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Economic Liberty and the Constitution, Part 12

by Jacob G. Hornberger

Elsie Parrish, a chambermaid at the West Coast Hotel in Wenatchee, Washington, became the focal point of the most important case on economic liberty in the history of the U.S. Supreme Court — *West Coast Hotel v. Parrish*. As part of the growing American trend toward socialism, paternalism, and interventionism during the 1930s, the state of Washington had enacted a law requiring businesses to pay women a minimum wage. Parrish sued the hotel, contending that the law was unconstitutional because it deprived her of liberty of contract that was guaranteed by the Due Process Clause of the Fourteenth Amendment. The case reached the Supreme Court in 1937.

Ordinarily, the Court should have quickly declared the law unconstitutional, since the Court had previously declared two minimum-wage laws unconstitutional. In 1923, in the case of *Adkins v. Children's Hospital*, it had declared a minimum-wage law in the District of Columbia unconstitutional.

More recently — just 10 months before the *West Coast Hotel* decision — it had declared a New York minimum-wage law for women unconstitutional. Thus, those two decisions should have been controlling under the legal principle of *stare decisis* (“to stand by that which is decided”).

By the time the *West Coast Hotel* case reached the Supreme Court, the intellectual, moral, political, and legal battle over Franklin Roosevelt's New Deal programs was reaching its culmination. While some of the Court's decisions had gone in Roosevelt's favor, in 1935 and 1936 he had been hit by a string of judicial setbacks. In those years, it invalidated his beloved National Recovery Act, the Agricultural Adjustment Act, the Railroad Retirement Act, the Bituminous Coal Conservation Act, and other New Deal measures.

Thus, Roosevelt knew that other New Deal legislation, including the Wagner Labor Relations Act and the Social Security Act, was threatened by Supreme Court review.

It's important to recognize two points, one legal and one economic: First, by declaring much of the New Deal unconstitutional, the Court was essentially saying: Welfare-state laws that employ the power of the government to take money from one person in order to

give it to another person and regulatory laws that interfere with economic liberty violate the supreme law of our land — the Constitution. In other words, the Court wasn't saying that the New Deal was a bad economic idea — that wasn't its role. Its duty — ever since the famous case of *Marbury v. Madison* in 1803 — was simply to examine whether a law was consistent with the Constitution and, if not, declare it invalid under our system of government.

The second point is a related one — one that unfortunately many Americans have never wanted to face: Franklin Roosevelt's New Deal was based on socialist and fascist principles that were totally alien to the principles of liberty on which our nation was founded. In fact, there's a very simple reason that both Adolf Hitler and Benito Mussolini praised Roosevelt's New Deal — Roosevelt's program was based on the same principles that both of them were employing to get their countries out of their own economic depression.

FDR's infamous Court-packing scheme

Thus, given that Roosevelt was committed to imposing a revolutionary economic system in America, what would have been the proper course of action for him to follow? If he wanted America to change its economic system from one based on economic liberty and free markets to one based on socialism and fascism, the only proper course for him to take was to secure an amendment to the U.S. Constitution authorizing such a revolutionary change.

Instead, he pursued one of the most disgraceful courses of action in American history. He came up with a devious and deceptive scheme to alter the structure of the Supreme Court so that he could pack it with cronies who would do his bidding by upholding his New Deal programs.

There were four certain votes in the Supreme Court against any New Deal scheme — those of the Four Horsemen: George Sutherland, James C. McReynolds, Pierce Butler, and Willis Van Devanter. There were also two “swing” justices who would sometimes vote with one side or the other — Owen J. Roberts and Charles Evans Hughes, the chief justice.

Reflecting the deceptive nature of Roosevelt's character, his Court-packing scheme was ostensibly designed to assist the Court with its heavy caseload by adding a new justice for every justice who was 70 years or older. Roosevelt had calculated that such a scheme would mean adding a sufficient number of new crony-justices to the nine current members of the Court to enable his New Deal legislation to be easily validated. (Is it any wonder that Adolf Hitler, who himself was running roughshod in Germany with similar socialist and fascist legislation, pointed out that he was the sole leader in Europe who expressed “understanding of the methods and motives of President Roosevelt” ?)

The Court-packing scheme generated one of the biggest uproars in American political history. Even though most Americans were meekly permitting Roosevelt to change their

economic system without a constitutional amendment, they were not prepared to let him tamper with their judicial system. Despite his tremendous electoral landslide in the 1936 presidential election, Roosevelt's Court-packing scheme was met with a firestorm of resistance in the Congress, including members of his own party.

The “switch in time that saved nine”

In *West Coast Hotel v. Parrish*, the Four Horsemen knew that they could count on Justice Roberts to join them in declaring the Washington minimum-wage law unconstitutional because he had just recently voted that same way in a case entitled *Morehead v. New York ex rel. Tipaldo*, in which the Supreme Court had declared a similar New York law unconstitutional. Thus, Roberts shocked everyone in *West Coast Hotel* by voting to uphold the constitutionality of the law and to overrule both the *Adkins* and *Tipaldo* decisions.

Roberts's vote has gone down in legal history as “the switch in time that saved nine,” and many people believed he simply caved in to the pressure from FDR's Court-packing scheme. For many years, he was, quite naturally, reviled by many in the legal community for sacrificing his conscience and convictions for the sake of political expediency. In their dissenting opinion, the Four Horseman let loose a not-so-subtle barb at Roberts:

Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

In defense of Roberts, however, legal scholars later pointed out that his initial vote in judicial conference came before FDR's announcement of his Court-packing scheme.

Many years after the *West Coast Hotel* decision, Roberts explained that the only reason that he had voted against the minimum-wage law in *Tipaldo* was that the litigants in that case had not expressly asked the court to overrule the decision in *Adkins*; if they had, Roberts claimed, he would have voted the other way in *Tipaldo*. Yet he could have made that point expressly clear in a concurring decision in *Tipaldo*, and he did not. Thus, many critics still believe that Roberts's switch was due to massive pro-New Deal public opinion, which was partly reflected in FDR's landslide victory in the 1936 presidential race.

Freedom is slavery

The majority opinion in *West Coast Hotel* is also famous for containing what is undoubtedly one of the most perverted definitions of “freedom” ever issued by a high judicial body:

The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

In other words, a person is “free” whenever the state has the power to enact any legislation whose ostensible purpose is to protect the health, safety, morals, and welfare of the people. Reflecting the extent to which Marxist thought had pervaded American culture, the majority stated,

What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? ...The Legislature was entitled to adopt measures to reduce the evils of the “sweating system,” the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition....

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.

With the “switch in time that saved nine” in *West Coast Hotel v. Parrish*, the floodgates of the socialist welfare state and the regulated society were thrown permanently open. While the Four Horsemen issued a scathing dissent in which they emphasized the importance of economic liberty, freedom of contract, and due process of law, they knew that the war had come to an end and that the statist, socialists, and collectivists had won. The era of economic liberty in America came to end in the 1937 case of *West Coast Hotel v. Parrish*.

Today, most Americans are unfamiliar with the tremendous battle that took place in the Supreme Court over economic liberty. In fact, it’s safe to say that most Americans don’t even know the extent of the economic revolution that took place in their country during the 1930s. They continue to believe that the Great Depression was caused by natural forces and that FDR “saved” freedom and free enterprise with his new system of welfare and regulation.

Perhaps the words of Johann Goethe best sum up the plight of Americans who were born after 1937: “None are more hopelessly enslaved than those who falsely believe they are free.”

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