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The Courts and the New Deal, Part 2

by William L. Anderson

The system of laws and courts in the United States today hardly resembles that system that came about in the wake of the founding of this republic. This sea change in the law is not due — as some might claim — to the complexities of modern life or the need for reality to rule instead of ideology. Instead, we have lost the law because of expediency that comes with the Benthamite view of utility and because of the notion that “social good” rules over the principles of liberty and justice.

The deterioration of law in the United States (as well as other Western countries, including Great Britain, from which this nation inherited its legal traditions) is a sorry chapter of history, but one that needs to be repeated if only to provide inspiration to future generations who decide to recapture the spirit of liberty. In the meantime, it is necessary to detail the hows and whys of this decline.

Part 1 of this series dealt with the establishment of law in the United States and with how the Framers of the U.S. Constitution sought to limit the power of government at all levels, seeking to harness the apparatus of the state to ensure that individual rights were not violated. Within a generation of the document’s creation, however, forces were already at work in this country to undermine individual rights. This article deals with the rise of collectivist thought that was enforced through major wars and legislation meant to strengthen government at the expense of personal freedoms.

Lincoln, Hamilton, and war

We begin with the War Between the States, 1861–1865. It is popular — or at least “politically correct” — to say that the conflagration known as the Civil War (which really was not a true civil war, since the Confederacy was fighting to gain independence, not establish political power over the Northern states) was caused by slavery. It is true that slavery was a flash point over the issues separating North and South in the United States, but slavery, as much a cancer on liberty as it was, did not bring about the secession of the Southern states in 1860 or 1861 or the

war that followed. Indeed, one can argue that, even had chattel slavery not existed, the economic differences between North and South might very well have led to the exit of the Southern states from the Union.

The election of Abraham Lincoln as president of the United States was a triumph of those who had adhered to the vision of Alexander Hamilton, as opposed to people whose social and political philosophies mirrored those of Thomas Jefferson. Hamilton believed in a strong central government, central banking, and an economic order that was buttressed by government subsidies and regulated by Congress.

Jeffersonians, on the other hand, held to a philosophy in which government played a relatively small role in the lives of individual persons who were to be free to pursue their own interests within a social order that emphasized free exchange unregulated by the “dead hand” of the state.

Hamilton’s ideas outlived the man, and they were first embodied in the two Banks of the United States and later animated those who were members of the Whig Party. When the Whig Party ceased to exist, the scattered former members formed the Republican Party, which became the party of central banking, taxpayer-subsidized “internal improvements” (such as railroads and canals), government-sponsored education, and high protective tariffs. (Contrary to popular belief, as Thomas DiLorenzo has pointed out in his book *The Real Lincoln*, the Republicans were defined by their economic program, not by any principled opposition to slavery.)

By 1860, according to DiLorenzo, almost 90 percent of federal tax revenues were coming through the Southern ports, which meant that higher tariffs would make the position of Southern economic interests even worse relative to that of the industrial North. (We need to add that, at this time, British and European goods were considered vastly superior in price and quality to goods made in the Northern states. Northern economic interests wanted higher tariffs precisely to force Americans to purchase their goods rather than products made abroad.)

In the war following the Southern secession, we find that Lincoln simply circumvented the Constitution. First, he engaged troops in a war not declared by Congress. Second, he unilaterally suspended the writ of habeas corpus, which meant that, by an administrative act, he was able to declare the Constitution null and void. As DiLorenzo points out, by crossing this Rubicon, Lincoln was able to set a standard — through the use of raw force — that has haunted us since.

The postwar demise of law

Following the war, attempts were made to patch up the old system of federalism and restore some semblance of constitutional order, but the damage had already been done. In effect, those who advocated the centralized political and legal system over the decentralized one that had characterized the United States since its founding had won the battle, albeit by force. Furthermore, even though some decentralization came to the fore, the politicians and courts were

already at work undermining individual rights. One of the first dominoes to fall was the right to bear arms, as outlined in the Second Amendment. Many states and localities (mostly the former Confederate states but certainly not only them) passed laws prohibiting blacks from owning firearms.

The U.S. Supreme Court in two decisions upheld the laws that were passed precisely to keep blacks from being able to defend themselves from attacks by groups such as the Ku Klux Klan. While the decisions were dressed in the language of federalism (the Second Amendment did not apply to the states, only the federal government), the Court also held that the Second Amendment involved a *collective* right, not an individual one. In other words, when it failed to protect the individual rights of blacks by ensuring that they would be helpless in the face of violent attacks by vengeful whites, the Court simultaneously undermined the constitutional concept of individual rights.

Of course, the modern gun-control advocates have seized on those decisions (which clearly were racist in design) to promote their agenda of disarming *all* law-abiding persons. Thus, the descendants of whites who once supported those decisions now find them being used in a way that the justices of the late 1800s never thought possible. Call it “blowback.”

The rise of the “isms”

The concept of collectivism continued to grow in the United States in the late 1800s. As Walter Lippman wrote in *The Good Society*, the “classical liberalism” which stressed individual rights was fighting a “rearguard action” by about 1870. The “isms,” such as Progressivism and Populism, already were beginning to dominate the American political scene.

It is difficult to fathom the sea change which occurred in this country from the 1880s to the beginning of World War I. The Populists and their allies demanded that government embark on a policy of deliberate inflation, which could happen only if the state fully controlled the issuing of money, something that the U.S. banking system could only partly do before the creation of the Federal Reserve System in 1913. Until the creation of the Interstate Commerce Commission in 1887, the setting of special rules and regulations for businesses was left to state and local governments. The ICC was one of the first breaks in the policy of nondelegation of powers that was enshrined in the Constitution, which gave Congress the power to regulate commerce.

(It should be noted that the concept of regulation in 1787 meant that Congress needed to make sure that trade ran smoothly between states, keeping it “regular.” The Commerce Clause of the Constitution was written to make sure states did not erect trade barriers against one another; it was not meant as a “hook” by which Congress — and later the administrative branch — could assume powers that were left to the states.)

Congress again called on its powers to “regulate” interstate commerce with the passage of the Sherman Antitrust Act of 1890 and the Clayton Act of 1914. In 1913, the Sixteenth

Amendment, permitting Congress to levy a national income tax, and the Seventeenth Amendment, which called for direct election of U.S. senators (they were previously chosen by state legislatures), further “nationalized” law in this country. Congress also created the Federal Reserve System in 1913, which gave the government the tools to inflate the currency at will.

“Progressive” actions were not limited to Congress, as the courts took part in ushering out the concept that the Constitution protected *individual* rights and replacing it with a collectivist notion of “public interest.” The Progressive mindset was not limited to the courts or the intellectuals and activists who promoted the growth of the state. As Robert Higgs pointed out in *Crisis and Leviathan*, Charles Whiting Baker wrote in 1921 that

doctrines that were deemed ultra-radical thirty years ago . . . are accepted today without question by railway presidents, financiers and captains of industry.

One could argue that the actual change in politics and governance would not have been possible had these people not bought into the Progressive ideology. If one leaves out the high protective tariffs of this time, it can be argued that the huge business enterprises that developed during the latter portion of the 19th century were grown in a relatively laissez-faire atmosphere. The so-called captains of industry were primarily interested in making money and promoting their own enterprises, not in being the guardians of an individualist ideology of liberty that no longer captured the intellectual “commanding heights.” It is not surprising that the intellectuals “won” the industrialists to their side, and the results, ultimately, were disastrous, as they would create and nurture the conditions that created the Great Depression and ushered in the New Deal.

Economic historians such as Robert Higgs and Murray Rothbard have noted that the entry of the United States into the First World War was a triumph for the Progressives. First, it gave the government near-absolute power over the economy. Second, it gave the government the excuse to raise marginal income tax rates to very high levels. (In the mid 1920s, the top tax rate was lowered to 25 percent, and it has not been lower since.) Third, it elevated the power of the central government as an ideological substitute for liberty.

In calling for the United States to enter the war, President Woodrow Wilson said that war was necessary “to make the world safe for democracy.” No longer did the old “individualism” hold sway; as Higgs notes in *Crisis and Leviathan*, there was a vast change in the ideological winds from the 1890s to the U.S. entry into the war and it permanently changed the course of U.S. history.

Ideology and the courts

The courts were hardly immune to the ideological changes, although they would not be brought fully into line with Progressive thinking until the New Deal. However, Progressivism had

made its mark with the jurists long before the presidency of Franklin Roosevelt. In 1911, the federal courts ordered the breakup of the Standard Oil Company into a number of smaller firms, citing the Sherman Antitrust Act and a vague notion of the “public good.”

Keep in mind that the courts paid no mind to the realities of the marketplace or the role Standard Oil had played in making fuel available to poor and lower-income persons, who simply did without in the pre-Standard Oil era. Furthermore, the courts took no notice of John D. Rockefeller’s decision not to tap into the oil that flowed from Texas wells. (That oil ultimately helped other companies to become able to whittle down Standard’s once-huge market share.)

Furthermore, the courts did not seem to care that consumers preferred to freely purchase Standard Oil products. Instead, the courts depended on the nebulous “public interest” argument that basically promoted the “everyone knows big, successful businesses are bad” point of view.

Of course, government intervention into the economy was not the only area in which the courts broke with the past. The courts also decided to empower the state by eviscerating the *mens rea* doctrine in the area of criminal law. The great English jurist William Blackstone held that *mens rea* was the bedrock of criminal law. The term means “a guilty mind,” and its application to criminal law emphasized that it was necessary for persons who broke the law to have done so deliberately in order to charge them with a crime. A person who did not know he was acting illegally could not be placed in the dock for alleged criminal offenses.

The courts began to hold that a crime simply was the violation of a set of laws (and later, simple regulations), regardless of the intent of the person who transgressed the rules. This should hardly be surprising, as *mens rea* involves an individualistic interpretation of the rule of law. Crimes before then involved the imposition of real harm to real people; a “public interest” view of law that grew (metastasized?) during the Progressive Era emphasized the “social good” of law. Thus, when one broke a law, he harmed *society*, regardless of the intent or even the outcome of the action itself.

The assault upon *mens rea* began with the Minnesota Supreme Court in a 1910 ruling denying a *mens rea* defense to a lumber company that was being prosecuted for cutting timber on state lands without a valid permit. (As Paul Craig Roberts and Lawrence M. Stratton point out in their book *The Tyranny of Good Intentions*, a state official had renewed the permit, but it turned out he did not have the legal authority to do so.) And while the judicial attacks that finally did away with a meaningful sense of *mens rea* were not passed until after the New Deal, they ultimately would bring a veritable legal revolution to this country.

Conclusion

As noted in the previous paragraph, the United States has experienced a legal revolution. However, the sea change did not happen all at once. What was a tiny trickle turned into a stream because of the War Between the States, and while the flow was slightly curtailed for a while after

the war ended, it did not take long for the stream to grow into a near river by the time the Progressive Era rolled around.

The entry of the United States into World War I in 1917 further strengthened the central state at the expense of both the states and individuals. Most important, however, was the fact that the intellectuals in this country no longer supported the view that the Constitution was a document dedicated to individual rights and restraint of the state. The intellectual and legal table now was set for the political economy of the New Deal.

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