

Regulation of Economic Activities

For the first 150 years of the Republic, the American political process adopted what was basically a laissez-faire policy regarding economic activities. Private property was sacred and owners could do pretty much as they pleased. Andrew Jackson deviated from this ideology somewhat, as did the Supreme Court under Chief Justice Taney (1837-1864), but their efforts had little impact. The vast majority of Justices appointed during the period 1865-1935 came from the corporate sector. “Liberty of contract” became part of the Constitution. Even though legislation was passed in the late 1800s to curb monopolies, the courts did little to enforce the laws. Invoking the “rule of reason,” the Justices left it to them to decide what constituted a “monopoly.” More modest efforts by the States also got little support from the courts. For example, in a landmark case in 1905, Lochner v New York¹, the Supreme Court struck down a New York *State* law that sought to regulate working conditions in bakeries. In a 1918 case, Hammer v Dagenhart, the court, citing the Tenth Amendment restriction of Federal authority, struck down a *national* law that prohibited products from child labor to be involved in interstate commerce. The court said “...the commerce clause was not meant to give to Congress a general authority to equalize...conditions”. Workers had no rights to speak of. It has been estimated that 35,000 workers were killed on the job in 1914 and employers had no liabilities.

Although the Founders had moved away from the State-centered Articles of Confederation, they had not clearly established the supremacy of national over States sovereignty, or primacy of national over State citizenship. The Civil War and the Reconstruction acts resolved the citizenship question in a legal sense (this was not put into practice until the latter half of the 20th Century). The issue over the limited power of the national government to intervene in economic affairs was left to the 1930s for resolution. The New Deal legislation, with eventual Court concurrence, decisively repudiated the notion of limited national government power in economic and social matters deemed to be “in the general welfare”. It took all three branches of government working together to make this historical transformation of the Constitution.

The “New Deal” era brought sweeping changes to the Constitution. FDR asked for emergency powers to deal with the economic crisis and Congress went along with his request. Among other measures, the Administration decided to go off the gold standard. When it appeared the Supreme Court would not go along with this idea, FDR prepared a scathing radio address. He intended to tell the American people that he refused to “...permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion”. He would cite a statement in Lincoln’s first inaugural: “...**if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers.**” *How is that for decrying “judicial activism?”* Chief Justice Charles Hughes managed to get a 5-4 decision upholding the decision (Gold Clause Cases, 1934). Hughes, acknowledging that the framers would consider this decision to be unconstitutional, rejected the claim “...that the great clauses of the Constitution must be confined to the interpretations that the framers, with the conditions and outlook of their time, would have placed upon them.”

¹ For those interested in getting an insight into the ideological climate regarding government regulation of economic activities in the early 20th Century, read the majority and dissenting opinions in this case.

The 1934 Court decision avoided a constitutional crisis for the time, but it did not forecast future attitudes towards the New Deal agenda. When the National Industrial Recovery Act (NIRA) was challenged, the 2nd Appeals Court upheld the law. On appeal the Supreme Court, in a 9-0 decision, struck it down (Schechter Poultry Corporation v U.S., 1935). In this case, Hughes cited the tenth amendment regarding what powers were given to the Federal Government. FDR was not prepared to go to the wall on this one, partly because the NIRA had become increasingly unpopular. Instead, he took a different approach. He framed the issue as one involving the role of the Federal Government in solving the nation's problems. He had this to say in a radio address:

“It is infinitely deeper than any partisan issue, it is a national issue; yes, and the issue is this: Is the United States going to decide, are the people of this country going to decide, that their Federal Government shall in the future have no right under any implied power or any court-approved power to enter a national economic problem, but that that economic problem must be decided only by the States?

The other part of it is this: Shall we view our social problems—and in that I bring employment of all kinds—shall we view that from the same point of view or not, that the Federal Government has no right under this or following opinions to take any part in trying to better national social conditions? Now that is flat and simple the issue.”

In all, the Supreme Court declared nine acts unconstitutional in the period 1935-37. How, then, was FDR to handle this conflict? Was he to seek Constitutional amendments to give the Federal Government authority to regulate economic activities? A number of amendments were proposed by Congress to do precisely that. Mindful of the lengthy and uncertain process of amendment, however, he chose to wait for a more “enlightened” court to reverse the Hughes court. After sweeping the 1936 election, Roosevelt tried to “pack” the court by raising its membership to 15 so that he would have a sympathetic majority, but Congress balked. While the bill was debated in Congress, the Court began reversing earlier decisions; this has been referred to as “the switch in time that saved nine.” Other historians say the Court heard the people loud and clear. In any event, the packing scheme died and the Court continued to reverse earlier decisions.

In a 5-4 decision in 1937, the court upheld the National Labor Relations Act (NLRB v Jones and Laughlin Steel). In another case (U.S. v Carolene Products, 1938) the court said *in a footnote* that only if the regulatory intervention by the national government lacked all “rational basis” would the Court consider it to be unconstitutional. In 1941, laissez faire economics was dealt a mortal blow a few days after the last of the *Lochnerian* jurists had retired. The Court, in a 9-0 decision (U.S. v Darby), upheld the 1938 Fair Labor Standards Act. This act made it a crime to ship any goods in interstate commerce that were manufactured either by children or by workers making less than the national minimum wage. The Darby decision laid Lochner and Hammer to rest and they were never again cited in Supreme Court decisions. An activist Federal Government in economic activities had now become part of the Constitution.

The laissez faire ideology that had dominated public philosophy since the Founding was gone and the Tenth Amendment and Commerce Clause were given new meaning. Since then, the debate has not been about whether or not the Federal Government has authority to regulate economic activities, but how far it should go *as a practical matter*. One can contrast FDR's

approach to changing the Constitution with that of the Republicans during Reconstruction. The Republicans formally amended the Constitution with the 13th and 14th amendments, whereas FDR chose to “amend” it through court decisions. By and large, all courts since the New Deal era have been “activist” courts, much to the chagrin of jurists such as Scalia and Anti-Federalists in general. The concept of a “living document” that can be re-interpreted by “nine old lawyers” is anathema to this group.

The New Deal legislation and the Supreme Court endorsement of a more expansive role for the Federal Government in regulating economic affairs laid the groundwork for the “Great Society” activities under President Johnson and the occupational safety and environmental protection activities of recent administrations. These activities have continued under both Republican and Democratic regimes. The Nixon administration was one of the most active in promoting government involvement in these activities, having established EPA and OSHA. Another Republican president, Teddy Roosevelt, had had the foresight to establish national parks, having done so over the objections of his party. Reagan attempted to roll back the clock on the New Deal, the Great Society, EPA, OSHA, etc., but was largely unsuccessful. Moves to do away with, or weaken, Social Security have run up against the political “third rail” and gone nowhere. The latest strategy is to “privatize” the program. Many consider this to be a first step in killing the program.

The latest controversial economic issue to surface is the court decision (*Kelo v. New London*, 2005) to uphold a local use of the power of eminent domain to condemn private property and allow it to be used by other private enterprises to develop businesses and upscale housing that would benefit the entire community. Previously, the exercise of this power has been limited to the use of the condemned property for public projects such as roads, airports, etc.

The jury is still out, however, on whether or not the laissez-faire ideology of our first 150 years will make a comeback. Marginal retrenchment may occur, but it is doubtful that there will be any significant return to the unfettered laissez faire economic philosophy. The “Warren” and “Burger” courts (both Chief Justices were appointed by Republican presidents) continued the “activist” tradition of the “Roosevelt” court. Rehnquist came to the court dedicated to reversing this trend, but even after he was elevated to the Chief Justice position, his court failed to undo any of the major decisions of the Warren and Burger decisions. Only Scalia and Thomas shared his ideological views. How these decisions will stand is debatable, now that Bush has transformed the court to a certain degree with his two appointments. The replacement of Rehnquist by John Roberts doesn’t appear to make much difference, since both are similar in their judicial philosophy. The replacement of O’Connor with Alito is another matter. While one can never predict with certainty how a Justice will vote once he or she is on the Court, all indications are that Alito will shift the balance toward the Scalia/Thomas philosophy, but so far they have sided with that wing of the Court. George Bush declared in his campaign that he wanted more Justices like Scalia and Thomas and he seems to have delivered on that pledge.

The issue of government involvement is about to be tested in a big way, given Obama Economic Agenda, which represents a significant move toward increased involvement.