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The Courts and the New Deal, Part 3

by William L. Anderson

When Janice Rogers Brown was renominated to fill a vacancy on the D.C. Court of Appeals this year, the *New York Times* demanded that Democrats filibuster her nomination, one of the reasons being that, in a speech to a gathering of conservative lawyers, Brown had called the New Deal a “socialist” venture. In his *New York Times* columns, Princeton University economist Paul Krugman on many occasions has praised the Franklin D. Roosevelt administration and recently called for a new installment of the New Deal.

Not only did the New Deal transform U.S. governmental structures as we know them, it also left an economic and legal legacy that to this day is both influential and controversial. Judging from the outright anger of many Democrats to Brown’s criticism of the New Deal, it is not hard to understand that Roosevelt still is the standard-bearer of the Democratic Party, no matter how many “New Democrats” may be running for office.

New Deal programs from Social Security to the minimum wage play a major role in our lives nearly 70 years after Congress enacted them, and attempts to make even minimal reductions in them spark national outrage. Witness the firestorm that has erupted from the Bush administration’s reform proposals in Social Security. While these programs are regarded as almost sacrosanct today, before Roosevelt’s time in office they would have been regarded as *illegal*. Furthermore, there was a time in the history of the United States when the vast powers now being wielded by members of the executive branch would have been seen as unconstitutional by most people who understood the law. To put it another way, the United States of America that existed in early 1933 was not the same country when Roosevelt died in April 1945.

The U.S. Supreme Court played a major role in the legal and political transformation of this country during the New Deal through the way it chose to reinterpret the U.S. Constitution. First, the High Court was willing to ignore the Constitution’s “non-delegation clause” by permitting the executive branch to take on legal responsibilities that the Framers of the Constitution clearly had given Congress. Second, it chose to take earlier rulings regarding laws governing workplaces and employment contracts and turn them upside down. Furthermore, even

though the language of the justices' decisions declared them to be a correct and legal interpretation of the Constitution, those involved in the legal process clearly understood that what they were doing went contrary to the law.

Rexford G. Tugwell, a close advisor to Roosevelt, said as much in an article entitled "Rewriting the Constitution," published in the March 1968 issue of *The Center Magazine*:

The Constitution was a negative document, meant mostly to protect citizens from their government... Above all, men were to be free to do as they liked, and since the government was likely to intervene and because prosperity was to be found in the free management of their affairs, a constitution was needed to prevent such intervention.... The laws would maintain order, but would not touch the individual who behaved reasonably.

Regarding the enforcement of what the Roosevelt administration would have called "social virtues," Tugwell said,

To the extent that these new social virtues developed [in the New Deal], they were tortured interpretations of a *document intended to prevent them*. The government did accept responsibility for individuals' well-being, and it did interfere to make secure. But it really had to be admitted that it was done irregularly and according to doctrines the framers would have rejected. Organization for these purposes was very inefficient because they were not acknowledged intentions. Much of the lagging and reluctance was owed to constantly reiterated intention that what was being done was in pursuit of the aims embodied in the Constitution of 1787, when obviously it was done in contravention of them.
[Emphasis mine.]

The Great Depression

To understand the background of the New Deal, one first needs to understand the economic catastrophe that was the Great Depression. The economic downturn that began soon after the stock market crash of October 1929 turned into calamity within two years. Unemployment rates, which were at about 7 percent in 1930, ballooned to about 28 percent by February 1933, a month before Roosevelt was sworn in to office, Democrats having swept the 1932 elections.

The standard mainstream approach has been to label the Great Depression the ultimate failure of capitalism, private property, sound money, and free enterprise. "Unbridled competition" had led to "overproduction" of goods with workers not being paid wages high enough to "buy back the products" they had made, with "underconsumption" being the result. Thus, as one political cartoon of the day put it, there was "too much wheat, too much oil, and too much poverty."

While this article cannot go into depth on the economic side of the Depression and the New Deal, it is important to point out that economic historians Murray N. Rothbard, Robert Higgs, and others have argued that government interventions themselves created the conditions that gave us the Depression. For example, President Herbert Hoover insisted that businesses not permit wages and prices to fall, despite the fact that bank failures were resulting in the shrinkage of the supply of money in the economy; thus, Hoover's policies resulted in unsold goods and unemployment.

Rothbard also notes that Congress passed the destructive Smoot-Hawley tariff in 1930 and doubled tax rates in 1932, thus increasing business costs and making the downturn even worse. The Roosevelt administration continued in that same vein. Writes author William Shughart II in *Independent Review* (Vol. IX, No. 1, 2004),

The [Roosevelt] administration's mindset was colored strongly by Marxist notions that free-market institutions inevitably are self-destructive. Competition was seen not as beneficially expanding output, lowering prices, and increasing wealth, but as fostering ruinous overproduction that impoverished capitalists and workers alike. Confusing effect with cause, the New Dealers interpreted the unprecedented collapse of prices, wages, and employment that began in the fall of 1929 as evidence consistent with the supposed evils of unfettered markets.

Upon taking office, the New Dealers, through various new laws and proposals, such as the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA), attempted to force up commodity prices and reduce output in an attempt to create an economic recovery. Ironically, as Higgs noted in his 1987 book *Crisis and Leviathan* (quoted in the Shughart article),

Hence arose the anomalous but widely supported policy proposal to cure the depression, itself a catastrophic decline of real output and employment, by cutting back on production.

The "reforms" brought in by the New Deal were radical, to say the least. Furthermore, as Tugwell admitted, the only way to enact them was to turn U.S. law upside down. Thus began a major transformation of how the courts would view the Constitution.

The Court and the "first" New Deal

Perhaps it is ironic that the decade that transformed the legal landscape of the United States did not begin that way. In fact, during the early years of the Roosevelt administration, the Supreme Court was seen as the last bastion defending the original Constitution. Roosevelt himself openly plotted to force a change in the Court's makeup in order to bring about rulings that would give his administration a free hand to reconfigure the law.

As the story is popularly told, a small group of justices on the Supreme Court stood against Roosevelt's attempts to install popular programs proposed to mitigate the economic misery being caused by the Great Depression. Shughart points out,

Standard accounts of the drama that began to unfold early in January 1935, when the U.S. Supreme Court ruled on the first of the challenges to New Deal legislation that came before it, frequently ignore these uncomfortable facts. As the story usually is told, the Old Court stubbornly blocked FDR's policies by invalidating on constitutional grounds the bold experiments undertaken during his first term to deal with the nation's extraordinary economic emergency. Thwarted at nearly every turn, often by narrow five-to-four vote margins, and emboldened by his stunning reelection to the White House in November 1936, FDR responded the following winter by threatening to pack the Court with up to six additional members, thereby ensuring a more compliant majority. To diffuse that threat, the Court abruptly changed course, executing its famous "switch in time that saved nine," and began to sustain most of the president's policies and programs, especially in the area of economic regulation.

The truth, as Shughart points out, is somewhat different. While the Court struck down the two flagship programs of the first 100 days of the New Deal, the National Industrial Recovery Act and the Agricultural Adjustment Act, it already had upheld other major planks of Roosevelt's agenda.

Soon after Roosevelt took office in March 1933, he decided to pursue a deliberate policy of inflation. Since, at that time, individuals could demand payment in gold from the government for their dollars, a surge of deliberate inflation caused by printing more dollars would have brought about a run on the government's gold reserves. To keep that from happening, Roosevelt invoked an obscure 1917 World War I-era law — the Trading with the Enemy Act — to justify the confiscation of almost all gold owned by private individuals. (The government raised the price of its gold from \$20 an ounce to \$35 an ounce and compensated individuals with the cheaper dollars.)

Not surprisingly, the action was challenged in the courts, but the Supreme Court upheld it in three separate cases. The Court had also upheld a mortgage-moratorium law in Minnesota, which Roosevelt supported, and approved the formation of the Tennessee Valley Authority, which clearly was an exercise in socialism. In other words, the Supreme Court had a mixed record and certainly was not "obstructionist" as the critics have claimed.

Moreover, one must keep in mind the nature of the two acts in question. Both the NIRA and AAA were attempts to "stimulate" the economy by forcing up prices of consumer goods and raising business costs, as well as curtailing the production of agricultural and other goods. In other words, in a time of real deprivation for much of the country, the government's answer to the Depression was to make it even more difficult for people to afford their daily bread.

The NIRA was an attempt to organize the entire U.S. economy into a series of cartels ranging from forest and wood products to the dog-food industry. Industry groups were required to set minimum wages and minimum prices, hold back production, and prevent new entrants from starting businesses. However, because cartels tend to be unwieldy over time, the system began to collapse even before the Court declared the NIRA unconstitutional in its famous *A.L.A. Schechter Poultry Corp. v. the United States* decision. The economist Benjamin M. Anderson wrote that the NIRA “was not a revival measure.... It was an antirevival measure.”

Likewise, the AAA attempted to increase the incomes of farmers by setting limits on crops and even went as far as having agents from the Agricultural Adjustment Administration destroy commodities and animals in order to achieve goals. As author Lawrence W. Reed noted,

[The AAA] levied a new tax on agricultural processors and used the revenue to supervise the wholesale destruction of valuable crops and cattle. Federal agents oversaw the ugly spectacle of perfectly good fields of cotton, wheat, and corn being plowed under (the mules had to be convinced to *trample* the crops; they had been trained, of course, to walk *between* the rows). Healthy cattle, sheep, and pigs were slaughtered and buried in mass graves. [Emphasis in original.]

When the Court struck down the AAA in 1936, Roosevelt was enraged and floated his infamous proposal to “pack” the Court by sending Congress a plan that would give him authority to appoint up to six more judges to the Supreme Court (in addition to the nine already on it). Although the anti–New Deal decisions were based clearly on constitutional merits, Roosevelt wanted justices to reevaluate the Constitution in a way that would permit his future programs to be implemented unmolested by the rule of law. However, the Court “conveniently” began to change the pattern of its rulings, and, with retirements, Roosevelt was soon able to appoint justices who ruled more to his liking.

The Court and the “second” New Deal

The “first” New Deal can be seen as an attempt to cartelize the U.S. economy in an effort to aid businesses. The “second” New Deal was different in that it was aimed at attacking business enterprises through regulation and the promotion of labor unions. The Court ultimately acquiesced.

First, in complete reversal of a 1936 decision that struck down a New York state minimum-wage law, the Court in *West Coast Hotel v. Parrish* (1937) upheld a Washington state minimum-wage law that was nearly identical to the New York one that had been upheld. Similar rulings followed.

Second, the Court began to reinterpret the Commerce Clause of the Constitution by changing its definition of interstate commerce. Previous courts took the clause as a reason to limit

the role Congress could play in crafting laws that usurped what traditionally were seen as state functions. While the Constitution gave Congress the power to “regulate” interstate commerce, the key element was the fact that the courts had interpreted “commerce” in a very narrow way.

By 1937, however, the Court began to define interstate commerce in a way that turned the earlier interpretation of the Commerce Clause upside down. Candice E. Jackson argues that — although from 1870 to 1937 the Supreme Court slowly loosened some of its strictest definitions of interstate commerce — after 1937 the Roosevelt Court moved full speed ahead to give Congress almost unlimited power in imposing the will of the federal government on individuals and business enterprises.

The effects of this sea change in legal interpretation of a document that clearly was written to limit the power of the government became obvious. The most blatant example of the Court’s new way of reading the Commerce Clause was its decision, in *NLRB v. Jones & Laughlin Steel Corp.*, to rule in favor of the Wagner Act, which, in effect, placed labor unions under congressional protection against firms that wished to resist being unionized, and *based its decision on the Commerce Clause*.

Within a year of this decision, the country was hit by numerous strikes, walkouts, and labor-related violence. Coupled with the Federal Reserve’s decision to raise interest rates, the U.S. economy, which had been making a relatively small recovery after 1935, fell into another deep recession, with the unemployment rate reaching 20 percent.

(The Court’s willingness to make nearly everything subject to its new interpretation of the Commerce Clause was demonstrated by its infamous 1942 *Wickard v. Filburn* decision in which the Court upheld government action against a farmer who grew wheat for his own consumption. Because he had grown more than the quota permitted by the government, the Court ruled that, while the farmer had no plans to sell the wheat he was growing, his home production of wheat flour meant that he would not be purchasing more wheat elsewhere, a personal decision that, the Court reasoned, would affect interstate commerce.)

The second major change in the legal interpretation that the Court permitted was the wholesale transference of legislative power from Congress to the executive branch. This was done in two ways. First, although the Constitution declares that “all legislative powers” rest in the hands of Congress, Roosevelt demanded that Congress rubber-stamp his proposed legislation, which then was quickly passed without debate and without many members’ having even read the proposed bills. While this preserved the image of Congress actually performing its legislative duties, in reality the president was the legislator.

The second way that the Roosevelt administration usurped legislative powers was through the creation of bureaucracies that were able to, in effect, write the law through regulations. The way it worked was that Congress would write laws that deferred the rulemaking powers to the

regulatory agencies. In their book *The Tyranny of Good Intentions*, Paul Craig Roberts and Lawrence M. Stratton describe the legal change that followed:

Prior to the New Deal, legislation tended to be specifically and tightly written in order to avoid delegating the law to executive branch enforcers. This minimized the opportunity for executive branch interpretation.

However, the Roosevelt administration followed the path urged by James M. Landis, the dean of Harvard Law School. Landis believed that bureaucracies would be staffed by “experts,” who would be more adept at following “correct” policies than the less-nimble Congress. Such a state of affairs would mean, according to Landis, “that the operative rules will be found outside the statute book.” In other words, the wording and even intent of the laws passed by Congress meant nothing; the law was whatever the executive branch — aided by a subservient Supreme Court — said it was.

Conclusion

The New Deal did not revolutionize the courts but instead accelerated the changes already taking place. However, even given the encroachments on liberty that occurred during the Progressive Era, the decade of the 1930s still is breathtaking when one realizes what was lost.

Furthermore, the courts have not effectively moved from the various positions that justices such as William O. Douglas, Felix Frankfurter, and Hugo Black took in regard to the Constitution. Like Tugwell, they fully understood that the Founders of this country wrote the Constitution in order to create the necessary fences around the exercise of power by government officials. And, like Tugwell, they decided that liberty was archaic and unnecessary in a modern, complex society. Thus, liberty faded as a polestar, and the New Dealers replaced it with statism, all with the blessings of the U.S. Supreme Court.

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