechter brothers had been convicted of violating industrial codes that had been implemented pursuant to the National Industrial Recovery Act (NIRA) of June 1933. Their conviction having been upheld by the federal Court of Appeals, the Schechters appealed to the U.S. Supreme Court.

It is impossible to overstate the magnitude of the transformation in American society produced by the NIRA. The act perfectly embodied the hopes and dreams of American collectivists, who had long yearned for the abandonment of the principles of private property and free enterprise on which our nation had been founded in favor of the principles of socialism and economic interventionism that were sweeping the world.

The foundations of economic liberty

Keep in mind that our nation was founded on the most unusual economic principles in history — the principles that people should be free to engage in economic activity without government permission, engage in mutually beneficial exchanges with anyone in the world without government interference, and accumulate unlimited amounts of wealth (given that the original Constitution did not empower the federal government to levy taxes on income).

The result of this unusual society was a level of wealth and a standard of living that would have been unimaginable to people just a short time before.

Of course, the official line in American public (i.e., government) schools is that life in 19th-century America was horrific and that parents abused their children on a massive scale by sending them into sweatshops to work for unreasonably long hours.

There is one big problem associated with the analysis of public schoolteachers, however: It is fallacious because it compares the standard of living in the 19th century with that of today,

while the proper analysis is to compare the standard of living in the 19th century with standards of living that preceded it.

As it was pointed out in *Capitalism and the Historians* (edited by Nobel Prize-winning economist Friedrich Hayek), as bad as life was during the Industrial Revolution, it was much more horrific prior to that era. What America's system of free enterprise accomplished was to give multitudes of ordinary people the chance to survive and even prosper.

What so many socialists fail to recognize is that wealth in a society is not a given, not even in the United States. If it was, our 19th-century American predecessors would have had the same high standard of living we have today. Moreover, a high standard of living is not a magic act — there is a clear cause-and-effect chain of events that produces more wealth and higher standards of living.

The more productive people are in a society, the higher the standard of living in that society. Conversely, the less productive they are, the lower their standard of living.

What makes people more productive? Capital. A worker on a farm that has a tractor will produce more than a worker on a farm with a hoe. How does capital come into existence? Through savings. How do savings come into existence? By people's spending less than what they receive in income.

Thus, the more people earn, the more they are able to save. The more they save, the more capital in society. The more capital, the more productive people are. The more productive, the higher the standard of living.

That's why America's unusual economic system produced a relatively high standard of living in the 19th century — relative to standards of living in previous centuries. For the first time in history, people were able to engage in enterprise freely (i.e., without government interference), to enter into exchanges with one another freely, and to accumulate unlimited amounts of wealth. That's why immigrants from all over the world continued to flood American shores throughout the 19th century.

And the reason they had their children working in factories for long periods of time was that the capital base had still not accumulated sufficiently to free them from that necessity. Children worked because it was still the only way to survive for most families. And survival was preferable to death.

FDR's New Deal and NIRA

It is impossible to overstate the magnitude of the Roosevelt economic revolution in America in the 1930s. In order to "save" America's system of free enterprise, Roosevelt abandoned the principles of free enterprise on which our nation had been founded in favor of the socialist, collectivist system that was guiding the destiny of all other countries on earth, including Nazi Germany and fascist Italy.

In fact, the scheme of government-business partnerships and economic regulation set up by FDR's NIRA could easily have served as a model for how Adolf Hitler and Benito Mussolini were addressing the Great Depression in their countries.

Indeed, as I pointed out in Part 8 of this series ([Freedom Daily](#), January 2003), that's why such Western leaders as Winston Churchill admired Hitler during the early 1930s, and, for that matter, why Hitler admired Roosevelt. Mussolini put it well when he said that he admired FDR because he, like Mussolini, was a "social fascist."

In his article, "The Sick Chicken Case," which appeared in *Quarrels That Have Shaped Our Constitution* (1962), edited by John A. Garraty, Frank Freidel, a Roosevelt apologist who wrote a major biography of Roosevelt, pointed out,

Some businessmen, remembering the War Industries Board, urged [President Hoover] to put the force of federal law behind business efforts to stop price-cutting and overproduction. Hoover rejected the proposals indignantly. Earlier as Secretary of Commerce he had opposed giving them power to stabilize prices and control distribution. This power, he believed, would lead to the decay of American industry, the creation of monopolies, the destruction of human liberty, and ultimately, the imposition of Fascism or Socialism.

When Franklin D. Roosevelt became President in the spring of 1933, he expressed no such qualms. . . . Unlike Hoover, he felt that these so-called voluntary recovery programs, if they were to be effective, must have behind them the force of federal law.

The NIRA empowered representatives from management and labor in industries all across America to set their own wages, prices, and working conditions within their respective industries. Once a code was established for a particular industry, it would be submitted to the president, whose signature on the code would give it the force of law. All the businesses within that industry were expected to abide by the terms of the code, on pain of criminal prosecution by the feds.

Imagine the perversity of it all. Financial manipulation by the federal government's central bank, the Federal Reserve System, caused the stock-market crash in 1929. That led to the Great Depression. Rather than admit that government was the root cause of the economic crisis, Roosevelt and his cohorts blamed it on "the failure of free enterprise."

Then, they used the economic emergency (that the feds caused) as an excuse to implement the most revolutionary change in American history — the adoption of an economic system that combined features of both socialism (such as Social Security, which originated among German socialists in the late 1800s) and fascism (such as government-business partnerships, which were important both in Nazi Germany and fascist Italy). And it was all sold to the American people as

“saving free enterprise,” which obviously was an easier sell than “embracing socialism and fascism.”

Adding to the pressure to “go along” with the cartels and codes was a powerful political campaign led by a former U.S. army general named Hugh Johnson, whom FDR had appointed to serve as chairman of the National Recovery Administration, which put the NIRA into effect. The general immediately made it clear that those who opposed the NRA and its famous symbol “the Blue Eagle” were not true, patriotic Americans. Everyone was encouraged to display the Blue Eagle in their store windows, and consumers were expected to boycott unpatriotic Americans who refused to go along with the new scheme.

The principal economic crime that the Schechter brothers had committed was selling a chicken at less than the price established in the poultry industrial code. Since the chicken in question was diseased (thus, the now-famous term for the case — “The Sick Chicken Case”), the Schechters felt it only proper that it be sold at a discounted price. Wrong! They were convicted, sentenced to serve time, and fined for violating the poultry code.

Since the federal attorneys had just recently won the *Blaisdell* case and the *Gold Clause Cases* (see “Economic Liberty and the Constitution,” Parts [9](#) and [10](#), *Freedom Daily*, February and March 2003), they were quite cocky as they walked into the Supreme Court to hear Chief Justice Charles Evans Hughes deliver the opinion of the Court. Their sunny attitude did not last for long.

Ruling against Roosevelt

The Court held that the NIRA violated the Constitution of the United States by unlawfully delegating legislative power to the president. Empowering the president to simply sign off on the codes that each industry devised and then giving the codes the force of criminal law gave dictatorial powers to the president, which the Constitution did not permit:

If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry. . . .

[The law] supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of

the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Is it any wonder, then, that both Hitler and Mussolini admired Roosevelt, given that the manner in which he was addressing the economic emergency was so similar to what they were doing in their respective countries? Is it any wonder that many Western leaders admired the way that Hitler was leading his country out of its economic crisis?

(Hitler's antipathy toward Jews was not a major problem for many people in the 1930s, given that anti-Semitism was fairly common throughout the world. In fact, the U.S. State Department's anti-Semitism was what prevented German Jews from immigrating to the United States prior to the Holocaust.)

The Court also held that the NIRA was an unconstitutional attempt to regulate intrastate commerce:

The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.

In 1935, in *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court held the NIRA unconstitutional. Even worse for Roosevelt, the decision was unanimous. All nine members of the Court, including the Four Horsemen, had sent a powerful message to the president: While we express no opinion on economic theories, we will not permit you to transform American society in an unconstitutional manner.

President Roosevelt was not amused. After all, the NIRA was one of his most beloved economic programs. Four days after the Court's announcement, Roosevelt told reporters,

The implications of this decision are much more important than any decision probably since the Dred Scott case. The big issue is this: Does this decision mean that the United States government has no control over any national economic problem? We are the only nation [including Nazi Germany and fascist Italy] that has not solved that problem. We thought we were solving it, and now it has been thrown right in our faces and we have been relegated to the horse-and-buggy definition of interstate commerce. [Bracketed comments added.]

Adding insult to injury, in other cases the Supreme Court proceeded to invalidate other parts of the New Deal, such as the Guffey Act (which reenacted the bituminous coal industry code) and the Agricultural Adjustment Act.

Those decisions motivated Franklin Roosevelt to commit one of the most shameful acts in the history of our country — his infamous “court-packing” scheme in 1935. While that scheme failed in the short run, it provided the springboard for the final triumph of economic statism in America, which occurred in the watershed case of *West Coast Hotel v. Parrish*, decided by the Supreme Court in 1937.

Jacob Hornberger is founder and president of The Future of Freedom Foundation.

This article was originally published in the April 2003 edition of *Freedom Daily*.