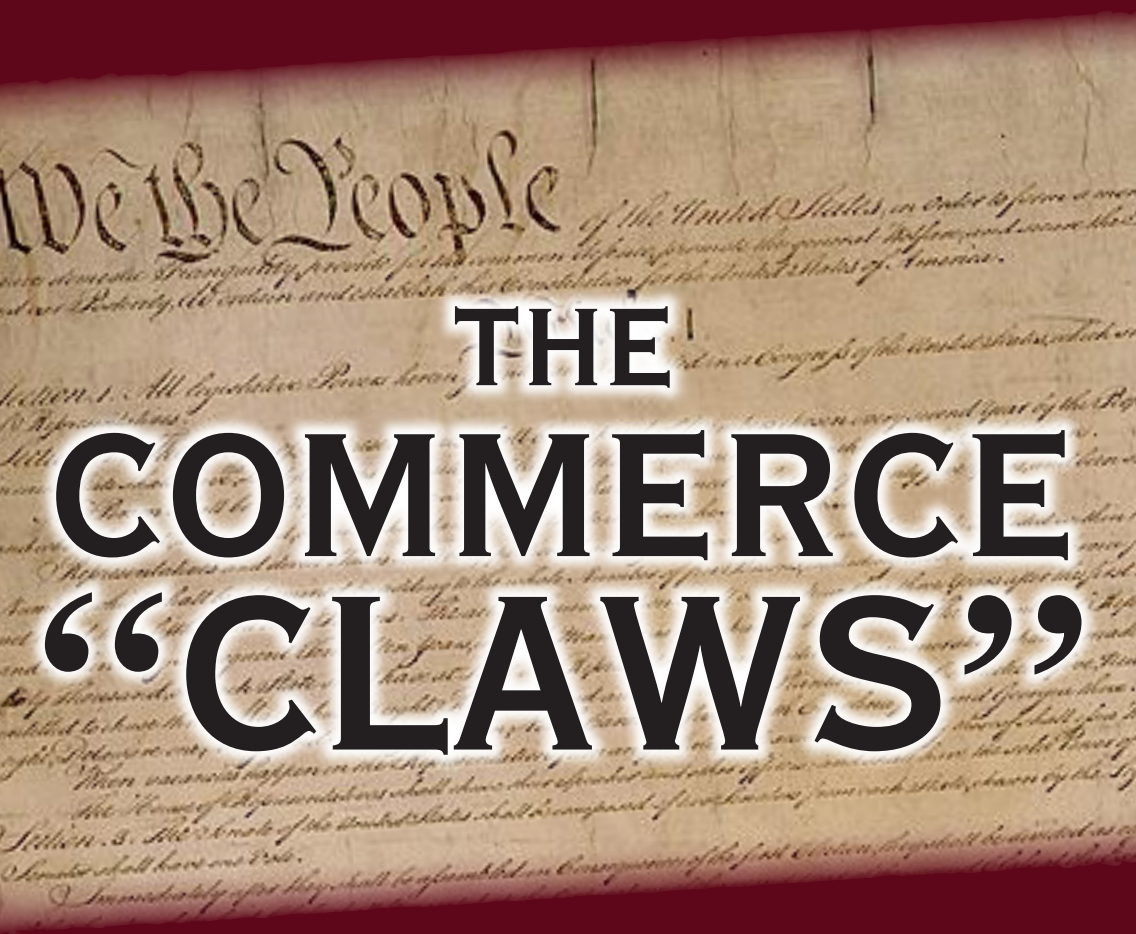
DULOCRACY* in America



THE COMMERCE "CLAWS"

Book one

FRANKLIN ROOSEVELT'S NEW DEAL ASSAULT ON THE CONSTITUTION OF THE UNITED STATES

RESEARCHED AND COMPILED BY
J.D. SWEENEY

*A GOVERNMENT WHERE SERVANTS AND SLAVES HAVE SO MUCH LICENSE AND PRIVILEGE THAT THEY DOMINEER.

DULOCRACY IN AMERICA

Book One

THE COMMERCE "CLAWS"

Book One

SECOND EDITION

Researched and Compiled by
J.D. SWEENEY

Published by
The Sorel Group
United States of America

To America's sons and daughters who will
someday rise up and fight to restore liberty lost
while we stood silent.

"Thus before our time, the customs of our ancestors produced excellent men, and eminent men preserved our ancient customs and the institutions of their fore-fathers. But though the republic, when it came to us, was like a beautiful painting, whose colours, however, were already fading with age, our own time not only neglected to freshen it by renewing the original colours, but has not even taken the trouble to preserve its configuration and, so to speak, its general outlines. For what is now left of the 'ancient customs' on which 'the commonwealth of Rome' was 'founded firm'? They have been, as we see, so completely buried in oblivion that they are not only no longer practised, but are already unknown. And what shall I say of the men? For the loss of our customs is due to our lack of men, and for this great evil we must not only give an account, but must even defend ourselves in every way possible, as if we were accused of capital crime. For it is through our own faults, not by any accident, that we retain only the form of the commonwealth, but have long since lost its substance." Cicero, *The Republic*, V, 1-2

Preface to the Second Edition

This Second Edition contains a considerable number of changes from the First Edition, but almost all of them are confined to correction of errors and clarification. Language has been straightened wherever necessary, and typographical errors have been removed. Some footnotes of the old edition have been expanded, and some new ones have been added. -- J.D.S.

Preface to the Original Work

The present work is an abridgment, made by the researcher and compiler of his original 1995 three volume treatise. It presents in a compressed form the leading doctrines of that work, so far as they are necessary to form a complete understanding of the actual history of New Deal legislation and its connection to the commerce clause of the Constitution of the United States. The object of the work is to give an account, in a short but comprehensive manner, of the most important events which had taken place in the country during the presidency of Franklin Delano Roosevelt.

The importance of the subject will hardly be doubted by any individual, who has recently reflected upon the nature and the importance of the Constitution in securing their liberties and freedoms. I regret that this work has not fallen into prominent hands, with more prestige to bring it before the American public.

Imperfect as this work may seem to more intellectual minds it has been attended with a degree of unfaltering labor, immense research and personal sacrifice. Many of the research materials used lay scattered throughout the universities and law libraries of this great Nation; among obscure public documents; the National Archives and Library of Congress; and from private journals, all which required an exhausting diligence to master their contents.

In dismissing the work, I cannot but solicit the indulgence of the public for its omissions and deficiencies. With more time it might have been made more exact. Such as it is, it may not be wholly useless, as a means of stimulating younger minds to a more thorough review of the whole subject; and of impressing upon America's sons and daughters the history of events which have a direct correlation to their continued pursuit of life, liberty and happiness.

January 2010.

"What the people really want they generally get. The same constitution which serves as a shield to protect the rights of the people will now be used as the sword for their own destruction." United States Supreme Court Chief Justice Charles Evans Hughes, 1937.

Table of Contents

"Of all the habits and dispositions which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars." George Washington's Farewell Address to the People of the United States.

INTRODUCTION

"If in the opinion of the people, distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." George Washington.

Security Number is Tattooed

Leon Roofener, 45-year-old building engineer for a Memphis theatre, is almost certain he will not lose his Social Security Act number. He has it tattooed on his left arm.
Nashville Banner, January 13, 1937

"WE HAVE THEM NOW!" a smiling Franklin Delano Roosevelt told the Committee of Seven[1] in January, 1937 after being informed that 22 million federal licenses to engage in interstate commerce had been issued to employees across the United States. For four long years Roosevelt and his Brain Trust worked diligently to achieve the president's vision of an all-powerful centralized government. The seedling that was planted in

---

1 The origin of the Committee of Seven is discussed in Chapter 11 – The "Great Secret."

America's political soil in 1933 had taken root and this tree was finally starting to bear fruit. Roosevelt's fruit of dulocracy was ripe and ready for the harvest.

Dulocracy in America, Book One: The Commerce "Claws" is in no sense a biography of President Franklin Roosevelt. It rather sets out some of the legal history behind his New Deal legislation and how these programs were utilized in the United States, at both the state and federal levels. The story is one of subterfuge and apostasy. It illustrates how the opportunists in government have worked diligently to create a scheme for relieving an uninformed citizenry of their inherent and constitutionally secured rights, through a process that has been evolving for over one hundred years. In the first half of the twentieth century, the citizenry by clearly abandoning their individual responsibilities to their posterity, aided in the transformation of this nation from a constitutional democracy in republican form to a cleverly cloaked socialistic oligarchy.[2] What was conceived as a nation of confederated sovereign states united by and under the Constitution as the result of the direct and deliberate act of the duly authorized representatives of a once free and self-regulating People, metamorphosed into a collective endeavor pointed to the management of a large population under principles legally associated with mass peonage; the citizenry being converted into little more than commodities or resources, to be consumed and controlled for the purpose of promoting a socialistic concept of utopia founded on a hopelessly insolvent welfare state. The saddest part of the story is that the people, by active counter-revolutionary endeavor or by indolent acquiescence have, with the rarest exceptions, both promoted and enforced upon their neighbors, the values and norms of this usurpation system.

In attempting to understand the relationships of the different materials presented in The Commerce "Claws," it is important to understand the following:

1. The form of the government in the United States is expressed in a written constitution. A *constitution* is a form of rules by which the members of a society agree to be governed. The persons forming an association draft a set of rules setting forth the objects of the association declaring what officers it shall have, and prescribing the powers and duties of each, and the manner of conducting its operations. So the rules adopted by the people of a state or nation for their government, are called the constitution. They are in the nature of articles of agreement by which the people mutually agree to be governed.

---

[2] An oligarchy is a form of government in which power effectively rests with a small elite segment of society.

INTRODUCTION

The object of a constitution is two-fold. It is intended, first to guard the rights and liberties of the people against infringement by those entrusted with the powers of government. It points out the rights and privileges of the people, and prescribes the powers and duties of the principal officers of the government; so that it may be known when they transcend their powers, or neglect their duties: and, by limiting their terms of office, it secures to the people the right of displacing, at stated periods, those who are unfaithful to their trust, by electing others in their stead.

2. The laws (statutes) of the various states of the Union are passed under the sovereign authority of the several state legislatures. The state constitutions have been considered by both the federal judiciary and the courts of the various states to be declarations of "limitations of power" placed by a sovereign people upon the government they created as their own free and voluntary act. It is clear, to any legitimate thinker, that while the state may theoretically possess unlimited power to provide for its own self-preservation, it cannot, by any legally proper means, hold any greater power than any one of the people who comprise the least common denominator of the political power that created it. In other words, the state cannot properly exercise its "police powers" in excess of the limitations express, or of necessity implied, in its respective constitution. The federal government, on the other hand, is a creature constructed upon the basis of "granted powers." These powers are expressly stated in the Constitution and are conclusive evidence of the extent of the power possessed by the federal organism. If the Constitution does not evidence a power expressly, or by necessary implication, where such is allowed by the language of that instrument, then that power does not legally exist.

The statutes passed by Congress are the law of the land and inasmuch as they are not repugnant to the principles of the Constitution, but are passed, or made, in pursuance thereto, are the supreme Law of the Land. So it is with treaties. But, no law or treaty may be of legal force if it operates in excess, or contravention of the Constitution, for to do so would be to violate the national common law. Therefore, all statutes must pass the test of consistency with the Constitution.

3. Among the powers granted Congress, perhaps the greatest of all is the power to control interstate commerce. Virtually all statutes passed by Congress since the mid 1930's hinge upon the "commerce clause" and the "necessary and proper" clause of the Constitution. It is through the commerce clause that Congress claims jurisdiction over the U.S. citizen. However, the only way such a process can be "legally" binding is by first converting the Citizenry from their private and individual capacities into that of commercial agents of government. Voluntarily participating in schemes, i.e. federal entitlement programs, licenses, etc. which effectively constitutes the government as one's guardian provides the needed “legal

magic" to allow the regulatory laws of the government to directly affect said person. For example, in 1936, the Social Security number was originally issued as a federal license to engage in interstate commerce.[3] By use of the number the holder is presumed to be a "person" who is engaged in congressionally controlled and regulated interstate business. By 1940, the number had evolved from a license to engage in commerce into an additional pledge of surety for the national debt.

Unfortunately, the people apparently never seriously considered the cunning of Congress, nor the declarations of the Supreme Court when it, on several occasions, has stated that no vested rights exist in any entitlement program, including Social Security.[4] So we see liberty under God traded for the bowl of sour pottage. Sweet in the mouth, yet bitter in the belly.

J.D. SWEENEY

---

3 See Chapter 11 – The "Great Secret."

4 *Flemming v. Nester*, 363 U.S. 603 (1960). The Court ruled that there is no contractual right to receive Social Security benefits. Speaking for the Court, Justice John Harlan said: "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision of the Act."

LET'S MAKE A "NEW DEAL"

"Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap - let it be taught in schools, in seminaries, and in colleges; - let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation." Abraham Lincoln, January 27, 1838.

This country has had its share of recessions and depressions. The people and the government weathered these economic storms without resorting to extraordinary remedies. Somehow the "Great Depression" was perceived differently than the others this nation had endured.

During the early 1930's, factories, mines, and mills throughout the country had to be shut down. Stock brokerage and investment houses closed or failed, causing serious losses to their customers. Homes and farms were being foreclosed. Unemployment became widespread. Inaction by the federal government added to the discontent of the people. Strikes were reported from all parts of the country. The Capitol became the Mecca of thousands of unemployed who came to Washington to voice their discontent with the government.

The legislatures of many states took drastic steps to remedy the situation existing in their respective states, but the people were not satisfied

with the results and instead demanded a "savior." Such was the state of affairs of the country when on Saturday, March 4, 1933, a day that was cloudy and cold Franklin Roosevelt became the thirty-second President of the United States. Over 1,000,000 people crowded on the grounds of the Capitol to watch Roosevelt take the oath of office “to protect and defend the Constitution.” Over the vast multitude here hung another cloud - a cloud of worry and despair, because of the economic outlook for the country.

Roosevelt stood on the main steps of the Capitol building as Charles Evans Hughes, Chief Justice of the Supreme Court of the United States,[1] administered the oath of office to the president elect which reads: *I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.*

As the Chief Justice finished Roosevelt answered in a clear voice "I DO." Then facing the great multitude, the new President of the United States delivered his inaugural address. In his inauguration address, Roosevelt blamed the economic crisis on bankers and financiers, the quest for profit, and the self-interest basis of capitalism. Roosevelt reassured the nation that "the only thing we have to fear is fear itself." He proposed a New Deal for the people of the United States and outlined his plan to expand the power of the executive branch to achieve his legislative objectives and ease the effects of the Great Depression.

After his address, Roosevelt departed from the Capitol and went to the White House where the members of his cabinet[2] which included nine men and one woman were sworn in the by Justice Benjamin Cardozo in the Oval Office. Never before was the White House the scene of the swearing in of the cabinet. Roosevelt told the gathering that he was breaking a precedent: "It is my intention to inaugurate precedents like this from time to time," he laughed. Everywhere Roosevelt was hailed with unprecedented applause. Newspapers began referring to Roosevelt as, “the darling of destiny, the Messiah of American's tomorrow.” However, four years later with growing criticism to his programs and unfettered power,

---

[1] The members of the Supreme Court when Roosevelt took office included the following Justices: Chief Justice Charles Evans Hughes; Willis J. Van Devanter; Pierce Butler; James Clark McReynolds; George Sutherland; Harlan Fiske Stone; Louis Dembitz Brandeis; Benjamin N. Cardozo; Owen J. Roberts.

[2] Roosevelt's cabinet included the following: Timothy Hull - Secretary of State; William Woodlin - Secretary of the Treasury; George Dern - Secretary of War; Homer Cummings - Attorney General; James Farley - Postmaster General; Claude Swanson - Secretary of the Navy; Harold Ickes - Secretary of the Interior; Henry Wallace - Secretary of Agriculture; Daniel Roper - Secretary of Commerce; and Frances Perkins - Secretary of Labor, the nation's first woman Cabinet officer.

Roosevelt would deliver in May, 1937, his famous midnight radio address, in an attempt to quiet his critics and to debunk their claims that he (Roosevelt) was becoming an American dictator.

So Let it be Written, So Let it be Done.

Roosevelt's inaugural address was merely a prologue before the curtain rose upon the stirring drama of his first one hundred days in office. On March 5, 1933, Roosevelt summoned a special session of Congress beginning March 9. At 11 o'clock that same night Roosevelt issued a proclamation declaring a national emergency to exist, closing the banks and prohibiting the hoarding and exporting of gold bullion and currency.[3]

On March 9, Congress, gathering in special session, passed the National Banking Emergency Relief Act,[4] which gave the government the power to authorize the reopening of the closed banks which were ascertained to be in sound condition.

Then on March 10, Roosevelt sent his economy message to Congress. "For three long years," he said, "the federal government has been on the road toward bankruptcy. For the fiscal year of 1931 the deficit was $462,000,000. For the fiscal year of 1932 it was $2,472,000,000. For the fiscal year 1933 it will probably exceed $1,200,000,000. For the fiscal year 1934 based on appropriation bills passed by the last Congress and the estimated revenues, the deficit will probably exceed $1 billion unless immediate action is taken. Thus we shall have piled up an accumulated deficit of $5 billion." Then Roosevelt warned: "Too often in recent history liberal governments have been wrecked on the rocks of loose fiscal policy. We must avoid this danger."

Supposedly, here was the man who would put an end to the deficits. Roosevelt declared these deficits had contributed to the recent collapse of our banking structure and has added to the ranks of the unemployed. He stated, “our government's house is not in order, and for many reasons no effective action has been taken to restore it to order." Then Roosevelt declared "the credit of the national government is imperiled." And then he asserted "the first step is to save it. National recovery depends upon it." The first step was a measure to cut payroll expenditures 25 percent. The second step was to authorize a bill providing for the biggest deficit of all - $3,300,000,000.

---

3 Proclamation 2039.

4 48 Stat. 1.

To provide immediate employment for about 500,000 people, Congress on March 31 passed the Civilian Conservation Corps Act,[5] establishing forest camps for the unemployed. Farmers received special attention when Roosevelt sent a message to Congress calling for the passage of the Agricultural Adjustment Act. The Act was approved by Congress on May 12, 1933.[6] The Agricultural Adjustment Act or AAA was intended to establish and maintain a proper balance between the production and consumption of agricultural commodities, increase the agricultural purchasing power, provide emergency relief to farmers.

On April 20, the gold standard was suspended when Roosevelt by executive order imposed an embargo on all gold exports.[7] Then on May 12, both houses adopted the Thomas amendment to the farm bill.[8] The amendment gave Roosevelt power to (a) provide for an expansion of credit by arranging for the purchase of $3 billion of Government bonds by the Federal Reserve Banks; (b) to issue $3 billion in paper currency; (c) to authorize an unlimited coinage of silver at the ratio of gold to be fixed by Roosevelt in his own discretion; and (d) to reduce the gold content of the dollar by not more than fifty percent.

On June 5, Public Resolution No. 10 was approved. This resolution in substance provided that: (a) it is the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in markets and in the payment of debt; (b) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; (c) all coins and currencies of the United States (including Federal Reserve notes and circulating notes of the Federal Reserve banks and national banking associations), heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues.

Then came the "Great Charter of Free Business," the National Industrial Recovery Act[9] or NIRA. It was rushed through Congress with little or no debate. Few members of Congress had even the foggiest idea what it was, save that it was what Roosevelt wanted. The National Industrial Recovery Act was approved June 16, 1933. The purpose of the Act was contained in Section 1 of Title I of the Act, which read:

---

5 48 Stat. 22.

6 48 Stat. 31.

7 Executive Order 6111.

8 48 Stat. 51.

9 Act of June 16, 1933, c. 90, 48 Stat. 195.

> A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist.

The NIRA authorized the expenditure of $3.3 billion for public works. Upon signing the National Industrial Recovery Act, Roosevelt said: "History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress. It represents a supreme effort to stabilize for all time the many factors which make for the posterity of the nation, and the preservation of American standards."

In a radio address delivered July 31, the chief of the legal division of the NIRA said, "I wonder how many of the fortunate people of this country understand that the long-discussed revolution[10] is actually under way in the United States. There is no need to prophesy. It is here. It is in progress. In this favored land of ours we are attempting possibly the greatest experiment in history."

On August 28, Roosevelt issued an executive order prohibiting the hoarding, exporting and earmarking of gold coin and currency,[11] and on December 28, the Secretary of the Treasury issued an order requiring the delivery to the Treasury of the United States of all gold coin and gold certificates.

On June 27, 1934, in order to aid employees of rail carriers, Congress passed the Railroad Retirement Act.[12] This Act established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act.

The first phase of Roosevelt's New Deal was complete. The banks were open. Business was moving back into activity, *the country was saved*. People everywhere were talking about the coming Roosevelt boom. The whole nation sat quietly around their radios to hear the voice of Roosevelt explain to them in simple terms the meaning of all the great measures he was driving through Congress. Several times a week, the White House press corps gathered around Roosevelt's desk, to hear his lectures on economic theory. They left these lectures saying: "What a man!"

---

[10] The correct term used by the chief of the recovery administration should be "counter-revolution." This government is a revolutionary government, born while under a condition of war. Roosevelt through his counter-revolutionary ideas and so-called economic and social experiments, sought to destroy the very foundation of our revolutionary government.

[11] Executive Order 6260.

[12] 48 Stat. 1283.

All that was now left to do was to let the people assimilate themselves into this new economic order. Congress had given Roosevelt vast emergency powers and had put an enormous amount of taxpayer money into his hands to be spent in any way he desired which led to an ever increasing federal deficit. It is interesting to note that while campaigning for the presidency in 1932, Roosevelt promised to balance the federal budget during his first term in office. In his acceptance speech during the democratic convention, Roosevelt promised: "I proposed to you, my friends, that government will be made solvent and that the example will be set by the President of the United States."[13] During the campaign he frequently denounced President Hoover's failures to restore prosperity and constantly ridiculed Hoover's huge deficits. In a speech in Sioux City, Iowa on September 29, 1932, Roosevelt said:

> We are attempting too many functions and we need simplification of what the federal government is giving the people. I accuse the present administration of being the greatest spending administration in peace times in all our history – one which has piled bureau on bureau, commission on commission, and has failed to anticipate the dire needs or reduce earning power of the people. Bureaus and bureaucrats have been retained at the expense of the taxpayer."

And in Brooklyn, New York on November 4, 1932, he declared:

> The people of America demand a reduction of Federal expenditure. It can be accomplished not only by reducing the expenditures of existing departments, but it can be done by abolishing many useless commissions, bureaus and functions, and it can be done by consolidating many activities of the government.

While campaigning in Pittsburg on October 19, 1932, Roosevelt referring to Hoover's unsound fiscal policies said Hoover's government spending was "the most reckless and extravagant pace I have been able to discover in the statistical record of any peace-time government anywhere, any time."

So what impact did Roosevelt's first term in office have on the economic health of the nation? Did he keep his promise to reduce federal spending and the size of the federal government? Let's take a look at the facts:

---

[13] Acceptance Speech, July 2, 1932.

In March, 1933 there were 12,183,000[14] unemployed workers receiving federal relief benefits. By January, 1936 over 19,000,000[15] unemployed workers were receiving relief benefits. In July, 1933, there were 3,908,068 families and individuals on federal relief. By March, 1936, the number had risen to 5,300,000.[16]

From March 4, 1933, to March 31, 1936, the Roosevelt administration created more than fifty additional bureaus, commissions, committees, boards or governmental agencies. From June 30, 1932, to June 1936, there was an increase of 241,000 in the number of employees in the Executive Branch, an increase from 19.9% to 39.5%.

In the last full fiscal year (1932) of President Hoover's administration the federal government spent $5,153,644,895. By 1936, federal spending was $8,879,798,000, an increase of 72%.[17] From 1929 to 1933, under President Hoover, the federal deficit increased $3.5 billion. From 1933 to 1936, under President Roosevelt, the federal deficit increased $12.8 billion, an increase of 365%.[18]

When analyzing the performance during his first term in office, Franklin Roosevelt reveals his grand vision for the country: A bigger, more centralized federal government with absolute control and authority over the lives of the American people. A dulocracy in America begins to emerge. A far cry from the 1932 Democratic Platform which Roosevelt ran on and immediately abandoned after his election. The platform read in part:

> "In this time of unprecedented economic and social distress the Democratic Party declares its conviction that the chief causes of this condition were the disastrous policies pursued by our government. … We advocate an immediate and drastic reduction of government expenditures by abolishing useless commissions and offices, consolidating departments and bureaus, and eliminating extravagance, to accomplish a savings of not less than 25% in the cost of federal government."

---

14 The American Federation of Labor.

15 House of Representatives hearings on First Deficiency Bill, 1936.

16 Federal Emergency Relief Administration reports, 1936.

17 House Hearings on Revenue Act of 1936.

18 It is interesting to note the very last Act passed by the Congress and signed by Roosevelt before the summer adjournment of the Congress was the Act of June 16, 1934, entitled, 'An Act to establish a uniform system of bankruptcy throughout the United States.'

THE NEW DEAL AND THE COMMERCE CLAUSE

"We hold that our loyalty is due solely to the American Republic and to all our public servants exactly in proportion as they efficiently serve the Republic. Every man who parrots the cry of 'stand by the President' without adding the proviso 'so far as he serves the Republic' takes an attitude as essentially unmanly as that of any Stuart royalist who championed the doctrine that the king could do no wrong. No self-respecting and intelligent freeman could take such an attitude." Theodore Roosevelt, 1918.

The Roosevelt administration came into power "confronted with an emergency more serious than war" and convinced that "there must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs."[1] If the administration was to adopt its social and economic programs, it would be necessary to utilize the commerce clause contained in the Constitution. No other constitutional sanction was available for such New Deal legislation as the National Industrial Recovery Act, the Agricultural Adjustment Act, the Railroad Retirement Act and the Social Security Act, for they could not be enforced without valid law to support and sustain them.

---

1 *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

CHAPTER 3

In 1930, Franklin Roosevelt, as governor of New York, expressing his view of the Constitution and the economic condition of the country said:

> The Constitution of the United States gives Congress no power to legislate in the matter of a great number of vital problems of government, such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and a dozen other important features. Washington must never be permitted to interfere in these avenues of our affairs.

Three years later, Roosevelt, as the newly-elected President of the United States, was presented by his "Brain Trust"[2] with a catchy slogan and the blueprint of a program which in the succeeding years would begin the transformation of the nation into a socialistic oligarchy. Roosevelt accepted this program, deserting the principles he enunciated so clearly three years earlier. The program came from a book published by Stuart Chase in 1932, entitled, *A New Deal*, outlining the ideal government. Chase wrote:

> Best of all, the new regime would have the clearest idea of what an economic system was for. The sixteen methods of becoming wealthy would be proscribed - by firing squad if necessary - ceasing to plague and disrupt the orderly processes of production and distribution. The whole vicious pecuniary complex would collapse as it has in Russia. Money making as a career would no more occur to a respectable young man than burglary, forgery or embezzlement.[3]

To justify the validity of the New Deal legislation, several theories were advanced by the administration in 1933 in finding the power needed for Roosevelt to implement his so-called economic and social reforms under the commerce clause of the Constitution. This chapter will examine four theories.

---

[2] Brain Trust began as a term for a group of close advisors to a political candidate or incumbent, prized for their expertise in particular fields. The term is most associated with the group of advisors to Franklin Roosevelt during his presidential administration.

[3] Stuart Chase was named to the National Resources Commission in 1933 where he is credited with authoring Roosevelt's order banning ownership of gold by U.S. citizens. Chase moved steadily upward in the New Deal hierarchy. He served successively on the Securities and Exchanged Commission, the Tennessee Valley Authority, and finally settled in UNESCO, the United Nations Educational, Scientific, and Cultural Organization.

THEORY ONE

Whether a certain activity is subject to the commerce clause is a question of economics.

To Roosevelt, the term "commerce" did not have a precise and static meaning. The authors of the New Deal insisted that any constitutional opinion as to the scope of the commerce clause in a particular situation must run the gauntlet of an economic justification on the basis of the factual background.

Congress, in passing the Agricultural Adjustment Act[4] and the National Industrial Recovery Act,[5] incorporated into these statutes a Declaration of Emergency and a Declaration of Policy in an attempt to connect the economic depression in agriculture and business with the interstate commerce clause. The Declaration of Policy of the National Industrial Relief Act reads: “A national emergency, productive of widespread unemployment and disorganization of industry, which burdens interstate commerce, is hereby declared to exist.” In the Act nothing was left to conjecture or implication. It was assumed by the administration that this change in legislative technique afforded a much more effective device than the old-fashioned preamble. However, it should be noted, preambles are not properly speaking, parts of acts. They do not *exproprio vigore* (make the law) and in themselves have no constraining force upon the citizen.[6]

THEORY TWO

The legal effect of the emergency.

The New Deal strategists did not contend that Congress had an "emergency" power over commerce in the sense that constitutional limitations are suspended or that by virtue of the emergency the federal government has a true police power over all business activity. They reasoned the only effect of an "emergency," in the sense that the so-called economic depression was an emergency, is that it presented a situation in which interstate commerce was endangered by activities which in normal times would not seriously affect it. The administration reasoned Congress; with Roosevelt leading the way could then reach out and control those activities under its commerce power because of their effect on interstate commerce.

---

4 48 Stat. 31.

5 48 Stat. 195.

6 Black, *Interpretation of* Laws (2d ed.), p. 254.

THEORY THREE

The commerce clause is not limited to the regulation of the movement of commodities or persons or information across state lines, but extends to the regulation of intrastate activities whenever such regulation is necessary for the effective control of interstate activity.

The New Deal strategists felt that when intrastate commerce is intermingled with interstate commerce (over which Congress exercises its regulatory power) the effective regulation of the latter requires regulation of the former. The strategists insisted that when intrastate commerce affects or burdens interstate commerce, Congress has the power to regulate both intrastate and interstate commerce. The New Deal strategists emphasized the depression caused businesses of the nation to become a single integrated whole. The prosperity of basic industry was dependent on every other industry if the nation was to pull free from its economic and social problems.

The administration recognized that Congress could regulate purely intrastate activities which might burden and affect interstate commerce by exerting an adverse influence on the price of commodities which move in interstate commerce. The administration reasoned since the depression seriously obstructed the flow of commodities in interstate commerce, measures could be initiated in order to free business from the burdens of the depression and regulations could be adopted which would protect and foster interstate commerce.

THEORY FOUR

The "Current of Commerce" doctrine.

The administration felt the dicta contained in *Swift & Co. v. United States*,[7] had a new significance under the so-called "emergency" conditions of 1933, which enabled them to adopt an expanded interpretation of the commerce clause. In the *Swift* case the Supreme Court declared: "Commerce among the states is not a technical legal conception, but a practical one drawn for the course of business. The plan may make the parts unlawful and bring the constituent acts, although not in themselves interstate commerce, within the commerce clause." In *Stafford v. Wallace*,[8] the Court said of the *Swift* case:

---

[7] 196 U.S. 375 (1905).

[8] 258 U.S. 495 (1921).

> It was the inevitable recognition of the great central fact that such 'streams of commerce' from one part of the country to another which are ever flowing are in their very essence the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect to such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilitates when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.[9]

This "current" or "stream of commerce" doctrine looks to the subject of the regulation as a whole, and not to the individual transgressor's separate acts. There are many transactions that may be subject both to state and federal regulations, the administration declared. Thus intrastate railroad rates may be regulated by the states but when intrastate rates affect interstate commerce, Congress may regulate them.[10] The states may both regulate such sales and tax the grain which is the subject of the sale, and yet detailed regulation by Congress of all transactions on the grain exchange had been upheld. The states may still exercise their police power over intrastate acts which have an interstate effect so long as their regulations are not inconsistent with those of the federal government or contrary to the commerce clause.

The commerce clause was the only clear power granted to Congress to regulate trade or business. Because of the economic conditions which existed in the nation during the 1930s, the administration concluded Congress, under the commerce clause, would have ample power to combat the destructive economic forces that "have broken down the orderly exchange of commodities" or have affected, burdened or obstructed the "normal currents of commerce." To the Roosevelt administration, a new concept of commerce power began to emerge in 1933.

Having concluded that Congress had full authority under the commerce clause to regulate all business activity, it is little wonder that on January 3, 1934, during his State of the Union address, Roosevelt told a jubilant Congress that the New Deal was here to stay. Roosevelt's message was greeted with enthusiasm both in Congress and in the public. It was apparent to both parties in Congress that Roosevelt's State of the Union address would greatly strengthen his prestige and his hold on Congress, allowing him to continue without question his economic, social and

---

9 *Id*. at 518-519.

10 The Shreveport Case, 234 U.S. 342 (1914).

monetary reforms. The Democrats declared Roosevelt had won the country by his speech. The reaction of the people to Roosevelt's legislative programs to be presented later, leaders of the party asserted, would assure quick congressional approval.

Across the Atlantic Ocean, British press reaction to Roosevelt's message painted a somewhat different view of the events unfolding in America. Leading newspapers interpreted his message to Congress as proof of Roosevelt's desire to embark upon a long-term policy of reconstructing the American economic, social and industrial systems.

Some British papers expressed doubt as to whether Roosevelt could attain these objectives along the lines indicated in his speech. All agreed, however, that Roosevelt still had a practically unanimous country backing him. The *Times of London* closed its reaction to Roosevelt's message to Congress by concluding:

> In short, can America, with its traditions of highly individualistic, not to say lawless, private enterprise in industry and its great lack of a trained and professional civil service, be induced to accept the degree of State control over the social and economic structure which President Roosevelt clearly proposes without the risk of paralyzing its capacity to achieve recovery on the existing capitalistic lines? In the light of this message, his long-run policy seems likely to carry his administration much further in the direction of socialism than most Americans have yet begun to realize.

THE COURT'S INTERPRETATION OF THE COMMERCE CLAUSE BEFORE 1937

"The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam in the whole volume of human nature by the hand of the Divinity itself, and can never be erased or obscured by mortal power." Alexander Hamilton, 1775.

Before continuing further, and before the definition of the commerce clause as interpreted by the Roosevelt administration and eventually adopted by the courts can be fully understood, a thorough review of the interpretation of the commerce clause by the courts prior to Roosevelt's arrival in office seems to be not only proper but essential.

The commerce clause of the Constitution of the United States reads: The Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. Article I, Section 8, para. 3. The section concludes:

> The Congress shall have power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

> Government of the United States, or in any Department, or Officer thereof. Article I, Section 8, para. 18.

The Commerce Clause in the Constitution

Prior to the constitutional convention of 1787, which framed the Constitution, commerce among the states was very simple, and other than that carried on in teams and wagons were carried on by navigation. There was comparatively little discussion in the debates of the convention or in the Federalist Papers concerning the federal control over interstate commerce. It was regarded as essentially supplemental to the control over foreign commerce, and was granted so as to make the control over foreign commerce effective. It was said by Mr. James Madison,[1] that without this supplemental provision the great and essential power of regulating foreign commerce would have been incomplete and ineffectual, and that with state control of interstate commerce, ways would be found to load the articles of import and export during the passage through their jurisdictions with duties, which would fall on the makers of the latter and the consumers of the former.

The far-reaching importance of this federal control over commerce among the states was not and could not be foreseen. It only came to be realized in the course of years, as the commercial development of the country demanded a judicial construction of the federal power in harmony with the requirements of such commerce. The Supreme Court in 1895[2] in affirming the supremacy of the federal power in interstate commerce, said:

> Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad trains and steamships. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce, unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

---

1 *The Federalis Paperst*, No. 42.

2 *In re Debs*, 158 U.S. 564 (1895).

The Case of Gibbons v. Ogden

The judicial construction of the commerce clause begins in 1824 with the opinion of Chief Justice Marshall[3] in *Gibbons vs. Ogden*,[4] wherein a grant of the state of New York for the exclusive right to navigate the waters of New York with boats propelled by fire or steam was held void as repugnant to the commerce clause of the Constitution, so far as the act prohibited vessels licensed by the laws of the United States from carrying on the coast trade by navigating the said waters by fire or steam.

The broad and comprehensive construction of the term "commerce" in this opinion is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority. *Commerce is more than traffic; it includes intercourse*. The power to regulate is the power to prescribe the rules by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; it may be exercised to its utmost extent and acknowledges no limitations other than as prescribed in the Constitution. The power over commerce with foreign nations and among the several States, said the Court, is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as is found in the Constitution of the United States.

What is Commerce?

The term "commerce" is not defined in the Constitution, but its meaning has been determined by the process of judicial inclusion and exclusion on the broad and comprehensive basis laid down in *Gibbons v. Ogden*. Commerce, it was there said, is not traffic alone, it is intercourse. "It described the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the *Pensacola Telegraph Company* case[5] the Court said that since the case of *Gibbons v. Ogden* it had never been doubted that commercial intercourse was an element which comes within the power of regulation by

---

[3] John Marshall was Chief Justice serving from February 4, 1801, until his death in 1835. Marshall dominated the Court for over three decades and played a significant role in the development of the American legal system. Most notably, he established that the courts are entitled to exercise judicial review, the power to strike down laws that violate the Constitution. Marshall has been credited with cementing the position of the judiciary as an independent and influential branch of government.

[4] 22 U.S. 1 (1824).

[5] 96 U.S. 1 (1877).

Congress, and that the power thus granted was not confined to the *instrumentalities of commerce* known or in use when the Constitution was adopted, but kept pace with the progress of the country, adapting themselves to the new developments of time and circumstances

Interstate commerce as distinguished from domestic commerce includes traffic between points in the same state, but which in transit is carried through another state. Commerce includes navigation, and the power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the rivers of the United States which are accessible from a state other than those in which they lie.[6]

What is Not Commerce?

While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental or even in one sense are essential to interstate commercial intercourse. Though Congress may regulate the relation of master and servant in matters of interstate commerce, that power cannot be extended to include the regulation of master and servant as to things which are not interstate commerce.[7]

The business of a manufacturing company, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce.[8] Commerce succeeds manufacture and is not part of it, and the relation of the manufacturer, in such a case, to interstate and foreign commerce is incidental and indirect, and the business therefore is subject only to state control.

Power of Congress to Regulate Intrastate Commerce and Matters that are not Commerce

In the light of the foregoing review of the elements and interpretation of the commerce clause by the Supreme Court prior to 1937, the task facing President Roosevelt and his Brain Trust was how a partnership could be established between the federal government and business in which the federal government would be the senior and, to the extent that it thinks best, the dominating and controlling partner if the Court decided to rule against the New Deal legislation? They concluded unless previous judicial

---

6 *Gilman v. Philadelphia*, 3 Wall. 713, 724 (1865).

7 *Howard v. Illinois R.R. Co*., 207 U.S. 463, 496. (1908).

8 *Kidd v. Pearson*, 128 U.S. 1 (1888).

interpretation of the commerce clause were expanded, Congress would be constitutionally powerless to fix maximum hours or minimum wages, to prescribe labor conditions, or even establish for the people, as Roosevelt pledged in his State of the Union Address,[9] a program of "security against the major hazards and vicissitudes of life." Even if Congress could regulate all activities in interstate commerce, Congress could not arbitrarily mandate some regulation which deprives an individual the right to acquire property including the right to acquire property by labor. Now the right to fix the price of one's goods or labor is a part of one's liberty of contract.[10] One cannot be deprived of this liberty, says the Court - that is, have his prices fixed or labor regulated by governmental authority - unless his business or activity is "*affected with a public interest.*"[11] A person could voluntarily enter into an agreement which allows for the regulation of his labor or business activity, thereby converting his right to labor into a privileged activity affected with a public interest, or as this term is known today, an activity "*effectively connected with a trade or business*" in interstate commerce.

It seems unmistakable then, that, despite the effort by the Roosevelt administration to circumvent the plain prescriptions of the Constitution as expounded by the Supreme Court, no fundamental change in the economic or social system of the 1930s, no far-reaching alteration in the relations of government to business or to individual citizens, could be brought about without a fundamental change in the Constitution or the Supreme Court. The Roosevelt Brain Trust concluded if the Constitution could not be amended, or the construction put upon the commerce clause, then a vital change in the legal relationship of the federal government to business and the individual would be needed.

---

9 January 4, 1935.

10 See Chapter 8.

11 A commercial venture or an occupation that has become subject to governmental regulation.

RAILROAD RETIREMENT ACT CASE

Railroad Retirement Board v. Alton Railroad Company et al.
295 U.S. 330 (1935)

The first significant New Deal Act to come before the Supreme Court was the Railroad Retirement Act of 1934.[1] The Act was passed by the Congress, to promote economy and improve employee morale and promote the efficiency and safety of interstate transportation. The Act imposed a compulsory pension scheme on the entire industry. It established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. It also provided for the creation of a fund into which contributions from employers and employees were paid. These funds were raised by compulsory contributions, in specific amounts, of both employers and employees, each carrier to pay double the total payable by its employees.

---

1 48 Stat. 1283.

The Retirement Act's constitutionality was challenged by 137 railroad companies on the grounds that it violated the due process clause of the Fifth Amendment and that it breached the restrictions imposed by the Commerce Clause.

On May 6, 1935, the Supreme Court of the United States handed down its judgment in *Railroad Retirement Board et al. V. Alton Railroad Company et al*.[2] The Court by a majority of one, held the act unconstitutional, on two grounds; *first*, that certain of its provisions violate the due process clause of the Fifth Amendment, and being inseparable, condemn the whole act; and *second*, the act was not in purpose or effect a regulation of interstate commerce, under the Constitution. Justice Roberts delivered the majority opinion for the Court.

The first feature of the act which was considered by Justice Roberts was the provision affecting former employees. The act made eligible for pensions all employees who were in carrier service within one year prior to its passage, irrespective of future employment. It was agreed in both the majority and dissenting opinions that this provision was arbitrary. General features, in relation to the Fifth Amendment, were also considered by the Court. First among these, was the unitary nature of the system, which treated all railroad as a single carrier. This provision of the act if found valid, would result in the solvent carriers furnishing the money necessary to meet the demands of the system upon insolvent carriers. In other words, all the future employees of any railroad which discontinues operation must be paid their pensions by the surviving railroads. This underlying basis of the system, through its imposition of unequal burdens on various carriers, was also thought to be unconstitutional.

Finally, the case was then considered from the standpoint of the power of Congress to regulate interstate commerce. Justice Roberts said:

> It results from what has now been said that the Act is invalid because several of its inseparable provisions contravene the due-process-of-law clause of the Fifth Amendment. We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could survive the loss of the unconstitutional features which we have discussed. The Act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.[3]

The Court finally concluded that the act in its fundamental purpose and effect was a measure designed to promote the social security of retired

---

2 295 U.S. 330 (1935)

3 *Id*. at 362.

employees, which is not included within the powers delegated to Congress to regulate interstate commerce.

> In supporting the Act the petitioners constantly refer to such phrases as 'old age security,' 'assurance of old age security,' 'improvement of employee morale and efficiency through providing definite assurance of old age security,' 'assurance of old age support,' 'mind at ease,' and 'fear of old age dependency.' The theory is that one who has an assurance against future dependency will do his work more cheerfully and therefore more efficiently. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power.[4]

Justice Roberts finally concludes:

> We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the Act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency.[5]

What Affect Did the Railroad Retirement Act Case Have on Roosevelt, the Congress and the Public?

After the Supreme Court declared the Railroad Retirement Act unconstitutional, it raised serious doubts in the Roosevelt administration

---

4 *Id*. at 367-68.

5 *Id*. at 374.

and Congress as to the validity of the Social Security Bill[6] pending in Congress at the time.

The anxiety of administration leaders in the Senate over the implications in the decision was reflected in a request by Arkansas Senator Joseph T. Robinson,[7] for a thorough re-examination of the Social Security Bill by the Finance Committee.

Legal advisers of the Finance Committee reported to Roosevelt, that they interpreted the Railroad Retirement Act decision by the Supreme Court as a "danger signal" involving not only social security but also the National Industrial Recovery Act, the Agricultural Adjustment Act, and other New Deal legislation.

Senator Robert F. Wagner,[8] the author of the social security legislation, declared in the Senate that social welfare legislation must be enacted that would meet the test of the federal courts. Senator Wagner remarked:

> Of course, the word of the Court is the law, and as such is entitled to respect and obedience, but the United States Senate has never regarded it improper to inspect and comment upon the intrinsic validity of the decisions of the Supreme Court - whether they are consonant with a living law responsive to social needs and whether they are forced upon the court by the weight of existing precedent.
>
> As I read the majority opinion, it holds merely that under the interstate commerce clause, Congress has not the power to provide pensions for railway employees, the theory being that the retirement of superannuated workers has no effect upon the efficiency and flow of interstate commerce.
>
> The Court has never indicated that a tax for old-age pensions does not fall within the category of a public purpose; in fact, cases involving State systems have held that contrary. And no substantial limitations have ever been placed upon the spending power of Congress. Thus is seems clear that the old age pension plan contemplated by the Social Security Bill is constitutional.

---

6 The Social Security Bill was introduced in Congress on January 17, 1935. The bill was titled "The Economic Security Bill of 1935." After the Alton decision, several sections of the bill were revised in committee in order for it to comply with the Supreme Court's interpretation of the commerce and general welfare clauses in the Constitution.

7 Senator Robinson was a leading spokesman for President Roosevelt's New Deal legislation and his court packing plan in 1937.

8 Robert Ferdinand Wagner was a Democratic Senator from New York from 1927 until 1949.

CHAPTER 5

On May 9, 1935 the American Federation of Labor's executive council issued a statement, calling on Congress to propose a constitutional amendment, if necessary, to validate the social security legislation. William Green president of the American Federation of Labor, in delivering the statement said:

> The council was bitterly disappointed over the Supreme Court's decision that the railroad pension plan was unconstitutional. The minority opinion presents the situation in a constructive way. If the majority opinion is to control and we are faced with a situation where Congress is impotent to enact this type of legislation, then we'll have to get behind a constitutional amendment.

George Harrision, chairman of the Railway Labor executives Association and president of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Expressman and Station Employees, said:

> The decision represents one of the most reactionary decisions handed down by the Court and shows a total disregard of the social obligations of industry to its workers. It will be most difficult for Congress to enact any social legislation that requires employers' contributions and, therefore, it is a serious obstacle to the consummation of the whole New Deal program.
>
> Organized railway labor has long sought recognition for those workers who have contributed their lives in furnishing essential transportation service, and now, since it appears that this question is beyond the power of Congress, they will therefore of necessity be compelled to rely upon their economic strength to compel a fair and decent system of retirement benefits. In other words, "*if they won't give us what we want, we'll have to take it away from them.*"

Phil Ziegler, editor of the *Journal of the Brotherhood of Railway Mail Clerks*, declared:

> The Supreme Court's decision throws the railroad pension plan out of the window and with it probably goes the entire social security program of President Roosevelt. It is a tragedy that five aged gentleman can block the will of the people.

NATIONAL INDUSTRIAL RECOVERY ACT CASE

A.L.A. Schechter Poultry Corporation et al. v. United States
295 U.S. 495 (1935)

When President Roosevelt took office on March 4, 1933 he had major plans for governmental control of all industries. A number of different groups were organized to develop ideas and draft bills. After several months working on various bills, what emerged was the National Industrial Recovery Act (NIRA).[1]

The NIRA was the outgrowth of a belief by Roosevelt that in order to save our capitalistic system there was need for a unified governmental control to limit unrestrained competition and lend direction and form to our national effort to create and distribute the things of life. This control had to be exerted by the federal government, because the states had shown their innate incapability to deal with such a problem.

---

[1] The National Industrial Recovery Act (NIRA), was officially known as the Act of June 16, 1933, ch. 90, 48 Stat. 195.

CHAPTER 6

The National Industrial Recovery Act had three titles. Titles II and III dealt with public works and Title I with the nation's industrial structure. Under Title I, the president had the authority to approve codes of behavior drawn up by industrial groups, but in the event that there was no agreement within an industry over a code, the president was empowered to impose one. The Act also granted the president the authority to approve collective bargaining agreements between unions and business organizations and give these agreements legal effect. In summary, Title I was a break with the past on two fronts. First, it delegated an extraordinary grant of power to the executive branch. Second, it involved the federal government in an unprecedented manner in the nation's economy.

On May 27, 1935 the Supreme Court in a unanimous decision decided the National Industrial Recovery Act was unconstitutional in that it was an unlawful delegation to the president of legislative power and the control of wages and hours in New York poultry slaughter-houses was an attempted invasion of the field of *intrastate commerce*.

The case had arrived before the Supreme Court on a *writ of certiorari*.[2] It was the attempted enforcement of the code provisions that came before the Court.

The Schechter brothers and the A.L.A. Schechter Poultry Corporation were convicted in the Federal Court for the Eastern District of New York on 18 counts of an indictment charging violations of the "Live Poultry Code," and on an additional count for conspiracy to commit such violations. The violations included the sale of sick chickens, failure to comply with poultry inspection ordinances of the city, failure to make proper reports, sales to dealers who were without licenses required by the city, failure to comply with minimum wage and maximum hour provisions, and conspiracy to do the same. The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the Code, but reversed on two counts charging violation as to minimum wages and maximum hours of labor, on the ground that the latter were not within the regulatory power of Congress. On appeal to the Supreme Court it was contended; (1) that the code had been adopted pursuant to an unconstitutional delegation of legislative power; (2) that it attempted to regulate *intrastate* transactions which lay outside the power of Congress; and (3) that certain provisions of the code were repugnant to the "due process" clause of the Fourteenth Amendment.

The Supreme Court reversed the judgment so far as the Code had been upheld, and affirmed so far as the Code had been held invalid by the Circuit Court of Appeals. The opinion of the Court was written by Chief

---

[2] When the U.S. Supreme Court orders a lower court to transmit records for a case for which it will hear on appeal, it is done through a writ of certiorari.

Justice Hughes. In dealing with the questions raised as to the constitutional validity of the Code, Chief Justice Hughes states:

> We are told that the provisions of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary[3]

The Court turned their attention to the question of whether the transactions in question were in "*interstate commerce*." As to this, it was emphasized that the fact that almost all of the poultry coming into New York was sent from other states did not make the character of the defendant's transactions interstate commerce:

> Defendants held that poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.
>
> The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate

[3] 295 U.S. 485, 528, 529.

> commerce - where goods come to rest within a State temporarily and are later to go forward in interstate commerce - and with the regulations of transactions involved in that practical continuity of movement, are not applicable here.[4]

When considering the question whether the transactions "directly affect" interstate commerce so as to be subject to federal regulation, the Court observed that:

> The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations.[5]

Particular stress was placed on the fact that the wages and hours of those employed in the slaughter-house markets had no direct relation to interstate commerce. With respect to this the opinion states:

> The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce.[6]

In conclusion, the Court emphasized the limits of its province when it stated:

> It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power over the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself

---

4 *Id.* at 543.

5 *Id*. at 544.

6 *Id*. at 548-9.

establishes, between commerce 'among the several States' and the internal concerns of a State. …

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.

On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transactions which affect interstate commerce, only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.[7]

What Was Roosevelt's and Congressional Reaction to the Schechter Decision?

On May 31, 1935 Roosevelt held a White House press conference, to address his concern over the Court's refusal to allow the government to regulate nation-wide economic and social conditions in the United States. At this press conference Roosevelt stated the *Schechter* decision raised grave doubts as to the constitutionality of the Agricultural Adjustment Act as well as the pending Social Security Bill.

Roosevelt termed serious the Supreme Court's expressed view on the delegation of Congressional powers to the Executive, but said the greatest question revolved around its interpretation of governmental powers over interstate commerce. Those powers, he emphasized, "constituted the only weapon in the government's hands to fight conditions not even dreamed about 150 years ago."

Turning again and again to the implications of the decision, Roosevelt commented that not only business recovery efforts, but social security legislation had been jeopardized by the *Schechter* decision.

When asked if he had a plan, Roosevelt declined to answer, but stated if the Constitution made his federal program for regulating economic conditions impossible, the "Constitution must be changed."

Roosevelt said he considered the decision more important than any laid down in the lifetimes of those present. He compared the *Schechter* decision with the *Dred Scott*[8] decision, an important factor in the events that precipitated the Civil War.[9]

Roosevelt then picked up a copy of the text of the *Schechter* decision, and proceeded to analyze it part by part.

---

7 *Id*. at 549-51.

8 19 How. 393 (1857).

9 In 1937, Roosevelt led the charge in another war, his "war against the Supreme Court."

The most important phrase of the decision, said Roosevelt, was that relating to interstate commerce and the dictum that the government could not deal with any problem not directly interstate commerce.

The Supreme Court, Roosevelt said, had gone back to the *Knight* case,[10] which in 1895 set forth a thesis which in effect limited federal control over interstate commerce to goods in transit, with only a few minor exceptions.

The whole tendency over many years, Roosevelt stated, had been to view the interstate commerce clause in light of present day civilization, although it was written into the Constitution in the horse-and-buggy days of the eighteenth century.

There was hardly any interstate commerce in that period, Roosevelt pointed out, and virtually all communities were self-supporting to a degree impossible in modern civilization. All that the government feared was the possible growth of discrimination between States.

The clause was written in a day when there was no problem relating to unemployment, no wage problem as in the current differential between textile mills operating in New England and those in the South; when no social questions disturbed the United States and when care of public health on a national basis had never even been thought about, let alone discussed.

Roosevelt declared that the country was facing a great national nonpartisan issue; that over the next five years or ten years it must decide whether it would relegate to the States control over national economic conditions and over social and working conditions, regardless of whether those conditions had a definite bearing on conditions outside of the different States.

Public Reaction to the Schechter Decision

After the *Schechter* decision, many in Congress publicly expressed their anger with the Supreme Court. Several Democratic members of Congress suggested a constitutional amendment in order to validate Roosevelt's New Deal legislation. Republican house members said they would gladly accept the issue and fight for keeping the Constitution as it is. Representative Bacon,[11] a member of the Republican Congressional Committee, said:

> If the Democrats wish to write the New Deal legislation into the Constitution through a constitutional amendment, I feel sure that the

---

10 *United States v. E.C. Knight Company*, 156 U.S. 1 (1895).

11 Robert L. Bacon was a Republican congressman from New York. He served in the House from 1923 to 1938.

> Republican Party will accept the issue. I think the real issue for the people to decide is whether it is not time to stop the New Deal and not whether we should set up a dictator to carry out the program decided as contrary to law.

Mr. Jouett Shouse[12] speaking for the American Liberty League[13] proposed that the issues related by Roosevelt be brought immediately before the country. In his statement he said:

> In his very remarkable statement to newspaper men the president has renounced entirely the theory of States' rights to which the Democratic Party is traditionally committed and takes the view that all economic and social problems should be controlled by the federal government, regardless of the clear limitations of the Constitution. Otherwise, according to the president, we are relegated 'to the horse and buggy days.'
>
> Thus there is presented a clear issue. On the one side those who believe in the Constitution, who believe in orderly government, who believe in American institutions, who believe that the nine members of the Supreme Court who unanimously rendered their decision performed courageously and patriotically the clear duty assigned them.
>
> On the other side, a president who condemns that decision which upset one of his pet plans to assume unwarranted power and who would seek to abolish our dual form of government and the system of

---

12 Jouett Shouse was an American lawyer, newspaper publisher, and politician.

13 The American Liberty League was formed in 1934 by conservative Democrats Al Smith, Jouett Shouse and John W. Davis, along with many industrialists, Prescott Bush, and members of the Du Pont family. Also members were Alfred P. Sloan of General Motors, and about one hundred thousand other members. The League stated that it would work to "defend and uphold the Constitution" and to "foster the right to work, earn, save and acquire property." In the year of its founding the League was accused by Smedley Butler of being involved in a fascist Business Plot to overthrow President Roosevelt. Butler was a retired Marine Corps general and strong supporter of Roosevelt. According to Butler's congressional testimony, the League was founded intentionally as a para-military coup vehicle, an 'American version' of the 1930s French Croix de Feu. Butler said that he was approached to lead a group of 500,000 veterans to take over the functions of government. The final McCormack-Dickstein Committee report recounted Butler's allegations on the existence of the plot. No prosecutions or further investigations followed and the committee rejected the idea that any such plan existed. The *New York Times* on November 22, 1934 characterizing it as a "gigantic hoax." The League labeled Roosevelt's Agricultural Adjustment Administration "a trend toward Fascist control of agriculture." Social Security was said to "mark the end of democracy." Lawyers for the American Liberty League challenged the validity of the National Labor Relations Act, but in 1937, the United States Supreme Court upheld the constitutionality of the statute. The League faded away and disbanded in 1940.

checks and balances between the legislative, executive and judicial branches.

The president says that the American people must make an important decision. But it is not one that can wait, as he suggests, for five or ten years. It should be made at the earliest opportunity.

Former Governor Joseph B. Ely[14] of Massachusetts declared that a constitutional amendment was necessary if New Deal policies were to be carried out and that such an amendment would "spell the doom of American representative government." Speaking at a quarterly meeting of the New England council he said:

No American statesman of any earlier age would for one moment undertake to transform the whole theory of this government in any other way than by submitting to the people this question of fundamental change. If the New Deal policies are to be supported and sustained, Mr. Roosevelt must ask a constitutional amendment. Not otherwise can federal domination of business and agriculture be placed in the hands of the executive authority.

It is too apparent to be controversial that such an amendment to the Constitution furnishes the self perpetuating power of a monarch and a dictator and in the course of events spells the doom of American representative government."

The Supreme Court decision emasculating the NIRA ended the last hope of economic reforms in the United States without “revolutionary changes in the basic law of the land,” Dean Howard Lee McBain[15] of Columbia University said in an address before the conference on Canadian-American affairs at the St. Lawrence University on June 22, 1935.

Dean McBain intimated that only a constitutional amendment could validate the reform aspects of the New Deal. As a means of winning support for such an amendment, he said, “it would be shrewd strategy for President Roosevelt to drive through Congress as many bills of doubtful constitutionality as possible and hasten these laws to an early judicial decision. The more toes that are trod upon by the firm but gentle feet of

---

[14] Joseph Buell Ely was the governor of Massachusetts from 1931 to 1935. He ran for Democratic Presidential nomination in 1944, losing to Franklin Roosevelt.

[15] An authority on constitutional law, he revised in 1933 the Cuban electoral code. His books include *The Law and the Practice of Municipal Home Rule* (1916), *American City Progress* and *The Law and the Living Constitution* (1927).

the Supreme Court," he said, "the larger will be the number of those who will be prepared for constitutional amendment."

Dean McBain conveyed the impression that he believed the reform phases of the New Deal were plainly unconstitutional. Under the present Constitution, in view of the Supreme Court's interpretation of interstate commerce, Dean McBain said that “the federal government was powerless to regulate capitalism.” To look to the several States to do this, he said was futile. At the same time, he asserted it was "arrant nonsense" to confuse the issue with that of States' rights.

"The real issue," he asserted, "is an issue of national power versus the power of relatively unrestricted capitalism."

In the discussion that followed the delivery of Dean McBain's address, Professor S. F. Bemis of Yale suggested an amendment to the Constitution to nullify the Tenth Amendment[16] and give the federal government the power without which, the Columbia professor held, the New Deal was powerless. “Suppose," asked Professor Bemis, "that we had an amendment to the Constitution reading roughly that the Tenth Amendment is hereby repealed and all powers not specifically reserved to the States shall reside in the federal government?"

Dean McBain indicated that he would regard this as an effective means of meeting the problem but he expressed doubt that such a repealer would be adopted by the people.

Georgia Governor Eugene Talmadge[17] in a message celebrating the 4th of July termed the Roosevelt administration policies "pure communism" and predicted that the "real Americans" will rise up in the polls in 1936 against bureaucratic control. "The government can't give you anything," Talmadge said. "The government can't support the people. The people have to support the government. The government can and is robbing Peter to pay Paul."

Asserting that Washington bureaus by assuming the functions of State government are dragging the Constitution in the dust, Governor Talmadge said:

> When the time ever comes for us to placidly obey the orders of seventy-two bureaucracies in Washington that override the Constitution of the United States, we forfeit our rights to be a free and independent American citizens. When the time ever comes for the

---

16 The Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

17 Talmadge was a Democratic politician who served as governor of Georgia from 1933 to 1937 and again from 1941 to 1943. He was a outspoken critic of President Roosevelt and his New Deal legislation.

> sovereignties of the several States of this Union to be ignored and forgotten, then this Union is ready for dissolution. Get back to the Constitution. The Supreme Court of the United States is our greatest friend - our greatest protector.

Perhaps the best statement which typified the attitude felt by those who were disciples of the Roosevelt vision came from Democratic Senator James Pinckney Pope[18] of Idaho. Senator Pope criticizing the Supreme Court and the Constitution declared: *"The public welfare is first. If the Constitution gets in the way it must yield. If the Supreme Court gets in the way, it must yield."*

The battle lines were drawn, Roosevelt was not going to let the Supreme Court or the Constitution stand in the way of his "New Economic Order." After the *Schechter* decision, four options were available to him; *first*, convince the Supreme Court to see the error of their ways; s*econd*, change the makeup of the Supreme Court; *third*, change the Constitution, and *fourth*, create a mechanism to bring ALL business activity, both intrastate and interstate, under direct control of the commerce clause, without amending the Constitution.

---

[18] James Pope served in the Senate from 1933 to 1939.

CRITICISM OF THE SUPREME COURT IN 1935-36

"Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties. And not to Democrats alone do I make this appeal, but to all who love these great and true principles." Abraham Lincoln, August 30, 1856.

The decision of the Supreme Court on May 6, 1935 declaring the Railroad Retirement Act unconstitutional and the Court's subsequent decision in the *Schechter* case declaring the National Industrial Recovery Act unconstitutional was an unexpected blow to Roosevelt's New Deal legislation. The invalidation of several New Deal acts by the Supreme Court resulted in the introduction of a number of new bills and resolutions in Congress during 1935 and 1936, to curb the powers of the Supreme Court.

Bills and resolutions ranging from simple measures to prohibit the Court, by legislative enactment, from passing on the constitutionality of acts of Congress, to resolutions calling for constitutional amendments were introduced. Some bills sought to make Congress the sole judge of the constitutionality of its acts, others would have the Supreme Court render immediate advisory opinions on acts whose constitutionality was in doubt,

and still others would require a two-thirds or a three-fourths vote of the Court to declare an act unconstitutional.

On May 8, 1935, two days after the Supreme Court's decision invalidating the Railroad Retirement Act, Representative Joseph P. Monagham[1] of Montana, in a speech to the House of Representatives, urged his colleagues to curb the power of the Supreme Court. He advocated "packing" the Supreme Court, and suggested that Congress provide for advisory opinions, require unanimous decisions, or deprive the Court of its power to review acts of Congress.[2] His speech was typical of many which were to follow. As the democratic members of Congress saw Roosevelt's New Deal legislation cast aside by the Supreme Court, their feeling of frustration grew.

Senator George W. Norris[3] of Nebraska offered a resolution for a constitutional amendment giving the Supreme Court exclusive jurisdiction to declare acts of Congress unconstitutional and then only by a two-thirds majority of the Court and provided the action is begun within six months after the passage of the act. Senator Norris' constitutional amendment provided that:

> The Supreme Court shall have original and exclusive jurisdiction to render judgment declaring that any law enacted by Congress in whole or in part is invalid because it conflicts with the Constitution; but no such judgment shall be rendered unless concurred in by more than two-thirds of the members of the Court, and unless the action praying for such judgment shall have been commenced within six months after the enactment of the law.[4]

A similar amendment, but without the six months proviso, was proposed in the House.[5] All of the proposed amendments sought to deprive inferior federal courts and state courts of all power to pass on the constitutionality of federal statutes and would apply only to acts of Congress.

No one in Congress really contemplated that serious action would be taken on any of the bills introduced. They, as well as the comment on

---

1 Joseph Patrick Monaghan was a Democratic Congressman from 1933 to 1937.

2 79 Congressional Record, page 7149 (1935).

3 George William Norris served in the U.S. Senate from 1913 until 1943. A staunch supporter of President Roosevelt's New Deal, Norris sponsored the Tennessee Valley Authority Act of 1933. Norris left the GOP in 1936 and was re-elected to the Senate as an Independent with Democratic party support in 1936.

4 S.J. Res. 149.

5 H.J. Res. 287.

them in the Congressional Record, are analogous to the *obiter ditca*[6] of a judicial decision. They contained nothing definitive, but they did evine an attitude; one of outrage and brought to the attention of the public the helplessness of Roosevelt, caused by an adversarial Supreme Court in fulfilling his mandate to the people in their time of need.

In August, 1935, two amendments were proposed to abolish the Court's power to review legislation. One provided that: The Supreme and inferior courts of the United States shall have no jurisdiction to declare any acts of Congress unconstitutional.[7] The other proposal was broader. Its provisions were:

> No court in the United States or any State shall declare unconstitutional or void any law enacted by the Congress of the United States. All laws of the United States shall remain in full force and effect throughout the United States until repealed by the Congress of the United States, or until vetoed or repudiated by the actions of the legislatures of three-fourths of the States.[8]

In addition to the proposed amendments, an act of Congress was suggested which would provide:

> That from and after the passage of this act Federal judges are forbidden to declare any act of Congress unconstitutional. No appeal shall be permitted in any case in which the constitutionality of the act of Congress is challenged, the passage by Congress of any act being deemed conclusive presumption of the constitutionality of such act. Any Federal judge who declares any act passed by the Congress of the United States to be unconstitutional is hereby declared to be guilty of violating the constitutional requirement of 'good behavior' upon which his tenure of office rests and shall be held by such decision *ipso facto* to have vacated his office.[9]

Two bills were introduced which required the Supreme Court to render an advisory opinion upon any act by Congress, if requested to do so by the president or the Congress.[10] Under another proposed bill, an act passed by Congress and approved by the president, would not become law unless

---

6 Words of an opinion entirely unnecessary for the decision of the case.

7 H.R. 296.

8 H.J. Res. 329.

9 H.J. Res. 301.

10 H.R. 374; H.R. Res. 317.

presented by the president to the Supreme Court for its decision on the constitutionality thereof and not until sixty days after it has been so presented. This bill also stipulated that, "it shall be the duty of the Supreme Court to render such decision within sixty days."

Two rather unusual proposals submitted during the 1935-36 congressional session, remain to be mentioned. One sought to take from the lower federal courts the authority to decide the constitutionality of federal laws and vest it in a single court, from which an appeal could be taken directly to the Supreme Court.[11] The other proposal sought to increase the membership of the Supreme Court from nine to eleven.[12]

The prevailing sentiment in the Congress was that the Court had "usurped" powers which constitutionally belong to the legislative branch. A speech by Representative Lewis, of Maryland, was typical of the attitude of many members of the House. To restore the Constitution to its original state, he suggested that the following remedies be adopted: (1) under the "exceptions and regulations" clause,[13] of the United States Constitution which grants Congress the power to make exceptions to the constitutionally-defined appellate jurisdiction of the Supreme Court, a statute would be enacted providing that only a state, and never a private litigant, would be heard to complain of an invasion of its sovereign rights by Congress; (2) jurisdiction would be denied to nullify revenue laws at the instance of a private litigant; (3) jurisdiction would be left with the courts to review the constitutionality of statutes violative of provisions as to specific subjects, such as right of petition, habeas corpus, trial by jury, freedom of press, etc.; (4) jurisdiction would be denied to annul statutes on such nonspecific titles as general welfare, commerce among the states, taxation, due process of law, and money; (5) any decision that an act of Congress is void should be subject to reversal by Congress.

On February 17, 1936 in direct response to the massive criticism being leveled at the Supreme Court, the Court by a majority of eight-to-one reaffirmed the principle in *Ashwander et al., v. Tennessee Valley Authority*[14] that:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal

---

11 79 Congressional Record, pg. 10975, 15336 (1935).

12 H.R. 10362.

13 Article III, Section 2, Clause 2.

14 297 U.S. 288 (1936).

> principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[15]

And also:

> …one who accepts the benefit of a statute cannot be heard to question its constitutionality. *Great Falls Manufacturing Co. v. Attorney General*, 124 U.S. 581; *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407; *St. Louis Casting Co. v. Prendergast Construction Co.*, 260 U.S. 469.[16]

The doctrine is known as the "Ashwander Doctrine."[17] Under this doctrine, where a statute is susceptible to two constructions, one which gives rise to serious constitutional questions and the other which avoids such questions the court will decide a case on the narrowest possible grounds necessary to a decision. For example, if the Court can decide the issues based on statutory construction of the plain language and structure of the statute, legislative intent is unnecessary. If statutory construction is sufficient, the Court need not address constitutional claims.

The Ashwander doctrine was used by the Supreme Court in 1937 when they refused to pass on the constitutionality of Title VIII of the Social Security Act, in *Steward Machine Company v. Davis*.[18] The Ashwander doctrine is used today by the courts as the wall to bar the litigant from bringing certain constitutional issues before the courts.

---

15 *Id.* At 348 (quoting Crowell v. Benson, 285 U.S. 22, 62. (1932).

16 *Id.* at 323.

17 The Ashwander Doctrine states that a court should avoid constitutional issues whenever possible. It restricts cases that can be brought before the courts not on the merits of the case, but on the status or relationship of the parties involved.

18 301 U.S. 548 (1937).

THE SUPREME COURT AND MINIMUM WAGE CASES

"The first object of a free people is the preservation of their liberty. This spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of men. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defenses, and fortifies with passion. It does not trust the amiable weakness of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it." Daniel Webster, May 7, 1834.

The right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right. Every man has a natural right to the fruits of his own industry. Labor is deemed to be property, especially within the meaning of constitutional guaranties. Thus, the right to acquire property includes the right to acquire property by labor, enabling him to possess the necessities of life. To obtain money, an individual without an independent "income" must exchange his labor for remuneration, or wages. The right to earn wages is just as much property and within the protection of the due process clauses of the Constitution as earned wages.

Since the right to labor is protected by the Constitution and numerous guaranties of state constitutions, one cannot be deprived of such right by arbitrary mandate of the state legislatures and/or by the federal government.

As a general principle, every member of a community has a right to enjoy a free labor market, to have a free flow of labor for the purpose of carrying on the business in which he has chosen to embark. This right is not merely an abstract one; it is one recognized as the basis of a cause of action where there is an unlawful interference therewith. Specifically, laborers have a right to a free and open market in which to dispose of their labor, or a right to a free access to the labor market for the purpose of maintaining or increasing the incorporeal value of their capacity to labor. A laborer has the same right to sell his labor as any other property owner.

State Control Over Wages and Hours

In the early twentieth century, it was decided by several state legislatures, that, women were not physically able to compete with men in the enjoyment of access to the free and open labor market. To help women complete in the labor market, states adopted minimum wage laws pertaining to women and minors. The first attempt at general regulation of working conditions of employees in private industry was the Minimum Wages for Women Law of the State of Washington,[1] authorizing the establishment of minimum wages for women and minors.

Other states followed Washington's lead in enacting similar legislation.[2] In 1918 Congress, as the local legislative body for the District of Columbia, enacted a minimum wage law for women and minors employed in the district.[3] The law was similar to that of Washington State under which a wage board was empowered to inquire into and fix wages for women and minors with the objectives of meeting "the necessary cost of living and maintaining good health."

Advocates of the District of Columbia Act, before a committee of Congress, conceded that the liberty of men to contract for wages could not be taken away because men were free and able to attack and resist unfair practices and abuses by employers, but contended that women were physically inferior and mentally different; that they were susceptible to wage oppression by unscrupulous employers. Even though women may vote, sit on juries and on judicial benches, hold public office, acquire and dispose of property, carry on business and incur obligations, the Committee Report concluded that nevertheless women, married or single, who work for wages that did not sustain them in physical and moral health

---

1 Laws of 1913, Washington, c. 174.

2 Minimum wage and maximum hour legislation for women and minors were also enacted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Rhode Island, Arizona, Arkansas and Oregon between 1913-1922.

3 Act of Sept. 19, 1918, c. 174.

were not legally competent and should have the guardianship of the law to protect them against their employers and against themselves and such action by the Congress was deemed to be in the public interest. The committee reported the bill without dissent, and Congress all but unanimously passed the law and President Wilson promptly signed it on September 19, 1918.[4]

Judicial History of Minimum Wage Statutes

The constitutional question as to the validity of minimum wage laws first came before the courts in 1914, when, in two decisions,[5] the Supreme Court of Oregon held that minimum wage legislation for women and minors was valid. Seven judges favored the state legislation and none opposed it. One of these cases was appealed to the United States Supreme Court.[6] The Court on April 13, 1917, affirmed that judgment, by a four to four vote. Justice Brandeis, having been of counsel in the original case, did not participate in the decision. The tie vote settled nothing. The constitutional question was left without a final answer. In 1921, a challenge to the 1918 District of Columbia wage statute covering the employment of women and minors was brought before the Court of Appeals of the District of Columbia.[7] The Court of Appeals ruled in favor of the statute as constitutional. The vote was two in favor and one opposed. But one of the justices favoring the legislation was sitting *pro tempore*.[8] When the regular justice returned, he, with the previously dissenting judge, granted a rehearing. On this occasion, the former favorable decision was reversed by a two to one vote. This left that tribunal divided two to two.

The District of Columbia Minimum Wage Act Case

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

The District of Columbia's adverse decision was appealed to the United States Supreme Court, where it was affirmed on April 9, 1923 by a five to three vote. The question before the Court was whether the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia was constitutional. Justice

---

4 Note 3, *supra*.

5 *Stettler v. O'Hara*, 139 Pac. 743 (1914); *Simpson v. O'Hara*, 141 Pac. 158 (1914).

6 *Stettler v. O'Hara*, 243 U.S. 629 (1917).

7 *Adkins v. Children's Hospital*, 284 Fed. 613 (1921).

8 Latin meaning temporarily; for the time being.

Sutherland wrote the majority opinion. The Court held the act was an unconstitutional infringement of liberty of contract, as protected by the due process clause of the Fifth Amendment. The Court found that upholding the statute would dangerously extend the police power of the state and, thus, found it unconstitutional.

Within this liberty, declared Justice Sutherland, are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as a result of private bargaining. In his opinion Justice Sutherland said:

> This law is not at all like any of those which have been sustained. It forbids two lawful persons, under penalties to one, to contract freely with one another in respect to the price for which one will render service to the other in a purely private employment, where both are willing or anxious to agree. It compels the one to surrender a desirable engagement and the other to discharge or dispense with a desirable employee. The wage standard fixed by the Act is vague and impractical. It ignores personal habits of thrift and unthrift, and family cooperation, and other differences between individuals as well as any independent resources she may have.
>
> In his dissenting opinion Chief Justice Taft said he was not expressing an opinion that a minimum wage limitation could be enacted for men, but it was enough to say that a law applied only to women would not be an infringement on the freedom of contract.

In 1925 and 1927, Arizona[9] and Arkansas[10] minimum wage laws were appealed to the Supreme Court and were held invalid in memorandum opinions on the authority of *Adkins v. Children's Hospital*. After the *Adkins* decision, the courts of Kansas and Minnesota overruled similar enactments of their own states.[11]

The New York Minimum Wage Act Case

Morehead v. People ex rel. Tipaldo, 298 U.S. 587 (1936)

In 1933, the New York Legislature passed a statute providing for the minimum wages for women. The minimum wage was to be determined by a consideration of both "the fair and reasonable value of the services

---

9 *Murphy v. Sardell*, 269 U.S. 530 (1925).

10 *Donham v. West-Nelson Mfg. Co*., 273 U.S. 657 (1923).

11 *Topeka Laundry Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

rendered," and an amount "sufficient to meet the minimum cost of living necessary for health."[12] Thus an attempt was made to frame a statute that would pass the scrutiny of the Supreme Court under *Adkins*. In fact, the New York legislature passed two minimum wage measures and submitted them to the governor. One was approved; the act regulating minimum wages for women. The other was vetoed because it applied to men as well as women employees.

On June 1, 1936, the Supreme Court declared the New York Minimum Wage Act invalid as an interference with the rights of freedom of contract, in violation of the Fourteenth Amendment of the Constitution.

The case was brought by way of writ of habeas corpus originating in the Supreme Court of New York. Tipaldo, the manager of a laundry facility, was jailed for failing to obey a mandatory order of the state industrial commissioner prescribing minimum wages for women employees. The application for the writ was grounded upon the claim that the state statute was substantially identical with the minimum wage law enacted by Congress for the District of Columbia, which was condemned in the *Adkins* case as repugnant to the due process clause of the Fifth Amendment. The Supreme Court, adhering to the principles laid down in *Adkins*, upheld Tipaldo's contention, and declared the New York statute unconstitutional. Justice Butler delivered the majority opinion.

In his opinion, Justice Butler summarized the *Adkins* case and the protection of liberty of contract under the due process clause. While recognizing that the right is in some respects subject to limitation, it was expressly stated by Justice Butler that physical differences between men and women must be recognized in proper cases and legislation fixing hours or conditions of work may properly take them into account, but "we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." Then follows what is perhaps the most significant statement in the opinion:

> The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."[13]

---

12 Laws of 1933, c. 584.

13 298 U.S. 587, 611.

What Was Roosevelt's Reaction to the Morehead Case?

The decision of the Supreme Court in *Morehead* created intense anger in Roosevelt. One day after the Court's decision, he held a press conference to discuss the decision. During this conference Roosevelt described the decision by the Supreme Court holding unconstitutional New York State's minimum Wage Law, as creating a "No Man's Land" where neither states nor the federal government had the right to legislate in the contractual affairs of the parties.

He made this observation in reply to a question as to whether he had any statement on how his New Deal objectives could be brought within the framework of the Supreme Court's decisions nullifying the National Industrial Recovery Act,[14] the Agricultural Adjustment Act, the Railroad Retirement Act and, finally, the New York Minimum Wage case.

Roosevelt said the question should be redrafted to ask whether he cared to comment on the Supreme Court's decision. He then said that the answer was no. This was his first comment about the Court since his press conference on the *Schechter* decision, in which the Court invalidated the National Industrial Recovery Act. It was at the *Schechter* press conference when Roosevelt blamed the Supreme Court for putting the United States back in the horse-and-buggy days with their interpretation of the commerce clause. Roosevelt made the observation that it seems to be fairly clear after this decision that the "No Man's Land," where no government can function is being more clearly defined. "The state cannot interfere with contractual rights and the federal government cannot either," he stated. "Do you see a danger in the No Man's Land?" Roosevelt was asked. He replied that there was nothing more to be said.

Frustration over the Court's decision did not stop with Roosevelt. U.S. Secretary of Labor Frances Perkins stated that more than 3,000,000 women, or half of those engaged in industry in this country, were directly or indirectly affected by the Supreme Court's decision. "Public welfare demands that women workers shall be prohibited from accepting wages so low that their health is impaired or is maintained only by contributions from the taxpayers," Secretary Perkins stated.

Criticism of the Supreme Court did not stop after Roosevelt's press conference. Several amendments to the Constitution were introduced in

---

[14] On May 27, 1935 the Supreme Court in the *Schechter* case found the National Industrial Recovery Act unconstitutional as an unlawful invasion by Congress to legislate wages and hours of a trade or business engaged in intrastate commerce. Now in Morehead, the court declared the states could not interfere with the freedom of women to contract for their own wages and women enjoy the same rights as men under this freedom of contract.

Congress giving the federal government complete control over wages and labor, in both *interstate* and *intrastate* commerce.

The Costigan amendment drawn up 1935 in anticipation of possible adverse decisions in the Supreme Court, sought to legalize the New Deal. The proposed amendment read:

> Section 1. The Congress shall have power to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate production, industry, business, trade and commerce to prevent unfair methods and practices therein.
>
> Section 2. The due-process-of-law clauses of the Fifth and Fourteenth Amendments shall not be construed to impose no limitations upon legislation by the Congress or by the several States with respect to any of the subjects referred to in Section 1, except as to the methods or procedure for the enforcement of such legislation.

Throughout the fall of 1936, Roosevelt's brain trust worked on various plans which would validate Roosevelt's New Deal legislation without need of a constitutional amendment. One plan studied the possibility of resurrecting the invalidated National Industrial Recovery Act, endowing it with new powers to regulate interstate commerce and incorporating a federal minimum wage into the act. To overcome any constitutional issues which might be presented, a mechanism would be created to provide for federal incorporation of all "persons" who wished to engage in interstate commerce. A major Chicago newspaper upon receiving details of this plan from an unnamed White House source printed the following:

> NRA LICENSING PLAN STUDIED.
> GOAL IS TO SAVE REFORMS
>
> President Roosevelt has ordered certain agencies of the administration to make independent studies of the possibility of achieving the principal goals of the outlawed National Industrial Recovery Act - abolition of child labor, protection of the rights of workers to organize and bargain collectively, and maintenance of standard labor conditions - through a sweeping federal incorporation and licensing law.
>
> The president has not indicated to any of his advisers as yet what he proposes to do specifically toward reviving the main tenets of the old NRA. Whether he intends to proceed definitely along the idea of a Federal Incorporation Law or other laws to be enacted in accordance with the existing constitutional framework, or merely to explore the possibilities of such laws, or then ask later for amendments to the organic law, are questions which Mr. Roosevelt evidently has left

posed before his own administrative associates. Meanwhile, any numbers of experts, both within and without the government, are secretly working and advancing schemes of their own, just as they did in the first days of the administration.

At least two and possibly more reports on the federal incorporation and licensing plan are expected to be ready for the president soon after he returns from his prospective southern cruise and in ample time for him to make some decision on the subject for early transmission to the new Congress.

While none of the new studies on a possible incorporation law has proceeded very far, the understanding here is that each study is being made on the basis of the O'Mahoney bill, which was introduced in the Senate in July, 1935, but since has reposed in a subcommittee of the Committee on Interstate Commerce.

The main provisions of the bill specify a system of compulsory licenses for companies and individuals doing business in interstate commerce and permit incorporation of business under federal as well as state charters.

The bill provides, for instance, that "it shall be unlawful for any corporation of any State, Territory, or possession of the United States, or of any foreign country, or for any corporation heretofore organized under the District of Columbia, or for any business, to engage directly or indirectly in commerce without first having obtained a license."

The Washington Minimum Wage Act Case

West Coast Hotel Co. v. Parrish et al., 300 U.S. 379 (1937)

To say the least, the opinion in *Morehead* amounted to a challenge to present a case where the question of the validity of the *Adkins* decision was squarely involved. The Washington Minimum Wage Act case was that case. It arrived at the very next term of the Supreme Court. On March 29, 1937, the Supreme Court, in a five-to-four decision, sustained the Washington State minimum wage legislation authorizing the fixing of wages for women and minors.[15] The case was decided during the great battle between Roosevelt and the Supreme Court and was handed down less than two months after President Roosevelt's announced his plan to pack the Supreme Court with justices supportive of New Deal economic regulation.[16] Whether the ruling in the case was on its merits and constitutional validity or was decided to quiet Roosevelt and the public

15 Laws of 1913, c. 174.

16 See Chapter 9.

outcry against the Court, only those sitting on the Supreme Court can answer this question. However, in reviewing the dissenting opinion of Justice Sutherland, one might conclude that the majority opinion was "politically" motivated.[17]

The Washington minimum wage act as originally passed in 1913 declares that “the welfare of the State demands the protection of women and minors from conditions of labor having a pernicious effect on their health and morals.” The act provides that it “shall be unlawful to employ women or minors in any industry or occupation in the State under conditions of labor detrimental to their health and morals; and that it shall be unlawful to employ women in any industry at wages which are not adequate for their maintenance.”

From 1933 to 1935, Elsie Parrish worked as a chambermaid at the Cascadian Hotel (owned by the West Coast Hotel Company) in Wenatchee, Washington for $12 a week. Under Washington's Minimum Wage Law for Women she should have received $14.50 for her 48-hour week. After working at the hotel for two years, she demanded payment for the difference between what she was paid and the minimum wage established under state law. The hotel offered her a settlement. Elsie Parrish rejected the offer and along with her husband sued for $216.19 in state court. The trial court, using *Adkins* as precedent, ruled for the hotel. The Washington Supreme Court taking the case on a direct appeal, reversed the trial court and found in favor of Parrish. The hotel appealed to the U.S. Supreme Court arguing that the law violated the due process clauses of the Fifth and Fourteenth Amendments.

The Court, in an opinion by Chief Justice Hughes, ruled that the Constitution permitted the restriction of liberty of contract by state law where such restriction protected the community, health and safety or vulnerable groups, as in the case of *Muller v. Oregon*, 208 U.S. 412 (1908), where the Court found in favor of the regulation of women’s working hours.

The *Muller* case, however, was one of the few exceptions to decades of Court invalidation of economic regulation, exemplified in *Lochner v. New York*, 198 U.S. 45 (1905). *West Coast Hotel* represents the end of that trend, and came about through an unexpected shift in the voting habit of Associate Justice Roberts. Coming at the time when Roosevelt was pushing his court reform bill to weaken the votes of the older, anti-New Deal justices, Roberts' move was notoriously referred to as "the switch in time that saved nine."

---

[17] Justice Van Devanter announced his retirement from the Court May 18, 1937. Justice Sutherland retired from the Court on January 17, 1938.

Associate Justice Sutherland's dissent contained a thinly veiled admonition of Roberts, as well as an insistence that the Constitution does not change by events alone. The dissent also adhered to the previously dominant perspective that the majority repudiated: that freedom of contract was the rule with few exceptions, and that the shift of the burden for the poor onto employers was an arbitrary and naked exercise of power.

In the majority opinion, Chief Justice Hughes noting that the due process clauses of the Fifth and Fourteenth Amendments were invoked against the Washington legislation, on the ground that such legislation deprived women of freedom of contract, said:

> What is that 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.[18]

The majority opinion observed that recent economic experience had demonstrated the necessity for protecting a class of workers who were in an unequal position with respect to bargaining power. In this connection it was pointed out that what the workers lose in wages the taxpayers are called upon to pay in relief. In elaboration of this the opinion stated:

> 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. *What these workers lose in wages the taxpayers are called upon to pay*. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common

---

[18] *Id.* at 391.

> knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers.[19]

In affirming the judgment of the State Court, the *Adkins* case was expressly overruled.

Justice Sutherland delivered a dissenting opinion in which Justice Van Devanter, Justice McReynolds and Justice Butler concurred. Justice Sutherland's opinion opens with a discussion of the duty of the judiciary in cases involving constitutional questions, in which it was emphasized that each justice is bound by oath to exercise his own deliberate judgment. As to the view that supervening economic conditions require a reconsideration of the question involved Justice Sutherland said, in part:

> It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened,' but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written - that is, that they do not apply to a situation now to which they would have applied then - is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.[20]

Justice Sutherland continues:

> Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

---

19 *Id.* at 399-400.

20 *Id.* at 402-3.

> If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation - and the only true remedy - is to amend the Constitution.[21]
>
> What a court is to do, therefore, is to *declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.[22]

Attention was then given specifically to the validity of the Washington statute and it was noted that it was identical in all substantial respects with that involved in the *Adkins* case. As to validity of this distinction, Justice Sutherland said:

> The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a significant and important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have under our system long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept.[23]

The Adkins, Morehead and Parrish Cases - Revisited

Two cases were consolidated in the *Adkins* decision. In one case a woman 21 years of age, who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer. While willing to retain her, the company felt it was obliged to dispense with her services on account of the penalties prescribed by the District of Columbia Act. In the second case the appellee was a corporation maintaining a hospital for children in the District of Columbia. It employed a large number of

---

21 *Id*. at 403-4.

22 *Id.* at 404.

23 *Id*. at 411-3.

women, with whom it had agreed upon rates of wages and compensation satisfactory to the women employees, but in some instances were less than the minimum wage fixed by an order of the board made in pursuance of the Act. The women with whom the corporation had contracted were all of the age of majority and under no legal disability. The Supreme Court found the act violated the woman's freedom of contract which is part of the liberty of the individual protected by the due process clause of the Fifth Amendment.

The *Morehead* case was brought to the Supreme Court of the United States by way of habeas corpus originating in the Supreme Court of New York. An owner of a laundry was jailed for failing to obey a mandatory order of the state industrial commissioner prescribing minimum wages for women employees. It was contended by the owner that the statute was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. This contention was grounded upon the claim that the statute in question was substantially identical with that enacted by Congress for the District of Columbia, which in 1923 was declared unconstitutional as repugnant to the due process clause of the Fifth Amendment in the *Adkins* case. The Supreme Court, adhering to the principles laid down in the *Adkins* case, upheld the owner's contention, and declared the New York statute unconstitutional.

In the *Parrish* case the appellant operated a hotel and employed Elsie Parrish, as a chambermaid. She and her husband brought suit to recover the difference between the wages paid her and the minimum wage fixed by the Washington Minimum Wage Act. The hotel challenged the statute as violative of the due process clause of the Fourteenth Amendment, but the Washington Supreme Court sustained the Act. On appeal the decision was affirmed by the Supreme Court of the United States.

All three cases involved the same subject matter; that being women and employment contracts. In the *Adkins* and *Morehead* case all parties to the employment contract were satisfied with their employment contract. Both the employer and employees wanted to continue their contractual agreement. Neither party filed suit alleging breach of contract, conversion, etc. When the state tried to interfere with their contractual agreement it entered as an interloper.[24] Case in point: In the *Morehead* case the Solicitor General of New York in a brief filed for petitioner, argued that failure by employers to pay women the minimum wages prescribed in the New York Minimum Wage Act, resulted in a large number of women applying for governmental relief and their wages were being supplemented by payments from the Emergency Relief Bureau of the State of New York. The Solicitor General concludes in his brief, that “the failure of employers

[24] Persons who interfere or intermeddle into business to which they have no right.

to pay women the wages directed under the Act and the resulting burden by the state for support of the women imposes a heavy burden upon the taxpayers of the state."

The Supreme Court rejected the Solicitor General's "taxpayer burden" argument because the record before the Court indicated the women employees were not receiving any relief benefits from the Emergency Relief Bureau. Since the women were not receiving any relief benefits, there was no burden upon the taxpayers to support the women. Therefore, the state could show no lawful reason to intervene in the employment agreement between the parties, and since the parties to the agreement were not alleging any breach of agreement contract, the state could show no reason to interfere with the right or freedom of the women to contract.

However, in the *Parrish* case, the State of Washington was successfully joined as a third party, because one of the parties to the employment contract, Elise Parrish, sought and received relief benefits from the State of Washington. Because of her receipt of taxpayer benefits, the State was not considered an interloper, but a third party who could show damage to the taxpayers of the state, by the failure of the hotel to pay to their "ward"[25] (Parrish) a wage sufficient enough to support her and her family. It is interesting to note in the original cause of action filed in the Superior Court of Chelan County, Washington, Elsie Parrish denied the existence of any employment contract. At the trial, Parrish upon cross-examination by Mr. Crollard, attorney for the hotel company stated:

> There was nothing said about wages when I was hired. I was not keeping time at the beginning. After I began to keep my time I tried to figure out what I was getting. I cashed the checks which were given me by the hotel company in payment for my services between the dates of the checks. I did not object to any of the checks on the ground that it was not the right amount, but accepted and cashed them.
>
> I kept track of the checks I received and put it down in my time book. I had in mind that I should have been paid the state wage and that it would be paid. I never made any demand upon the hotel company or any of its agents for the state wage until my discharge. There was nothing ever said about wages. I took what they gave me because I needed the work so badly, and I figured the defendant would pay what was right, the state wage. I had the state wage in mind all of the while at least a short time after I began working for the hotel.

We, therefore see the underlining difference between the minimum wage cases. One relied on liberty of contract; the other claimed no

---

[25] *Ward*. Any person under another's protection or care.

contract existed. In *Morehead*, no employee sought any state relief benefits, while in *Parrish* the employee received state relief benefits and called upon the state to intervene on her behalf.

Who then is the person with this liberty of contract? - Liberty that is protected under the Fifth and Fourteenth Amendments. An Austrian cook in an Oklahoma restaurant, learned that it meant him and that this liberty included the right to hold his kitchen job although the state had made it a crime for an employer to employ more than one non-voting alien out of five in any business, and his employer in fear of the law was about to discharge him.[26]

Looking at the minimum wage cases, female employees at a New York laundry found that they also had this liberty of contract for wages and this liberty could not be taken away from them under a health and moral's law by the New York legislature. But this liberty of contract did not exist when an employee for a hotel in Washington State became a "ward" of the state by receiving state welfare benefits.

[26] *Truax v. Raich*, 239 U.S. 33, 41 (1915).

THE "COURT PACKING" BILL OF 1937

"The contest, for ages, has been to rescue Liberty from the grasp of executive power. Through all this history of the contest for liberty, executive power has been regarded as a lion which must be caged. So far from being considered the natural protector of popular right, it has been dreaded, uniformly, always dreaded, as the great source of its danger." Daniel Webster, May 7, 1834.

Suppose the president with the help of a willing Congress was intent on embarking on a policy the Supreme Court deems contrary to the Constitution. The Congress passes a statute. A case arises under it. The Supreme Court on the hearing of the case declares the statute to be beyond the powers of Congress. The Congress passes and the president signs another statute more than doubling the number of the justices on the Supreme Court. The president appoints to the Court judges who are pledged to hold the statute constitutional. The Senate confirms the appointments. Another case raising the validity of the disputed statute is brought up to the Court. The new justices out vote the old ones. The statute is held valid. The security provided for the protection of the Constitution is gone like morning frost.

President Roosevelt's massive re-election victory at the polls in November, 1936, had convinced him that something had to be done about

the Supreme Court. Thus began Roosevelt's plan to reorganize the United States Supreme Court by waging one of the greatest battles against the judicial branch of our government. Little if any of this court battle is taught in our institutions of learning. This chapter retraces the battle and will detail how the Supreme Court reacted to Roosevelt's plan for control of the judiciary. History records that Roosevelt lost this battle, but as we will see, *Roosevelt won the war*!

Our drama begins on May 31, 1935 four days after the Supreme Court had unanimously invalidated the National Industrial Recovery Act.[1] The four days had given Roosevelt's temper time to reach the boiling point, and Felix Frankfurter[2] and Hugh Samuel Johnson[3] who conferred with him in the oval room, found him in a fighting mood. Roosevelt told them that he wouldn't take the Court's action lying down and he was not about to let the Supreme Court stand in the way of his new economic order. The country was with him, not with the Supreme Court, Roosevelt said, and he promised to bring the Court into line, if he had to "pack it" or even "deny it appellate jurisdiction." It was at this meeting where Roosevelt first announced his decision to give battle to the Supreme Court. The famous "horse-and-buggy" press conference took place a few days later.

Roosevelt explained to the two senators that at the start of his first term, he wanted to play ball with the Court, and suggested to Chief Justice Hughes a sort of consultative relation between them; to discuss his important economic and social plans; to get the Court's slant on them before he acted. But the Chief Justice was chilled to the idea. Justice Hughes made it clear to Roosevelt that the strictest separation between the Supreme Court and the White House was not only advisable but necessary.

Throughout the remaining year and a half of his first term, as the Court's decisions against the New Deal piled up, Roosevelt kept his determination to force the Court into line without success. During the 1936 presidential election, legal experts in the Department of Justice were hard at work studying approaches to the Court problem. The strictest secrecy was maintained.

---

1 See Chapter 6.

2 Frankfurter gave legal advice to Roosevelt when he served as governor of New York (1929-1932). When Roosevelt became president he often consulted Frankfurter about the legal implication of his New Deal legislation. In 1939 Roosevelt appointed Frankfurter as a Supreme Court justice.

3 Johnson played a major role in the New Deal. While helping organize the Democratic Party convention of 1932, he distributed a memo proposing that FDR become a Mussolini-like dictator in the economic sphere. Johnson supported Roosevelt in the 1936 presidential election, but when the court-packing plan was announced in 1937 he denounced Roosevelt as a would-be dictator.

Then came the election. If anything was needed to persuade Roosevelt to act, it was his landslide victory in November. A few days after his re-election, Roosevelt called Attorney General Homer Cummings to the White House and told him that it was time to deal with the Supreme Court. Cummings and a few trusted subordinates went to work on a series of elaborate studies, involving both amendments and legislative acts to deal with the Court. After working on the problem for a few months, they concluded that in order for Roosevelt's economic and social agenda to go forward unhindered by an adversarial judiciary, the Court personnel needed to be changed, and one obvious way for the required change in personnel was to pack it. They drew up a plan and presented it to Roosevelt.

On February 4, 1937, just two weeks after his inauguration, Roosevelt contacted Joseph Robinson,[4] the Senate Majority leader, and House Speaker William B. Bankhead[5] and told them there would be an important press conference the next morning. No one in the Democratic leadership had any idea of what the press conference was all about. This was one show that was being managed by Roosevelt himself.

At noon Roosevelt gave his press conference. In this press conference, Roosevelt proposed increasing the number of justices in the Supreme Court and recommended that questions concerning the constitutionally of a statute should be directly appealed to the Supreme Court. He declared:

> I therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or resign.
>
> One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trail and appellate Courts on the constitutionality of every form of important legislation. Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.
>
> … A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act

---

4 Robinson was a leading spokesman for President Roosevelt 's New Deal legislation and his court-packing plan in 1937. He served as Senate Majority Leader until his death in July 1937.

5 Bankhead served in the United States House of Representatives from 1917 and as Speaker of the United States House of Representatives from 1936 until his death in 1940.

> valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others.
>
> Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previsions and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionally of acts of the Congress in suits between private individuals, where the government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land."

Roosevelt's news conference created a sensation. The Republicans were up in arms. A large section of the Democratic majority was dismayed. Democratic house leaders, angry though they were, reported to Roosevelt that he had a majority for the court bill of 100 in the House. The bill was referred to the Judicial Committees of both houses for hearings, but for some reason the House Judiciary Committee decided not to hold hearings on the bill. Even though Roosevelt had the votes in the House, it was decided to start hearings on the court bill in the Senate.

As the opposition strengthened, Roosevelt grew more and more anxious to enter the fight, and soon he was working on two speeches. The first, with its plea for party loyalty, was made at the Democratic Victory Dinner on March 4, 1937. The second, delivered five days later, on March 9, was a fireside chat in which Roosevelt asked the nation to trust him, to have faith in him. A careful examination of these two speeches sheds light on Roosevelt's true motives behind the court bill.

In his speeches of March 4 and March 9, Roosevelt clearly raises the issue of whether we ought not, henceforth, have a legislative, rather than a constitutional form of government.

In his remarks of March 4, Roosevelt explains why he wanted the Supreme Court increased by six members. On at least two occasions he referred, without its context, to a statement of Chief Justice Hughes, "We are under the Constitution, but the Constitution is what the judges say it is." Thereupon Roosevelt added, speaking of the charge that he proposes to pack the Supreme Court:

> But if by that phrase the charge is made that I will appoint justices who understand those modern conditions - that I will appoint *justices who will not undertake to over-ride the judgment of the Congress on legislative policy* if the appointment of such justices can be called 'packing the Court,' I say that I, and with me the vast majority of the American people, favor doing just that thing-now."

It is not the function of the courts to pass on the wisdom or un-wisdom of legislative acts and the Supreme Court has repeatedly stated that its decisions are not rendered on this basis. But Roosevelt thought any opinion by the courts declaring any part of his New Deal program unconstitutional was directed against "the judgment of the Congress on its legislative policy" rather than a decision on whether such act was within the powers granted to Congress by the Constitution. Can there be any doubt from this statement what Roosevelt was really saying is that we should change to a legislative form of government? Roosevelt obviously was not satisfied with the slow process incident to procedure under the checks of the Constitution. Roosevelt believed it to be the best policy: that when a majority of the people, under whatever stress, either war or economic depression, or even in normal times, want particular laws, they are entitled to them - to experiment with what may happen. If the results are ill, they will still be satisfied; for what the majority wishes, it should have. Roosevelt firmly believed he was chosen to lead the American people to a better land and a happier life; but he knew that he could only lead them into this land and life of milk and honey only if he was unhampered, by Congress, the Judiciary and the Constitution. In this same speech, Roosevelt spoke of the Preamble to the Constitution in this fashion:

> In its Preamble the Constitution states that it was intended to form a more perfect union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that there were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

Roosevelt then referring to the clause with reference to the laying of taxes said:

> But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to Congress the ample, broad powers to levy taxes and provide for the common defense and general welfare of the United States.

It is a well established principle under American Constitutional Law that the preamble and the taxing clauses, with reference to "general welfare," have been limited by other provisions of the Constitution. Roosevelt as the chief executive must have known this principle too. Are we then to conclude from his remarks that what Roosevelt wished for was

a legislative form of government, uncontrolled by the checks of the Constitution; that the majorities in Congress shall be regarded as having along with the Executive the final word as to what laws the people shall have? With a popular and forceful president, the legislative branch would have less influence; with a less influential executive, power would be centered in Congress. Roosevelt preferred this type of government power (legislative) rather than a constant check of power by the Supreme Court. The consequences, of course, would be an all powerful central government with the rights of the states subordinated to Congress and the Executive. We would then have government from Washington with exclusive jurisdiction over all the people of the Union. We would inevitably become a government by bureaucracy.

What further confirmation can we find for Roosevelt's desire for a purely legislative form of government? In his Fireside Chat of March 9, Roosevelt declared that "economic freedom for the wage earner, the farmer, and small businessman, will not wait for four years. It will not wait at all."

That declaration should be clear enough. It was a statement of what a legislative form of government can do. Roosevelt assumes the absolute necessity for what he calls "economic freedom"; an economic freedom solely legislated by Congress. If the Legislature was all-powerful and can pass any law without fear of reversal by the judicial branch, then their laws and decrees would be the final declaration of the rights, duties, and liabilities of all citizens.

Roosevelt, still confirming this theory, offered his analogy of the three-horse team. He declared, "For as yet there is no definite assurance that the three-horse team of the American system of government will pull together."

Roosevelt's analogy would be sound under a legislative form of government; but it is utterly contrary to the theory of a constitutional form of government. The founding fathers seeing the danger in a centralized government, divided the powers of government between three distinct branches. They wrote:

> To have a country and a civilization, to protect ourselves within and from foes without, we must give to the federal government certain powers; but even if the government we are creating is a republic, we are well aware that majorities are as autocratic, unfair, and unreasonable as kings. Therefore, we must protect minorities. We, therefore, divide the powers of government between three distinct branches, none of which may control the others. We write these laws in this Constitution, setting up three guardians of our liberties, each to watch and protect against the other two. We are not harnessing a

> three-horse team to work in unison; we are giving to each horse a different task, and if one does a bad job, the others will repair the negligent work.

It is clear enough that when the going is heavy, three horses might do more quickly any one particular job working in unison; but what the founding fathers saw was that; if the three branches worked absolutely together, it was very likely that one would, from time to time, control the action of the others. That way danger lay, and they avoided it. Roosevelt referred again to this three-horse metaphor in his March 9 speech saying: "Two of the horses are pulling in unison today; the third is not."

Again Roosevelt knew American history and the theory of our constitutional government. He knew perfectly well that, far from unity of action being intended, the Constitution provides for the opposite results. Again in his fireside chat on March 9, Roosevelt said: "The courts, however, have cast doubts on the *ability of the elected Congress to protect* us against catastrophe by meeting squarely our modern social and economic conditions."

Could there be a declaration of a desire for a non-constitutional form of government any clearer than is contained in those words? Roosevelt believed that Congress and the Executive alone must have the power, by legislation considered desirable at the moment, to meet current economic and social conditions. The founders of the government believed, on the contrary, that Congress may often adopt ill-advised legislation; that what may seem desirable at the moment may, in the long run, aggravate our ills and deprive us of our liberties. For that reason, the checks provided by the courts were insisted upon.

The conclusion of Roosevelt's March 9 fireside chat confirms all the other statements. He declared: "I am in favor of action through legislation: first, because I believe that it can be passed at this session of the Congress."

It was all summed up there. What Roosevelt wanted was a legislative form of government, without power in the courts to restrain legislation under the provisions of the Constitution.

After an analysis of the two speeches given by Roosevelt and finding the real purpose and intention behind Roosevelt's "court packing" bill, it is little wonder that the Republican leaders decided that it would be wise for them to leave this hot potato for the Democrats. On March 10, Democratic Senator Carter Glass[6] began hurling whole streams of epithets at the plan

---

[6] Carter Glass was a Democratic Senator from Virginia. He served in the Senate from 1920 until 1946. He was one of the most outspoken critics to Roosevelt's New Deal policies. He was a strong supporter of fiscal conservatism and state's rights.

which, he said, was "completely destitute of all moral understanding." At a meeting of democratic critics of the plan it was decided that Senator Burton Wheeler[7] should take the leadership of the opposition.

Wheeler had had a long and distinguished career as a champion of liberal causes. He knew when he took the leadership of the opposition movement for the Democrats; he was putting under Roosevelt's hand his own political death warrant which Roosevelt would not hesitate to sign. Wheeler had been critical of the Supreme Court, but he was a believer in the Constitution and the American system, and everything in his soul rose up in rebellion against Roosevelt's plan to destroy the independence of the judiciary.

On March 10, 1937 Wheeler delivered a terrific blow to the plan on the first day of Senate hearings. Since Roosevelt did not want to declare outright that he wanted to pack the Supreme Court with a batch of judges who would vote as he wished, his strategists suggested Roosevelt declare publicly the arguments for his plan were: (1) that the work of the Supreme Court was too heavy for nine men to handle; (2) that the advanced age of some of the justices made it difficult for them to do the arduous work required of them; (3) that there should be an infusion of "new blood" in the Supreme Court so that the judges would be more alive to changing conditions.

On Point No. 1, Roosevelt made a ghastly mistake because, at the time Roosevelt's message was delivered to Congress, there was available a clean cut and comprehensive report on the status of the Supreme Court docket showing that the Supreme Court was well up with its work and that whatever delay there was, was caused by the lawyers and not by the justices.

On Point No. 2, the opponents of Roosevelt's court bill promptly pointed out that not one of the nine justices was accustomed to being absent from Court for any appreciable periods and that all were attending to their duties without suffering any great inconvenience.

Point No. 3 involved the question of whether different justices were "liberal" or "conservative" the inference being that the older justices were too conservative or "reactionary" and should be replaced by younger men who would be more "liberal."

The opponents of the court packing plan called attention to the fact that the most liberal member of the Supreme Court, the man most quoted

---

[7] Burton Kendall Wheeler was a Democratic Senator from Montana. He served in the Senate from 1923 until 1947. Wheeler supported many of Roosevelt's New Deal policies, but broke with him over his opposition to Roosevelt's court-packing plan.

by the 'New Dealers' was Mr. Justice Brandeis, who happened to be the oldest member on the Court.

On the first day of the open hearings, Senator Wheeler rose and read a letter from Chief Justice Hughes, blowing to bits further Roosevelt's argument that new justices were needed to keep up with the Courts work. In the letter Chief Justice Hughes called attention to the fact that the Supreme Court's docket for the first time in many years was absolutely up to date. There were no cases lagging behind for any reason. This letter completely punctured the whole pretense on which Roosevelt's court plan was based.

The Hughes letter produced consternation in the White House. Roosevelt was angry with the strategists who had invented this shabby excuse which had now been completely deflated, and he poured out his wrath on them. Attorney General Cummings suggested there was nothing to do but to come out with the real reason. "This," he said, "is a plan to pack the court. You have to say so frankly to the people. Until you do that you cannot advance the real arguments which you have for the plan."

Roosevelt was forced to reveal his true position that he desired the Supreme Court changed in order that he might appoint justices who would support his New Deal legislation.

It was at this point that the battle began in earnest. Roosevelt made a speech in support of his position, backed up by several members of his Cabinet and several administration Senators. Several Senators on the Senate Judiciary Committee issued a signed statement recommending the rejection of the court-packing bill, calling it “a needless, futile, and utterly dangerous abandonment of constitutional principle.” They warned passage of the bill would “subjugate the courts to the will of Congress and the president and thereby destroy the independence of the judiciary, the only certain shield of individual rights.”

It can be said that past presidents have appointed to the Supreme Court men of their political party and known to be in sympathy with their views. But it is one thing for a president to appoint to the bench a man of the same general political and social outlook as himself and another thing to announce in advance to the man appointed that he is appointed for the purpose of having him vote, when he is once seated on the bench, in a particular way.

Roosevelt's proposal to "pack the court" had one objective; to destroy the independence of the Supreme Court of the United States. If Roosevelt was successful at destroying that independence, the independence of the other courts of the country would not survive.

The struggle for human liberty has revolved around the struggle for independent courts. The most important concession wrung from King John by the Magna Carta was that all men should be equal before the law

and the rights of every man should be protected by courts that were not mere appendages of the King. The Court of Star Chamber, infamous for its tyranny, was overthrown because it was made up of puppets of the King that did his will. When the American Constitution was presented for adoption, the memory of the tyranny to which the people had been subjected was still fresh in their minds. The *People* insisted that there be included in the new Constitution a bill of rights that would guarantee them freedom from arbitrary arrest, freedom of speech, freedom of the press, freedom of religious worship, freedom of assemblage, freedom from unreasonable search and seizure, freedom from conviction of crime except on a fair trial by jury, freedom, in short, to exercise all those rights which made up, in the burning words of the Declaration of Independence, the "inalienable rights to life, liberty and the pursuit of happiness."

And why did the people insist upon a guaranty of these rights being inserted in the Constitution? It was that they should become a part of the "supreme Law of the Land" and as such, be protected by the courts against violation by either the executive or legislative branches of the Government. Thomas Jefferson writing to Madison said:

> In the argument in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the Judiciary. This is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.

Patrick Henry said: "The Judiciary are the sole protection against a tyrannical execution of the laws. They (Congress) cannot depart from the Constitution; and their laws in opposition would be void."

James Madison, presenting to the First Congress the amendments incorporating the Bill of Rights in the Constitution said:

> If they (the rights specified in the Bill of Rights) were incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights.

To those opposed to Roosevelt's court bill, it was more than a battle for an independent judiciary, but a battle against a centralized government and a return to tyranny.

On March 29, 1937, the Supreme Court drove a death nail into Roosevelt's court bill when they upheld the Railroad Labor Act;[8] it upheld the reversed the Frazier Lemke Farm Mortgage Moratorium Law,[9] both with unanimous opinions. More important still, in a five-to-four decision, with Justice Roberts now joining with the liberal members of the Supreme Court in these opinions, the Court upheld the Washington State Minimum Wage Act[10] by distinguishing it from its decision a few months before on the New York Minimum Wage Act.[11] Justice Roberts had moved over to the other side of the Court. The liberals were in ascendancy, and at last there appeared to be a good chance that Roosevelt would get what he wanted from the Court - the interpretation of the laws by Brandeis, Stone and Cardozo.

Then on Monday, April 12, the tide of battle turned once and for all when the Supreme Court upheld the National Labor Relations Act.[12] At his press conference the same afternoon, Roosevelt smiled and said it had been "a pretty good day for us," but it was the death blow to his court bill. These decisions of the Supreme Court ended Roosevelt's most powerful argument for his court packing bill – that the Supreme Court stood in the way of progress. Roosevelt now had to abandon this argument.

For two years Roosevelt had been demanding a liberal Supreme Court. On February 5, 1937 he had taken radical steps to get a liberal court by introducing the “court packing” bill. Now with these recent decisions he had a liberal court. Even though Roosevelt looked pleased and happy at the press conference following the National Labor Relations Act cases, the truth was that the news, with all its implications of danger to the court plan on which Roosevelt had gambled so much, came as a severe shock to him.

Roosevelt and his strategists had been expecting the Supreme Court to commit a sort of judicial hara-kiri. Roosevelt was counting on the justices for a series of conservative decisions, decisions which would surely have put a very different face on Roosevelt's fight to packing the court. Instead, the Supreme Court astonished Roosevelt, his advisors and most constitutional lawyers in the country.

Roosevelt was indeed astonished. In late 1935, the consensus in the legal community was that in view of the Supreme Court's past decisions,

---

8 Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937).

9 *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937).

10 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). See Chapter 8.

11 *Morehead v. People ex rel. Tipaldo*, 298 U.S. 587 (1936). See Chapter 8.

12 See Chapter 10.

adverse holdings on the National Labor Relations Act, the Social Security Act[13] and other New Deal legislation were foregone conclusions.

Because of the Court's abrupt about-face, Roosevelt was confronted with the necessity for a prompt decision. There were three alternatives before him: (1) he could announce that, since the Supreme Court had liberalized itself, he would abandon his plan to pack it; (2) he could intimate that, under the circumstances, he would be willing to compromise on a smaller number of additional justices; or (3) he could call the Court's move "political" and press on with his original court bill.

Those close to the court packing fight began to talk of compromises. One was to limit the number of new justices to two. Another was to allow the president to appoint a justice for every man reaching the age of 75, by limiting him to one appointment a year. Roosevelt rejected the idea of compromise in spite of the advice of almost everybody around him and chose the third option, to continue the fight.

During a meeting with his strategists, Roosevelt informed them of his decision to continue by declaring "the fight must go on." He declared that the Supreme Court's change of direction was a political move, that the justices could not be depended on to stay liberal, and that, in any case, the whole reversal of the Court's direction hung on one man's whim - Mr. Justice Roberts – that five to four majority opinions were not good enough for him. He wanted a Supreme Court which would "co-operate" 100 percent with the White House. He needed six new justices who would be friendly and approachable and who would uphold his great plans for social and economic reform. He stated that where great economic and social questions were involved, it was in the public interest to have the Supreme Court and the executive work things out together, rather than to have a long interval of uncertainty between the executive's action and the Court's reaction.

On May 8, Justice Van Devanter one of the conservative members of the Supreme Court announced his retirement, giving Roosevelt the opportunity to appoint a judge of his own political complexion.

The Senate leaders wanted Joe Robinson appointed to the bench. But the appointment never came to Robinson. Because Roosevelt's unwillingness to appoint Robinson to the bench or to compromise on the court bill, anger soon developed among his own supporters who were still being forced to carry this unpopular cause. In the end he had to assure Robinson that he would have the appointment, but Robinson was stricken with a heart attack in the Senate and died shortly thereafter.

---

[13] The Supreme Court's decision on the Social Security Act is examined in Dulocracy in America, Book Two: "Welfare Enumeration and Suretyship."

Vice-president Garner, disgusted at the labor troubles which he attributed to Roosevelt,[14] had left for Texas. When Garner got back to Washington, he was informed that it was not possible to get any kind of face-saving compromise.

Upon receiving this news, Garner went to the White House. He told Roosevelt that passage of the court bill as written was dead and the best option was to leave the matter in his hands to make whatever settlement he could. Roosevelt agreed. Garner went to Wheeler and asked on what terms he would settle. Wheeler replied: "Unconditional surrender."

On July 22, in the afternoon, Senator Logan rose on the floor of the Senate. It had been agreed that the court bill would be recommitted to the committee with the Supreme Court provisions left out of it. Senator Logan now made the motion to recommit. Hiram Johnson of California rose. He asked: "Is the Supreme Court out of this?" Senator Logan replied with an element of sadness in his voice: "The Supreme Court is out of it." Senator Johnson lifted up his hands and said: "Glory be to God!" as the galleries broke into wild applause. The court bill was dead. Following the apparent liberalization of the Supreme Court and after defeat of the court bill, Roosevelt in a public address said: "We lost the battle [the court bill], but we won the war."

Historians will differ with respect to the reasons why sufficient opposition was present in Roosevelt's own political party to defeat the court bill, and whether this opposition was able to obtain assurances that the Supreme Court, or at least a majority, in order to protect and preserve its integrity as a tribunal of justice against the court bill becoming law, decided to "cooperate" with certain New Deal policies where economic and social interest was vitally concerned.

It is substantially clear that the real purpose behind the court bill was to secure the appointment of a sufficient number of new justices to the Supreme Court to insure that the New Deal legislation desired by Roosevelt would be sustained as to its constitutionality.

As a compromise to the court packing bill, and in order to please and pacify some Roosevelt loyalist, Congress on August 24, 1937 passed an act

---

[14] During the later part of 1936, a new strategy was developed by the national labor unions, which was secretly endorsed by Roosevelt. This strategy was the now famous "sit-down" technique used during a strike. These union leaders and Roosevelt adopted this technique as a way to create enough labor strife in the country, whereby, forcing the Supreme Court into a position of adopting an expanded interpretation of the commerce clause, giving the federal government exclusive jurisdiction over all parties involved in the strike, under the government's claim that the strike or threat of strike would cause a burden to the "flow" or "stream" of commerce. All of the decisions of the Supreme Court in the *National Labor Relations Act* cases (reviewed in Chapter 10) involved striking employees or a threat by the employees to go on strike if the employer refused to adopt the collective bargaining features of the National Labor Relations Act.

entitled "An Act to provide for intervention by the United States, by direct appeals to the Supreme Court, and for other purposes. Section 1 of the Act reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence and argument upon the question of the constitutionality of such Act.[15]

If Roosevelt could not prevent the Supreme Court from declaring an act of Congress unconstitutional, perhaps this act would prevent or make it harder for an individual to challenge the constitutionality of an act passed by Congress.

[15] 50 Stat. 751.

10

THE NATIONAL LABOR RELATIONS ACT CASES

"With all these blessings, what more is necessary to make us a happy and prosperous people? Still one thing more, fellow citizens - a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from one mouth of labor the bread it has earned. This is the sum of good government." Thomas Jefferson, First Inaugural Address.

The National Labor Relations Act (NLRA), commonly called the Wagner Act, was signed by President Roosevelt on July 5, 1935.[1] It was passed two months after the Supreme Court in the *Schechter* case found the National Industrial Recovery Act unconstitutional; beyond the power of Congress to regulate intrastate activities.[2]

The stated purpose of the NLRA was "to remove the obstructions to the free flow of commerce by encouraging the practice of collective bargaining…" The act was predicated on the fact that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining would led to

---

1 Act of July 5, 1935, c. 372, 49 Stat. 449.

2 See Chapter 6 for a discussion of the *Schechter* case.

strikes and other forms of industrial unrest burdensome to interstate commerce.

Even though the act was limited to the control of the relations of employers and employees "affecting commerce," it was an attempt to enunciate certain alleged rights which would be protected by permanent federal legislation. Senator Wagner[3] in his hearing before the Labor Committee, warned of a permanent state of inequality between employer and employee unless legislation of this type was enacted.[4] Addressing the constitutionally of the act, Senator Wagner told the Committee:

> While this bill does not intend to go beyond the constitutional power of Congress, it goes to the full limit of that power in preventing these unfair labor practices. It seeks to prevent them, whether they affect interstate commerce by causing strikes, or by destroying the equivalance of economic forces upon which the full flow of commerce depends, or by ocurring in interstate commerce.[5]

To many in Congress, the NLRA was a dangerous and radical experiment. Its opponents saw it as an attempt through federal legislation to coerce the employer into bargaining with the representative chosen by the majority of his employees upon any demand which this majority seeks to impose, and to restrain him from interfering with the actions of any or all of his employees, regardless of the character of these actions, providing they are aimed toward organization or unionization.

The proponents argued that under the present economic system collective bargaining is essential for maintaining purchasing power, that the impairment of this right tends to produce depressions which directly affect interstate commerce and Congress had the "authority" to correct this impairment.

The premise upon which the NLRA was founded is that the federal government, under power conveyed in the commerce clause, has jurisdiction to intervene in intrastate labor relations when such relations tend to affect the amount of interstate commerce transacted. Strikes and the impairment of economic stability, which are the matters complained of in the Declaration of Policy of the Act, can affect interstate commerce only by decreasing its volume. The suggestion that this result affords jurisdiction to the federal government was a novel conclusion. This

---

[3] Senator Wagner was a member of President Roosevelt's brain trust and was Roosevelt's point man in the Senate. He authored many labor bills, including the National Industrial Recovery Act (NIRA) and the National Labor Relations Act (NLRA).

[4] H.R. Report No. 6288, 74th Congress. 1st Sess. (1935) 8-25.

[5] Note 4, *supra*, pp 23, 24.

reasoning is no more irrational than that under consideration, which, if accepted, would subject every intrastate activity to federal control.

In the *Schechter* case is found an indictment of legislation based upon this type of authority. There it is said:

> The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and in peace, but these powers of the national government are limited by the constitutional grants. Thoses who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary, such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment – 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

Assuming *argumento* that the National Labor Relations Act was declared valid under the commerce clause is it constitutional under the due-process clause of the Fifth Amendment, which has been interpreted to guarantee the right to freedom of contract?[6] Would the NLRA subject the individual employee to the collective bargaining agreement obtained by the union representative? Or would the individual employee be free to contract for his own labor? Does the NLRA eliminate the limitations on the federal government in the exercise of their powers granted to it by the Constitution?[7]

In *Adair v. United States*[8] the Erdman Act of 1898 was directly held by the Supreme Court to be invalid because it interfered with the right of the employer and employee to contract. The Court said:

> …it is not within the function of the government to compel any person against his will to accept or retain the personal services of another, or to compel any person against his will to perform personal services for another.[9]

In support of the NLRA it was argued that since the *Adair* case[10] current economic and social conditions had changed so that governmental

---

6 *Allgeyer v. Louisiana*, 165 U.S. 578 (1889).

7 *Chicago, Burlington, & Quincy Ry. Co. v. McGuire*, 219 U.S. 549 (1910).

8 208 U.S. 161 (1907).

9 *Id*. at 174.

10 *Adair v. United States*, 208 U.S. 161 (1907).

regulations were now reasonable limitations on the employer and employee's freedom of contract and the Supreme Court has recognized the necessity for labor unions "to give laborers an opportunity to deal with their employers."

A Scheme for Labor "Instability"

When the National Industrial Recovery Act (NIRA) was signed by President Roosevelt in June 1933, it was assumed the Supreme Court would uphold the constitutionality of the act, but by late October 1934, it was a foregone conclusion in the administration that major provisions contained in the NIRA, would be found unconstitutional[11] and Roosevelt wanted a stronger labor bill passed as quickly as possible in order to "protect the American worker and his family" from the "unfair and deceptive practices" of big business.

In early November, Senator Wagner met with Roosevelt and was given the order to draft a new labor bill. Since Wagner was the author of the NIRA, Roosevelt insisted Wagner be the architect of this new bill. Senator Wagner had to pledge what political capital he had left to reassure Roosevelt that the courts would uphold the constitutional of this new bill. "Bob, do whatever it takes to ensure the viability and sustainability of the bill," Roosevelt told the worried Senator. Wagner had previously introduced a labor disputes bill in the Senate in March 1934 as an expansion of union rights not contemplated in the NIRA. But the bill died in committee.

After receiving his marching orders from Roosevelt, Senator Wagner proceeded to draft the new labor bill with the assistance of his legislative aide, Leon Keyserling,[12] lawyers from the NIRA, including Calvert Magruder[13] and American Federation of Labor (AFL) counsel Charlton Ogburn. The labor bill was introduced in the Senate in February 1935. Representative William P. Connery, Jr.,[14] sponsored the bill in the House.

---

11 See Chapter 6.

12 Leon Keyserling was an economist and lawyer. During his career he helped draft major pieces of New Deal legislation and later advised President Harry S. Truman as head of the Council of Economic Advisors. As an aid to Senator Wagner, he participated in the drafting of various New Deal initiatives, including the National Industrial Recovery Act, the Social Security Act, and the National Labor Relations Act.

13 Magruder served as General Counsel of the National Labor Relations Board from 1934 to 1935 and as General Counsel of the Wage and Hour Division of the Department of Labor from 1938 to 1939. In 1939 he was nominated by Roosevelt to serve as a judge in the United States Court of Appeals for the First Circuit.

14 William Patrick Connery, Jr.,was a congressman from Massachuetts until his death in 1937. He served as Chairman of the Committee on Labor from 1931 to 1937.

As the labor bill was being drafted, Wagner was also holding private meetings with John L. Lewis, president of United Mine Workers of America (UMW) seeking his input on the bill. Lewis was a power union strategist and was called the Father of the "sit-down" strike. He was the driving force behind the founding of the Congress of Industrial Organizations (CIO), which established the United Steel workers of America and helped organize millions of other industrial workers in the 1930s.

Wagner was determined to keep Lewis' participation a secret from Mr. Ogburn, the AFL attorney. The Senator needed the support of AFL leadership, but he also realized that in order to "do whatever it takes to ensure sustainability of the bill," he needed the "unique set of skills" that John Lewis brought to the table. As president of the UMW, Lewis was continually at odds with AFL leadership over union control and power. Because of his "strong-arm" union organizing tactics, his support and use of the sit-down strike and organization of unskilled workers, which the AFL leadership disapproved, by October 1934, tension between Lewis and AFL leadership was at a all-time high; reaching the boiling point.[15] If AFL leadership found out about Lewis' involvement in the bill, Wagner feared the union leaders would withdraw their support which he desperately needed.

It was during one of these meetings that the two men (Wagner & Lewis) hatched a scheme that sought to insure the viability of the new labor bill, if a challenge was brought before the Supreme Court. Two years experience with the NIRA taught Lewis that the NIRA was flawed because even though labor did have a voice in the NIRA, business had a greater voice and much more control. In order to give labor a stronger voice, "it must be organized with the government taking a bigger role in protecting workers in their right to unionize," explained Lewis. Wagner made sure the NLRA granted greater protection to organized labor than to business.

As a matter of policy, the NLRA would commit the U.S. government to encourage collective bargaining and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The labor bill would placed no restraints on trade unions, and created a Board to administer the new law.

---

15 Tensions finally erupted in November 1935, when Lewis with the help of ten international unions from the Americal Federal of Labor, form a new Committee for Industrial Organization within the AFL. A bitter rivalry for control ensued and as this new group grew in power until the AFL expelled the ten unions in 1937.

The stated purpose of the NLRA was to "remove the obstructions to the free flow of commerce." In order to remove these "obstructions," there first had to be obstructions which naturally happen when conflicts arise between labor and management. Instead of waiting for this natural progression to occur, Lewis would give it a little kick, to get the ball rolling. His experience in recruiting new union members and organizing strikes had convinced him that by using a militant, organized group of workers, he could exert enough turmoil in labor relations that the federal government would have to step in to remove these obstructions in order to protect the "free flow of commerce."

The main goal of the scheme, which was secretly endorsed by President Roosevelt, was to create unrest and strikes in all industries which in turn would affect or burden interstate commerce. With federal action needed to resolve these increasing labor disputes and in light of the action taken by the federal government to protect commerce, Wagner believed the Supreme Court would rule in favor of the constitutionally of the National Labor Relations Act.

Lewis formulated a strategy to organize workers using whatever means available. He would send his best organizers into industry, to organize collective bargaining units among the employees of selected companies. If some employees refused to join, they would be "persuaded" (strong-armed) into joining. The employees pledged to the union would demand greater concessions from the employer and threaten the company with a walkout if their demands were not met. These newly organized bargaining units, whether a majority or not, would flood the National Labor Relations Board with complaints against the company for "unfair business practices" giving the impression the employer was obstructing the free flow of commerce.

The Labor Instability Scheme in Action – Two Case Studies

In August 1935, a certain union known as the Amalgamated Association of Iron, Steel and Tin Workers of North America, sought to bring the Weirton Steel Company under the provisions of the National Labor Relations Act. Union representatives sent to the Weirton plant sought to sign up employees for union representatives. When only a small percent of the employees signed membership cards joining the union, the union representatives and the employees pledged to the union, instituted various scare tactics, including the threat of termination for employees who failed to join the union. When Weirton Steel tried to intervene on behalf of the un-pledged employees, the Amalgamated Association filed a complaint with the National Labor Relations Board claiming the company was engaging in "unfair business practices" by preventing the employees from

organizing into collective bargaining units. During the hearing before the Board, Weirton Steel called several employee witnesses to testify against the Amalgamated union and their agents.

Mr. Mason, a heater at Weirton Steel testified:

> Question: Will you state what lodge you did join of the Amalgamated? Answer: Well, in the last part of August, I attended an open meeting of the Amalgamated, and they were discussing dues, and one thing and another, and they said that - it was brought up by a resolution, which was brought before the lodge, that they were going to close the charter right away, and anyone that had not paid in their dues up then, would be assessed $50. So I did not at that night, and the next day, coming down through the mill, a fellow by the name of John Rawlings was coming down, and he says, “Tom are you going to sign up?” I said, “I don't know, it looks like as if I am going to have to.” John Rawlings said, “If you are not, your iron is not going to be sheared next week." I said, "What do you mean by that?" He said, "Practically every roller in the plant has signed up, and the majority of them - those rollers that are not signed up by next week are not going to have their iron sheared." Well, I says, "In that case, then, it looks like I will have to." He said, "You certainly are." He says, "If you are not in on the line by next week, by next midnight," he says, "I am afraid you won't have your iron sheared."

Mr. Kinty, a tinner also testified:

> Question: Was anything said to you as to what would happen if they got 51 percent of the workers in the Amalgamated? Answer: Yes, sir; they told me that the U.S. Government would be back of this A.A.
>
> Question: What do you mean by the A.A? Answer: This Amalgamated Union.
>
> Question: The Amalgamated Association? Answer. Yes, sir. They said when the President (Roosevelt) would get behind their back, it would bring all the boys home.
>
> Question: Was any statement made to you with respect to the recognition of the Amalgamated Association and what would happen if they came to you? Answer: They said if the ones did not have a card and unrecognized, they would have no job."

Mr. Miller, a rougher, testified:

Question: Did you join the Amalgamated Association? Answer: I did.

Question: Why? Answer: Because I was told I would lose my job if I didn't.

In *Dartmouth Woolen Mills, Inc v. Myers*,[16] members of Local Union No. 2123 left their positions in the plant and declared themselves to be on a "holiday," leaving at a time when the mill had large orders to fill.

Dartmouth Mills tried to keep its plant in operation until the orders had been filled, but members of the "union, their confederates, aiders, abettors, and sympathizers, and other persons to the complainant unknown, engaged in a conspiracy to obstruct and injure the corporation's good will, trade, and business and to obstruct and interfere with the corporation in securing and maintaining an adequate force with which do operate the plant until such time as said corporation should agree to operate its mill upon terms and conditions dictated by the members of said union."[17]

After completing the first part of Lewis' labor instability plan the union filed a complaint with the National Labor Relations Board alleging that the corporation had "engaged in, and is now engaged in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act"

Dartmouth fought back and filed in the District Court of New Hampshire, a petition asking the court to take jurisdiction over the case filed with the Board, asserting the NLRA was unconstitutional and void because said act: (1) Attempts to regulate business activities not within the powers of Congress; (2) Deprives the Dartmouth Woolen Mills, Inc., and its employees of their liberty to contract without due process of law, and; (3) Can not be applied to the Dartmouth Woolen Mills, Inc., because its operations are purely local intrastate transactions, initiated and completed within the state of New Hampshire.

District Judge Morris who reviewed the petition and the facts in the case was of the opinion that the only purpose behind the filing of the complaint with the Labor Board by the union was, "to coerce it and to compel it to comply with all the demands, or some of the demands, of such of its employees as have declared a 'holiday,' which appears to be only another name for a strike."[18]

Addressing the constitutionality of the National Labor Relations Act, Judge Morris states:

---

16 15 F.Supp. 751 (D.N.H. 1936).

17 *Id.* at 752.

18 *Id.* at 754.

> It certainly is a debatable question whether or not the National Labor Relations Act is constitutional, and if constitutional, whether it can be applied to a private manufacturing plant whose business is entirely within the limits of a state. See National Labor Relations Board v. Jones & Laughlin Steel Corp. (C.C.A.) 83 F.2d 998; National Labor Relations Board v. Friedman-Harry Marks Clothing Co., Inc. (C.C.A.2) 85 F.2d 1; Stout v. Pratt (D.C.) 12 F.Supp. 864.[19]

The Courts and the Constitutionality of the National Labor Relations Act

On December 21, 1935 the NLRA was addressed in the case of *Stout v. Pratt* [20] in the District Court of Missouri. District Judge Otis wrote the opinion for the court. Judge Otis begins the opinion with a statement of the facts of the case:

> The complainants, Charles Stout, Warda Stout, and Alice Stout, are citizens of the United States and of the state of Tennessee. They own a little mill in the small city of Aurora in Missouri. In that mill flour is manufactured. Most of the wheat ground is grown in Missouri by Missouri farmers and purchased from them by the Stouts; some is grown in Kansas, there purchased, thence shipped to the mill in Aurora. Some of the flour manufactured is sold in Aurora and elsewhere in Missouri; some is shipped to states other than Missouri and there sold.
>
> Not long ago a majority of the employees in the mill at Aurora organized a union. They named it "Federal Labor Union No. 20028." Some differences arose between complainants and the union touching wages and hours of labor, but the complainants voluntarily granted the demands of the union as to these matters. Soon the union made still other demands. It demanded a reduction in the hours of labor from six hours to five and one-half hours per day without reduction in wages. … It demanded the right to dictate the number of employees in each of the several operations in the mill. It demanded that complainants sign a contract agreeing to employ none except members of the union and to discharge no employee without cause, irrespective of complainants' need for his services.
>
> The complainants could not comply with these demands and continue to compete with other mills and were forced temporarily to

---

19 *Id.* at 755.

20 12 F.Supp. 864 (1935).

close their mill. The mill was closed August 20, 1935. Shortly thereafter, at the insistence and request of the business men and city officials of Aurora, they agreed to endeavor to resume operation of the mill, and to that end they offered their former employees an increase in wages over the previous scale. The wages offered were satisfactory. The proposed hours of labor were satisfactory. But the union still demanded that the complainants sign the contract surrendering their rights to employ and discharge their employees as they chose.

It was then that complainants committed the “offense” on account of which the government of the United States proceeded against them. The “offense” was this: They refused to execute the contract demanded by the union (to that extent refusing to bargain collectively with the representatives of a majority of their former employees), and they reopened the mill, re-employing all former employees who applied for employment, "dealing with said employees individually."

On November 8, 1935, the National Labor Relations Board issued through the Regional Director a complaint against the Stouts charging them with "unfair labor practices" affecting commerce among the states, giving them five days to answer, and setting the matter for hearing on November 21. The only "unfair labor practice" set out in the complaint issued by the board having any basis in the facts as alleged in the bill is that the complainants here refused to bargain collectively and did bargain individually with their employees.

In their motion to dismiss the complaint the Stouts raised two important questions: Is the proceeding initiated against complainants authorized by the statute? If the proceeding is authorized by the statute, is the statute, in so far as it authorizes the proceeding, constitutional?

In answering in first question Judge Otis examines the intent of the statute and concludes:

> … even though the flour mill at Aurora is a small establishment where relatively few individuals are employed and is engaged exclusively in manufacturing, which, it is conceded, is a local business, yet the clear intent of the National Labor Relations Act is to subject the relations between employers and employees in even such small intrastate institutions to the control of the executive branch of the National Government.”

Touching on the right of a majority of employees to organize together to be the exclusive representative of all employees at the expense of an

individual employee willing to bargain with the employer, Judge Otis declares:

> When the majority is organized, to bargain individually with any employee is condemned, at least impliedly. The individual employee still can confer, still can petition, but he cannot bargain. If his employer bargains with him as an individual, as a man, as an American citizen, that is unfair; it is prohibited. The individual employee is dealt with by the act as an incompetent. The government must protect him even from himself. *He is the ward of the United States to be cared for by his guardian even as if he were a member of an uncivilized tribe of Indians or a recently emancipated slave.*

Judge Otis then proceeds to the second question: In so far as the act impliedly prohibits (by empowering the board to prevent) a refusal by employers in such a flour mill as at that at Aurora to bargain collectively with their employees and prohibits individual bargaining, is it constitutional? In answering this question, Judge Otis states:

> Unless it is authorized by the commerce clause of the Constitution it is not constitutional. That clause is: 'The Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' Under the commerce clause, Congress has power to regulate one thing only; that is, 'commerce among the several states.' Nothing else can it regulate by virtue of this power.

Examining whether manufacturing is commerce, Judge Otis declares:

> Manufacturing is not commerce, nor any part of commerce. Nothing more firmly is established in constitutional law than that. Congress, therefore, under the commerce power cannot regulate manufacturing. Hence it cannot regulate the relations between employers and employees in manufacturing, as commerce. Never can these relations be any part of commerce.

Addressing the board's assertion that the "little mill" is in the "stream of commerce" and therefore subject to the jurisdiction of the board, Judge Otis dismisses it by declaring:

> The Supreme Court has decided that Congress may regulate that which is in a "stream of commerce" or "current of commerce" or "flow of commerce among the states," even although the thing so regulated (if

> isolated) is an intrastate transaction. That is because the thing so regulated (not being isolated but being in and an essential part of the stream or current or flow of commerce) is a part of commerce among the states. These phrases the defendants now lay before the court. They argue that if wheat is exported from Kansas to a Missouri mill and flour is exported from the Missouri mill to Iowa that is a stream of commerce, and therefore that the business of the mill, including the relations of employers and employees therein, may be regulated by Congress.
>
> The contention is untenable and may be disposed of in a paragraph. That is not a stream of commerce which begins in Kansas with the purchase of wheat in that state for transportation to a Missouri mill, which is interrupted by the delivery of the wheat at the Missouri mill where flour is manufactured from the wheat, and which ends in Iowa with the sale and delivery there of flour, a new product, a product different from the wheat which was shipped out of Kansas. Here are two distinct streams of commerce, one ending when the wheat is unloaded at the mill, the other beginning when the flour into which the wheat has been manufactured is loaded on cars for shipment to Iowa. The mill is at the end of one of these streams and at the beginning of the other, but it is a part of neither. In every opinion of the Supreme Court in which the phrase "stream of commerce" has been used, it has been used to describe a situation in which the thing moving in commerce, as cattle, as grain, has been the same at the beginning and at the end of the journey.

If Congress can legislate to prevent that which indirectly and remotely or even directly and immediately might lessen the production of goods intended in whole or in part to be transported in interstate commerce after production, then its power is almost unlimited. If the relations between employers and employees may be regulated in one respect, they may be regulated in all respects. Citing the *Schechter* case, Judge Otis states:

> … the great judge who now is Chief Justice of the United States said, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."

Concluding his remarks, Judge Otis offers this warning about Congress' effort to expand the meaning of the commerce clause:

> There is now pending in Congress a resolution to amend the Constitution.[21] The first section of the proposed amendment is this: "The Congress shall have power by laws uniform in their geographical operation to regulate commerce, business, industry, finance, banking, insurance, manufactures, transportation, agriculture, and the production of natural resources." When that proposed amendment has been submitted and ratified the statute now under consideration, in the respects considered here, if then re-enacted, certainly will be constitutional. But not until then. *Then also what yet remains of the sovereignty of the states will cease to be and the "citizen" will have become a "subject*."

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, decided by the Circuit Court of Appeals for the Fifth Circuit on June 15, 1936, the court said:

> The National Labor Relations Board has petitioned us to enforce an order made by it, which required Jones & Laughlin Steel Corporation, organized under the laws of Pennsylvania, to reinstate certain discharged employees in its steel plant in Aliquippa, Pennsylvania and to do other things in the connection.
>
> The petition must be denied because, under the facts found by the board and shown as evidence, the board has no jurisdiction over a labor dispute between employer and employees touching the discharge of laborers in a steel plant, who were engaged only in manufacture. The Constitution does not vest in the federal government the power to regulate the relation as such of employer and employee in production or manufacture."

In the case of *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*,[22] decided July 13, 1936, in the Second Circuit, the court said:

> The relations between the employer and its employees in this manufacturing industry were merely incidents of production. In its manufacturing, respondent was in no way engaged in interstate commerce, nor did its labor practices so directly affect interstate commerce as to come within the federal commerce power. *Carter v. Carter Coal Co*. 56 S.Ct. 855, 80 L.Ed. 1160 (1936); *Schechter*

---

21 H.J.Res. 323, introduced June 12, 1935, referred to the Committee on the Judiciary.

22 85 F.2d 1 (1936).

> *Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. No authority warrants the conclusion that the powers of the federal government permit the regulation of the dealings between employers or employees when engaged in the purely local business of manufacture.[23]

On October 8, 1936 another case involving the NLRA was brought before the District Court of Missouri. In *Oberman V. Pratt*, the court found the plaintiff was engaged in purely intrastate business and was immune from the supervision and regulation of the board. The opinion was delivered by Judge Reeves. Citing the case *Stout v. Pratt*, Judge Reeves said:

> The matter was covered in *Stout v. Pratt*, in which case my associate, Judge Otis, very carefully pointed out the reasons why the congressional act should not apply to intrastate commerce, even though the employment of labor was involved.[24] Moreover, the opinion of Judge Otis was affirmed by the Circuit Court of Appeals by opinion filed August 5, 1936. 85 F.2d 172, 178.[25] While the Court of Appeals refrained from passing on the constitutionality of the act, being moved with a high sense of abstract justice, yet, nevertheless, the court volunteered: "Another grave question presented by this suit is whether the curtailment of the right of an employer, who is subject to the act, to bargain individually with his employees or such of his employees as are willing to so bargain with him, as well as the curtailment of the right of employees to bargain individually with their employer, does not render the act null and void because of its apparent conflict with the due process clause of the Fifth Amendment of the Constitution of the United States. That this clause protects freedom of contract has long been settled. The last expression of the Supreme Court on that subject is contained in the case of *Morehead v. People ex rel. Tipaldo*, 298 U.S. 587, opinion filed June 1, 1936."

On February 12, 1937, sixty days before the Supreme Court decided the National Labor Relations Act cases the Circuit Court of Appeals for the First Circuit handed down its decision in *Mayers v. Bethlehem*

---

23 *Id*. at 2.

24 The identical question was determined in the Northern District of Oklahoma in the case of *Eagle-Picher Lead Company et al. v. Madden et al*. (D.C.) 15 F.Supp. 407. The opinion was written by United States District Judge Kennamer, on June 18, 1936.

25 The Fourth Circuit Court of Appeals, in *National Labor Relations Board v. Washington, Virginia and Maryland Coach Company*, 85 F.2d 990, reached the same conclusion.

Shipbuilding Corporation.[26] In this case the Shipbuilding Corporation and a company union, which was prohibited by the NLRA, had secured an injunction against the National Labor Relations Board, to prevent the board from proceeding with complaints of unfair labor practices. The Circuit Court of Appeals, reviewing the litigation on this subject, said:

> The case is by no means of the first impression. Cases involving the powers and jurisdiction of the National Labor Relations Board have already arisen and been decided in the second, fourth, fifth, sixth, eighth, and ninth circuits, some as in this case on proceedings to enjoin hearings, some on petitions by the board for enforcement of its orders. Where the question was presented it has uniformly been held that the act does not apply to manufacturers. Such persons are not engaged in interstate commerce and their relations with their employees are within the jurisdiction of the state rather than the national government.[27]

The court was also of the opinion that the fact that Bethlehem obtained much of its raw material from outside the state in which it was located and sent its finished products out of the state had not the effect of making the business a part of interstate commerce.

The Supreme Court and the Constitutionality of the National Labor Relations Act

Even though the second, fourth, fifth, sixth, eighth and ninth circuit court of appeals and several state courts declared the National Labor Relations Act did not apply to businesses or employees engaged in intrastate commerce, the Supreme Court of the United States on April 12, 1937 in five-to-four decisions, with conservative Justice Roberts joining the Court's four liberal members, involving five cases[28] upheld the constitutionally of the National Labor Relations Act.

The opinions in three cases were delivered by Chief Justice Hughes. In two of the cases, Justice Roberts delivered the opinion of the Court. In all of the cases, except *Washington, Virginia and Maryland Coach*

---

[26] 88 F.2d 154 (1937).

[27] *Id*. at 155.

[28] *National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co*., 301 U.S. 58 (1937); *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U.S. 142 (1937).

Company v. National Labor Relations Board, Justice Van Devanter, Justice McReynolds, Justice Sutherland and Justice Butler dissented.

National Labor Relations Board v. Jones & Laughlin Steel Corporation
301 U.S. 1 (1937)

In *NLRB v. Jones & Laughlin Steel Corporation*, the proceeding was instituted before the National Labor Relations Board by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization, charging that the steel corporation had violated the act in engaging in unfair labor practices affecting commerce. The board sustained the charges, ordered the corporation to cease and desist from the practices, to offer reinstatement to ten of the employees named, to make good their losses and to post for thirty days notices that the corporation would not discharge or discriminate against union members. Upon the corporation's failure to comply, the board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition on the ground that the order exceeded federal power. The case came before the Supreme Court by way of certiorari.
Chief Justice Hughes wrote the majority opinion in the case, which reversed the lower court's ruling. Four of the Justices dissented with Justice McReynolds writing the opinion. In his view the majority had overruled the *Schechter* case. Further, he stated the circuit judges were right in relying on these cases, and intimated that the opinion of the Supreme Court was perhaps not fair to the circuit judges who based their opinions on the most recent decisions of the Court. Justice McReynolds said:

> We conclude that these causes were rightly decided by the three Circuit Court of Appeals and that their judgments should be affirmed. The opinions there given without dissent are terse, well-considered and sound. They disclose the meaning ascribed by experienced judges to what this Court has often declared, and are set out below in full. Considering the far-reaching import of these decisions, the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a Board of three, the obligation to present our views becomes plain.[29]

The dissent of Justice McReynolds will be remembered not for what was written in his opinion but how he delivered his opinion. Ordinarily the

[29] 301 U.S. at 76.

dissenter speaks in a low voice, often difficult to hear, but on April 12 almost every word came clearly and with feeling.

Justice McReynolds began giving the dissent of the minority as soon as Chief Justice Hughes closed for the majority. He delivered his views extemporaneously, without once looking down at his manuscript. After announcing the names of those in the minority, McReynolds said: "You may recall that Webster, in one of his orations, suggested that the argument may proceed more profitably if the issue is more narrowly defined. I think I can tell you in a few minutes just what the issue is in this case and give you some understanding of what the decision means." McReynolds continued, "If you got the idea that this legislation was intended to prevent strikes and thereby improve commerce, let me read you a few lines of Section 13 of the act, which says that nothing in the act shall impede the right to strike."

It was reported by those in attendance, Justice McReynolds looked sternly out into the court room as he went on, his voice rising, "The Labor Act does not prohibit strikes. This act is leveled at employers, and defines as employers any one who acts for employers. The size and character of the enterprise are not involved. Now we are told that this act is intended to restrain any employer from discharging an employee belonging to a labor union - that is, any organization of any kind, or agencies in which the employee participates in whole or in part for dealing with employers."

McReynolds then said: "We have here three concerns: *first*, a large integrated steel company; *second*, a small manufacturer of trailers - an enterprise built up from a small blacksmith shop, largely the work of one man; *third*, a small clothing manufacturing plant in Richmond, Virginia, hiring less than 1,000 persons. The thing they have in common is this, each is a manufacturer, each imports from outside the State raw material, fabricates it and sends it out of the State. There are the essential elements."

McReynolds then spoke about past court decisions. He said: "This Court has decided again and again within the last fifty years and particularly in the last two years, that manufacturing is only incidentally related to interstate commerce and that Congress has no authority to interfere with manufacturing, operating as such. We had supposed that was settled as much as anything can be settled."

In his written opinion, Justice McReynolds said that under the conclusion of the majority, "almost anything, marriage, birth, death - may in some fashion be held to affect commerce." In the opinion he declares:

> It is gravely stated that experience teaches that if an employer discourages membership in 'any organization of any kind' in which employees participate, and which exists for the purpose in whole or

> part in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work, discontent may follow and this in turn may lead to a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything - marriage, birth, death - may in some fashion affect commerce.[30]

In speaking, he said that "marriage and babies" could be regulated, and that the marriage of "Mary Jones and John Smith" might be considered in the "stream" of commerce.

Voicing the sentiments of the four conservatives, Justices Van Devanter, Sutherland, Butler and himself, he closed by saying: "The field opened here is wider than most of the citizens of the country can dream. The cause is so momentous, the possibilities for harm so great that we felt it our duty to expose the situation as we view it." He asserted again that if, under the NLRA decisions, Congress could control the relations between employers and employees they could exercise supervision over marriage and birth.

Did the Decision of the Supreme Court in the NLRA Cases Create a New Interpretation of the Commerce Clause?

It was not clear in the National Labor Relations Act cases whether the Supreme Court really based its decision on the meaning of the term "interstate commerce" or not. A number of legal writers concluded that these decisions did not widened the meaning of the term "interstate commerce," but that they recognize and apply an established rule, that Congress may legislate with respect to activities that burden it, though these activities may themselves be wholly outside of commerce between the states.

How far the government's power extends away from the "flow" of interstate commerce is, said the Chief Justice, “necessarily a question of degree.”

In what direction was the Court headed with these decisions? Did the decisions of April 12, 1937 adopt the principles laid down by John Marshall one hundred and fifty years ago, or did the Court simply adopt a glorified interpretation of the transportation doctrine? The following excerpt from the opinion in the NLRA cases answers this question:

---

[30] 301 U.S. at 99.

> *When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities,*[31] how can it be maintained that their industrial labor relations constitute a foreign field into which Congress may not enter which it is necessary to protect interstate commerce from the paralyzing consequences on industrial war? [32]

In a discussion of the National Labor Relations Act cases in the *Georgetown Law Journal*, a writer states:

> The scope of the term 'interstate commerce,' as it has previously been understood and interpreted remains the same. The decisions must be limited to the admittedly serious effect of labor disputes and disorders on the 'free flow of interstate commerce.' Nowhere in any of the majority decisions can it be found or even inferentially stated that there is now vested in Congress, as a result thereof, the power to regulate and control the internal affairs of a business of a purely intrastate character where there can be found no serious restriction or burden on the free flow of commerce between the states.

What was the Reaction to the National Labor Relations Act Decision?

Upon hearing the Supreme Court decisions validating the NLRA, Senator Wagner stated: “It is a great victory for the people of America. The Supreme Court has thrust aside its more recent stereotyped and narrow generalities concerning federal power, and has adopted a broader concept fitting the organic interdependence of our nation-wide social and economic system. No one who reads the decisions of the Supreme Court will believe that there is a need at this time for further federal legislation dealing with labor relations."

Earl F. Reed[33] counsel for the Jones & Laughlin Steel Corporation, said the Supreme Court decision on the National Labor Relations Act, was one which "cuts both ways."

After reading press reports of the decision, Mr. Reed told the Associate Press the decision cuts both ways. “Workers who joined a union would obviously be viewed by the National Labor Board as being under

---

31 See Chapter 11 – The Great Secret.”

32 301 U.S at 41.

33 Mr. Reed regarded as one of the best labor attorneys in the country in the 1930’s and successfully fought the National Industrial Recovery Act. See Chapter 6.

the board's jurisdiction, while workers who freely decide not to join the union would be at liberty to contract for their own wages and conditions of employment free of any interference from the National Labor Board or the union," he said.

Was the Supreme Court Playing Politics When it Decided the National Labor Relations Act Cases?

Undoubtedly, the Supreme Court did yield to congressional pressure when deciding the NLRA cases. Perhaps they yield to the legislative leverage of Roosevelt's "court packing" bill, or to the Wagner-Lewis "labor instability plan." But the Court also translated policy (or politics, if you use the word respectfully) into judgment. In short, the Supreme Court acted in its capacity as an agent of self-preservation.

There are contained in the Constitution clauses, to quote Justice Frankfurter, "so unrestricted by their intrinsic meaning or by their history or by traditions or by prior decisions that they leave the individual justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life." The commerce clause is one of those. The four minority Justices were consistent in adhering to the restricted definition of that clause set out in the National Industrial Recovery Act decisions. The five majority Justices felt that "reading life" compelled a less restricted interpretation of it.

Needless to say, Justice Roberts (who moved over to the liberal members of the Court) must have taken a big look at life in 1937. Chief Justice Hughes, in the *Jones & Laughlin* case said: "We have repeatedly held that as between two possible interpretations of a statute, by one which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." Perhaps the Chief Justice meant to say "our plain duty is to adopt that which will save the Court."

Because of this new view of the Constitution by the majority of the Supreme Court, several New Deal acts previously declared unconstitutional by the lower courts now found constitutional favor with members of the Court. One such act was Social Security.[34] During a general staff meeting at the Social Security Administration Headquarters at Baltimore, Maryland on February 3, 1961, Thomas H. Eliot,[35] one of the original drafters of the Social Security Act[36] in 1935, was asked the

---

34 The Social Security Act cases are thoroughly examined in Book Two.

35 Thomas Hopkinson Eliot was a lawer and politican. He served as assistant solicitor in the United States Department of Labor from 1933 to 1935 and as general counsel for the Social Security Board from 1935 to 1938.

36 See Chapter 11.

following question: "What caused the Supreme Court to reverse itself in its decision to declare the Act (social security) constitutional?" His response was as follows:

> What happened in 1937 was that in February the president came out with a scheme to "pack" the Court. No one knows, and there is some dispute about it, but I think that probably it's fair to say that the Court was not unmindful of this attack. Two Justices, Hughes and Roberts, were very alarmed for the future independence of the Court. They were, especially Hughes, anxious to prevent the bill (court packing bill) from going through. However that may be, the fact is that in April the National Labor Relations Act came before the Court for decision while the president's bill to pack the court by adding six new Justices was still being considered by the Senate. Hughes and Roberts joined three liberal Justices, who had been voting in favor of the New Deal legislation, to uphold the National Labor Relations Act--even though in doing so they seemed to be repudiating their own opinions in earlier cases. Whether they did this in order to save the Court from defeat in the Senate I don't know, but it may be so. After that break, it was not altogether unexpected that the old-age insurance provisions would likewise be upheld. I think the unemployment compensation provisions were fairly safe all the way along because of the earlier decision. I don't know whether this is right or not. There were nine Justices on the Supreme Court; one or two of them had to change their positions pretty fundamentally to thwart the threat of that number of nine being added to by six new Justices appointed by the president. The old saying about that particular change of front is that, "a switch in time saved nine."

The Supreme Court in 1937

The year 1937 will probably rank as one of the most important years in the history of the Supreme Court. Not only because of the actual decisions rendered, but also because of the influence upon the decisions from outside forces.

In May and June 1936, the opinion in the *Carter Coal* case[37] holding that federal legislation providing for municipal debt readjustments was an unconstitutional exercise of the bankruptcy power and the Court invalidating New York's Minimum Wage law,[38] were decided shortly before the Court's summer adjournment. Within a few weeks after the

---

37 *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513 (1936).

38 *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). See Chapter 8.

decision, the national conventions were held and the campaign for the presidential election was in full swing. During the presidential campaign there were demands from many sources to extend the federal power to control such things as wages, hours and other matters. Bills were introduced in Congress to amend the Constitution to confer this authority. The attempt to amend the Constitution met with determined opposition.

The process of amendment by judicial activism,[39] however, follows a smoother path. No state or any group of states can block it. The draftsmen who prepared most of the New Deal measures sought to connect with interstate commerce every object desired to be accomplished. Nearly all New Deal legislation contain elaborate recitals by which Congress purports to find that interstate commerce is affected in some way by the evils sought to be remedied by the legislature.

Up to and including the year 1936, the Supreme Court, with consistent steadfastness, refused to recognize that recitals could alter facts, and refused to overturn the long settled distinction between production and commerce.

In November, 1936, the presidential election took place. Three months later, on February 5, 1937, a re-elected Franklin Roosevelt sent a message to Congress in which he advocated that the Supreme Court be enlarged by adding new judges so as to bring the total membership to fifteen. The court-packing scheme was obviously motivated by Roosevelt's desire for a change in the character of the Supreme Court's decisions. Whether influenced by the court-packing bill or not, the change or surrender came. In the crucial New Deal cases brought before the Court after the presidential election it was a change in the attitude of Justice Roberts that validated the acts. In the fourteen cases in 1937 in which one vote determined the outcome, Justice Roberts sided with the liberals in every instance but one; in 1936 he sided with the conservatives in six out of ten such cases. In two cases[40] the change represented a reversal of the Court's previous decisions. Chief Justice Hughes and Justice Roberts, who had written the opinions in the *Schechter* case, the *Railroad Retirement Board v. Alton* case and the *Butler* case, wrote the majority opinions in nearly all of these subsequent cases.

In early 1937, it was generally assumed that the Supreme Court would apply a narrow interpretation to the National Labor Relations Act.[41] While that statute by its terms applied only to interstate commerce between the states and with foreign nations, the National Labor Relations Board had

---

[39] The act of replacing an impartial interpretation of existing law with the judge's personal feelings about what the law should be.

[40] The Minimum Wage and NLRB cases.

[41] Act of July 5, 1935, c. 372, 49 Stat. 449.

sought to invoke it against manufacturing plants whose activities crossed state borders. On February 10, 1937, five days after Roosevelt sent his court packing message to Congress, three cases involving the constitutionality of the National Labor Relations Act were argued before the Supreme Court. They were decided on April 12, while the court packing fight was in full swing.

The case chosen as the first vehicle for the Chief Justice's elaborate opinion was *National Labor Relations Board v. Jones and Laughlin*.[42] Whether intentional or accidental, the facts of this case furnished the majority the most plausible reason for abandoning the old landmarks and the best opportunity for metaphysical dialectics. The Chief Justice, without holding that it was necessary to do so, commented on the fact that raw materials were transported in interstate commerce to the plant and that, afterwards, manufactured products were transported in interstate commerce out of the plant, and accepted the government's argument that, in consequence, the plant was in the midst of a “stream or flow of commerce” - although a similar argument had been made and rejected by the Court in prior cases.

It is noteworthy that in these three cases the Circuit Court of Appeals had decided the other way, the *Jones and Laughlin* case being from the Fifth Circuit, the *Fruehauf* case from the Sixth Circuit, and the *Friedman-Harry Marks Clothing* case from the Second Circuit. Each Circuit Court had relied upon the *Schechter* case and the *Carter Coal* case, and had considered them so conclusive and controlling as to require only a short *per curiam* opinion.

Justice McReynolds delivered the dissenting opinion in all three cases, in which justices Sutherland, Van Devanter and Butler concurred. The dissenting opinion pointed out that, not only three Circuit Court of Appeals, but six District Courts had held that the Board had no authority to regulate relations between employers and employees engaged in local production and that no decision or judicial opinion to the contrary had been cited.

The decisions which resulted in this new position of the Court were all, in one respect or another, labor cases. And they came before it against a background of extensive and far-reaching labor disputes accompanied by the growth of the militant C.I.O. labor organization and the development of the "sit-down" strike technique. It is hardly strange that under such circumstances as these and with mounting pressure from both the executive and legislative branches of government as well as increasing public resentment of the Court, that the Supreme Court would abandon its well established position on interstate commerce, and as Chief Justice Hughes

---

42 301 U.S. 1 (1937).

in a speech given later in the year would reply: "*What the people really want they generally get. The same Constitution which serves as a shield to protect the rights of the people will now be used as the sword for their own destruction*."[43]

The Supreme Court After 1937

After the Supreme Court executed its *volte face*[44] in New Deal constitutional law in April 1937, some significant changes in the Supreme Court's personnel occurred. Justice Van Devanter retired on June 2, 1937, and Justice Sutherland followed on January 18, 1938. The replacements were Justices Hugo L. Black[45] and Stanley F. Reed.[46] Two new justices, Felix Frankfurter[47] and William O. Douglas,[48] replaced justices Cardozo and Brandeis in 1939. As Justice Frankfurter aptly said, we have a "reconstructed" Court.[49]

National Labor Relations Board v. Fainblatt [50] was decided on April 17, 1939. In the *Fainblatt* case, the Court again had occasion to consider the jurisdiction of the National Labor Relations Board. The Court ruled that Congress had plenary power to regulate interstate commerce, "be it great or small."

Registering their dissents here as in earlier cases involving the limits of the jurisdiction of the NLRB, Justices McReynolds and Butler patiently record an impressive number of precedents for their view that manufacture is not commerce and that state sovereignty must be respected, and prophetically declared that the subversive views of the majority will seriously impair the "very foundation of our federal system."[51] Their

---

43 Perhaps the Chief Justice was offering a warning to those who wish to give up this protection for the benefits and protection offered from a caring federal government.

44 A total change of position, as in policy or opinion.

45 Black was nominated to the Supreme Court by President Roosevelt and confirmed by the Senate by a vote of 63 to 13. He served from 1939 to 1971.

46 Reed was nominated to the Supreme Court by Roosevelt and served from 1938 to 1957. He was the last Supreme Court Justice who did not graduate from law school.

47 Frankfurter was nominated to the Supreme Court by Roosevelt and was confirmed without dissent. He served from 1939 to 1962.

48 Douglas was nominated to the Supreme Court by President Roosevelt and served from 1939 to 1975. With a term lasting 36 years and 209 days, he is the longest-serving justice in the history of the Supreme Court.

49 *Helvering* v. Gerhardt, 304 U.S. 405 (1938).

50 *National Labor Relations Board v. Fainblatt*, 306 U.S. 601 (1939).

51 *Id*. at 673.

summary was a forceful reminder of the tremendous leap which the Court took in 1937 in sanctioning the extension of federal power.

Conclusion

The advent of the New Deal in 1933 represented a marked change in attitude concerning the functions of government. It was inevitable that the executive and legislative should clash with the judiciary unless the latter recognized the trend of the times. At first the judiciary was receptive. In 1935 after viewing the path the executive branch of government wanted the country to travel, a majority of the Court began a process of judicial nullification; this trend was accelerated in 1936. Two utterly inconsistent conceptions of government had collided. Taking the initiative the executive caused the "court-packing" bill to be introduced when the NLRA cases were before the Court. This forced a show down. Bowing to increased congressional, presidential and public resentment, the Supreme Court started gradual reversal of previous decisions and interpretations of constitutional law and the opinions of Justices Van Devanter, Sutherland, Butler and McReynolds were decisively defeated. A *volte face* in constitutional law occurred. Retirements of justices followed. Replacements accentuated the trend of the new constitutional law. By February 1940, the Supreme Court contained five Roosevelt appointees.[52]

Before "the great divide" the Supreme Court stood for the protection of all types of individual rights against what was conceived of, in many quarters, as the inroads of government. The protection afforded the individual was so absolute at times as to create a no-man's land wherein neither state nor federal government could enter. But soon a new "federalism" emerged. This new "federalism" would result in the subjection of the individual to governmental supremacy without even amending the Constitution.[53]

In several important respects the National Labor Relations Act cases, remain landmarks in constitutional law. They indicate an expanded interpretation of the term "interstate commerce." Under the power conveyed to the government to regulate commerce among the several states, Congress has at times attemplted legislation transcending the powers conferred by the grant. This clause can in no way be interpreted to authorize licentious inter-meddling in affairs properly of state concern.

It is interesting to note that when Roosevelt was Governor of New York in the 1920's, he protested in behalf of the states against the

---

[52] Justice Frank Murphy was appointed to the Supreme Court on January 15, 1940.

[53] By 1939 virtually all employers and employees were engaged in congressionally controlled and regulated interstate commerce. See Chapter 11 – The "Great Secret."

dishonest and lawless use of the Commerce Clause by the Congress and the president to occupy forbidden ground in the states. Speaking before a conference of governors at New London, Connecticut, on July 16, 1929, he condemned the stretching" of the commerce clause by Congress to cover cases not embraced by grants of power to it in the Constitution. Roosevelt declared:

> Our Nation has been a successful experiment in democratic government because the individual States have waived in only a few instances their sovereign rights. But there is a tendency, and to my mind a grievous tendency, on the part of our National Government, to encroach, on one excuse or another, more and more upon State supremacy. The elastic theory of interstate commerce, for instance, has been stretched almost to the breaking point to cover certain regulatory powers desired by Washington. But in many cases this has been due to a failure of the States, themselves, by common agreement, to pass legislation necessary to meet certain conditions.

The commerce clause contains a principle dating back as far as Magna Carta (1215), when King John, faced by armed men, signed an agreement not to interfere in the right of Englishmen to go to and fro in commerce, and abroad and return, except in an exigency of war. Englishmen in commerce were "in pursuit of happiness," which the Declaration of Independence later denominated a right from the Creator, for the protection of which "governments are instituted among men."

The speeches and writings of Edmund Burke in behalf of the American colonists make clear that the restrictions on commerce by the government of England were far more burdensome and intolerable than was "taxation without representation," usually given as the cause of the American Revolution. It was obstruction by states of this right to engage in commerce that contributed much to the breakdown of the government under the Articles of Confederation. Congress is authorized to regulate commerce so that it will not be obstructed as it was before-that is, it is to "promote commerce." It is not to obstruct it affirmatively, any more than the early states could rightly do so.

The history of commerce make clear that legally it is the most important right of men, not to be trifled with by kings or others in power, including the president and Congress. As Abraham Lincoln said on September 17, 1859, "The people - the people - are the rightful masters of both congresses, and courts - not to overthrow the constitution, but to overthrow the men who pervert it."

THE "GREAT SECRET"

THE LICENSE TO ENGAGE IN INTERSTATE COMMERCE

"How can sons and daughters who owe everything they have—their education, their ideals of life, their capacity to acquire independent living and their characters—to parents who have worked, sacrificed, prayed, wept, and striven for them to the exhaustion of their bodies and their energies be parties to a scheme which would make their fathers and mothers the objects of charity and cast the burden of their support on the community and stigmatize them with the loss of independence and self-respect. I think my food would choke me if I knew that while I could procure bread my aged father or mother or near kin were on public relief." Stephen L. Richards, 1944.

The purpose of this chapter is to set forth as simply as possible the reasons for believing that a vital change in the relations of the federal government to local government and business has taken place since Roosevelt's presidency, and that this change is based chiefly upon the construction put upon the commerce clause of the Constitution. This is not based on theory, but an accomplished fact; that with the sanction of the United States Supreme Court, the federal government regulates all business activity, whether local or national.

To fully understand the changes which have taken place since 1933, a review of the historic background proceeding this change was necessary, namely: *First*, the setting and the circumstances in which Roosevelt submitted his New Deal legislation and the discussion which took place in attempting to validate these acts under the interstate commerce clause of the Constitution; s*econd*, the meaning attributed to the commerce clause by

the Supreme Court in the long period of years following the adoption of the Constitution; *third*, the Supreme Court's invalidation of Roosevelt's New Deal legislation; *fourth*, the violent controversy over Roosevelt's attempt to pack the Supreme Court and *finally*, the surrender of the Supreme Court in 1937 and the Court's adoption of an expanded interpretation of the commerce clause which resulted in the conversion of the corporation and private citizen into articles of commerce.

This chapter explains how the citizens of this nation have traded their sovereignty for security and protection from the cradle to the grave and how the federal government acting as *parens patriae*[1] regulates all our activities for our own protection. Since the 1930's federal regulatory acts have increased fifty-fold. At the present time we find that our national government is now dictating to all individuals and businesses such matters as hours of labor, wages, retirement pensions, and now health care.

It should now be well established after reading the previous chapters of this work, that the federal government has only such powers as are expressly conferred upon it by the Constitution. So long as Congress is acting within its proper sphere, its power is supreme. Its activities cannot be limited or interfered with by the states or judiciary. Accordingly, when Congress acts within the limits of its Congressional authority, it is not the province of the judicial branch of government to question its motives.[2]

The power of the states to regulate their purely internal affairs cannot be interfered with by Congress unless this power has been surrendered to the federal government by the states. The maintenance of this balance is essential to the preservation of our dual system of government and is one of the safeguards of traditional American liberty. If the states and the people were to surrender their sovereign power, there would soon be such an encroachment upon the reserved power of the states and the people that this power would be entirely whittled away and we would awake to find ourselves to all intents and purposes wholly under a central government and impotent in local affairs. That this danger was foreseen by the framers of the Constitution is nowhere stated more forcefully than in the following passage from an opinion of the Supreme Court in a case in which it rejected the contention that there are legislative powers affecting the nation as a whole which belong to, although they are not expressed in, the grant of powers. In reiterating that the national government is one of enumerated powers, and that this proposition, although clear from the Constitution itself, was reasserted by the Tenth Amendment, the Supreme Court declared:

---

1 Latin for "parent of the country."

2 *Smith v. Kansas City Title & Trust Co*., 255 U.S. 180, 210 (1921).

> This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.[3]

It is probably conceded that the only basis upon which the extension of federal regulatory power can dictate over business activity is through the commerce clause of the United States Constitution. If the subject matter sought to be regulated is not within the commerce clause, the federal government has not satisfactorily explained its exercise of power which is otherwise reserved to the states or to the people.

The possibilities of such an extension of federal authority were never more graphically indicated than by Roosevelt's New Deal legislation, all of which were sought to be sustained as logical extensions of granted federal power; and to reduce the states to mere administrative districts in a central government.

Roosevelt's principal argument to sustain his New Deal was a plea that the national emergency and changed economic conditions which existed during his presidency justified a wide extension of federal power. Initially the Supreme Court ruled that the limits of constitutional authority apply under all circumstances and conditions. If an act was unconstitutional neither an emergency nor a widely-felt economic necessity can justify it.[4]

That an action by Congress is economically or otherwise highly desirable is immaterial as a condition of federal power. Thus in holding invalid the Railroad Retirement Act,[5] an act having purposes similar to Title II of the Social Security Act of 1935,[6] the Supreme Court said:

> Though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.[7]

---

3 *Kansas v. Colorado*, 206 U.S. 46, 90 (1907).

4 *Schechter Poultry v. United States*, 295 U.S. 495, 529, 549 (1935).

5 See Chapter 5.

6 Title II of the Social Security Act is examined in Book Two.

7 *Railroad Retirement Board v. Alton R.R. Co.*, 295 U.S. 330, 346 (1935).

In invalidating the National Industrial Recovery Act by unanimous action,[8] the Supreme Court held that neither the existence of a "national crisis" demanding "a broad and intensive cooperative effort by those engaged in trade and industry," nor the existence of a "serious economic situation" could justify federal action beyond the scope of its delegated powers.[9]

After several New Deal acts were declared unconstitutional, several bills were introduced in Congress seeking to amend the Constitution. Most sought to give Congress control over commerce, both interstate and intrastate. None were ever acted upon. However, today it appears the federal government through its various agencies can and does regulate virtually all business activity in the states of the Union. A question therefore must be asked: “How did the government get this power to regulate our working environment, our social environment and now our health care environment?”

Regulation of the Employer-Employee Relationship in Intrastate Commerce

In the *First Employers' Liability* case,[10] the Supreme Court reaffirmed the principle, that, Congress has no authority to regulate the employer-employee (master-servant) relationship involved in intrastate commerce, being it is outside the scope of the authority of Congress. The Supreme Court said:

> Though the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended to include the regulation of master and servant as to things which are not interstate commerce.

It was true in 1908 when this case was decided. It was true in the 1930's during the Roosevelt presidency. It is true today. Congress cannot impose any federal regulation upon the employer or employee, whose relationship is purely intrastate in nature. Nevertheless, Congress continues to pass laws and mandate compliance to their draconian regulations, not only over the employer-employee relationship, but over all our activities. How is this possible? Under what grant of power does

---

8 See Chapter 6.

9 Note 4, *supra*.

10 *Howard v. Illinois R.R. Co*., 207 U.S. 463, 496. (1908).

Congress claim this authority? Why does it seem impossible to release ourselves from the bonds of Congress and their massive regulations?

The answer is simple, Congress is exercising regulatory power under the presumption that every "U.S. person" is engaged in interstate commerce and Congress has jurisdiction over ALL activities in interstate commerce.

It is submitted, that Congress acquired this jurisdiction by way of a federal license. It is further submitted that you acquired a federal license to engage in the privilege of interstate commerce and this license is *prima facie*[11] evidence of your willingness to engage in this privilege; a privilege which grants to Congress exclusive jurisdiction over your commercial activities. You might be saying: "I don't have a license to engage in interstate commerce. I certainly would remember applying for and receiving such a license." It is submitted that the Social Security Number is a license to engage in congressionally controlled interstate commerce for the individual and the Federal Employer Identification number (FEIN)[12] is a license to engage in the privilege of interstate commerce for the corporation, etc. This is the "Great Secret" they don't want you to know!

In this chapter we examine the "Great Secret," a secret which has been hidden from the public since the Roosevelt administration and used to bring all Americans under the jurisdiction and control of Congress. Very few people know the extent of this secret. The vast majority of Congress is ignorant and not even aware of the connection between the social security number, the federal employer identification number and this connection to the commerce clause. However, the people who really hold the power in this country are aware of this great secret, exploit it to their advantage, and have tried for over seventy years to prevent this secret from being exposed to the American public.

The Economic Security Bill – A Short History[13]

We can trace the origins of the "Great Secret" to the U.S. Capital, when on June 8, 1934 President Roosevelt in a message to the Congress, announced his intention to provide a program for economic security for the Nation. The fourth tier in his New Deal utopia, the president spoke of his vision of economic security for every man, women and child. The program he

---

11 Latin for "at first view."

12 Federal Employer Identification Number (FEIN) is also known as the Employer Identification Number (EIN). See Exhibits.

13 A full history of the Economic Security Bill, including congressional debates, amendments, revisions, etc., is examined in Book Two.

envisioned and would later submit to Congress had three objectives. Roosevelt outlining the objectives said:

> These three great objectives the security of the home, the security of livelihood, and the security of social insurance, are it seems to me, a minimum of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work. They are the essential fulfillment of measures already taken toward relief, recovery and reconstruction.

It was the boldest program of its kind ever attempted by any sitting U.S. president and Roosevelt knew there would be opposition to it in Congress. Roosevelt sought to ease any opposition to his plan by declaring:

> It is true that there are a few among us who would still go back. These few offer no substitute for the gains already made, nor any hope for making future gains for human happiness. They loudly assert that individual liberty is being restricted by Government, but when they are asked what individual liberties they have lost, they are put to it to answer.

After his message to Congress, many people wondered if Roosevelt's was finally over-stepping constitutional boundaries with this new security plan and feared a lost of liberty if it ever became law. Sensing a major change in perception and mood in the public, Roosevelt in a Fireside Chat on June 28, 1934 said:

> Have you as an individual paid too high a price for these gains? Plausible self-seekers and theoretical die-hards will tell you of the loss of individual liberty. Have you lost any of your rights or liberty or constitutional freedom of action and choice? Turn to the Bill of Rights of the Constitution, which I have solemnly sworn to maintain and under which your freedom rests secure. Read each provision of that Bill of Rights and ask yourself whether you personally have suffered the impairment of a single jot of these great assurances. I have no question in my mind as to what your answer will be. The record is written in the experiences of your own personal lives.

Subsequently, the president created by Executive Order the Committee on Economic Security, which was composed of Frances Perkins, Secretary of Labor, Chairwoman; Henry Morgenthau, Jr., Secretary of the Treasury; Henry A. Wallace, Secretary of Agriculture; Homer S. Cummings,

Attorney General; and Harry L. Hopkins, Federal Emergency Relief Administrator. The committee was instructed to study the entire problem of economic security and to make recommendations that would serve as the basis for legislative consideration by Congress. In early January 1935, the Committee made its report to the president, and on January 17 the president transmitted the report to both Houses of Congress for simultaneous consideration along with his draft legislation, entitled: "The Economic Security Bill."

The bill proposed a three-part program of old-age security consisting of: old-age welfare pensions; compulsory contributory social insurance; and a third-tier which would consist of optional annuity certificates sold by the government to workers who, upon retirement, could convert the certificates to monthly annuities which would be used as supplements to their basic retirement.

When the Economic Security Bill was introduced most "new dealers" in Congress fear it didn't have a chance constitutionally. Many questioned whether it was constitutional for Congress to take the proceeds of a particular tax and pay them over in this fashion, even for a purpose that might be said to be for the general welfare. The bill bore similarities to the Railroad Retirement Act which imposed a compulsory pension scheme on the entire industry. The Economic Security Bill was also similar to the National Industrial Recovery Act which created a compulsory-code of regulations for industries in intrastate commerce. Critics of Roosevelt's Economic Security Bill called it a "hodgepodge" of old legislation soup being advertised on the menu at the executive diner as fresh.

On January 24, 1935 the *Bennington Banner* (Vermont) printed the following editorial:

Chamber of Commerce Denounces Social Security Plan

> Within a week after President Roosevelt's unqualified insistence upon passage at this session on his program of social security legislation, organized business, through the Chamber of Commerce of the United States came out vigorously today in opposition to his proposals.
>
> None of the countries which have developed social insurance plans have built reserves of any relative magnitude. The attempt to do so in this country would, in our opinion, prove disastrous to our future economic structure and defeat the very security that is sought. The bill has also several technical provisions requiring close study, in order that they may not have unexpected and harmful results.

> Finally, we question the propriety as well as the constitutionality of any effect by the federal government designed to take jurisdiction over the subject-matter of this proposed legislation.

Even with its similarity to other New Deal legislation, Roosevelt made it quite clear to congressional leaders that he wanted it passed immediately. Several provisions in the bill, including the lien provision,[14] depended on complementary state action and since most state legislatures were in session in 1935 and would not meet again in regular session for two years, speed seemed desirable. History records the Congress during the 1930's reached the lowest level in character and intelligence of any previous Congress since the Civil War. Its members and leaders were the compliant tools of Roosevelt and the hungry beggars for his handouts.

Congressional hearings on the bill were held throughout January and February. The House Ways & Means Committee held hearings on the bill from January 21, 1935 through February 12, 1935. The Senate Finance Committee held hearings from January 22, 1935 through February 20, 1935.

During the Ways & Means Committee consideration of the Economic Security Bill, the committee made several changes in the draft legislation. On March 1, 1935 Congressman Frank Buck (D-CA) made a motion to change the name of the bill to the "Social Security Bill."

On April 4 the committee reported the bill to the full House of Representatives for its consideration. The House debates began on April 11. After several days of debate, the bill was passed in the House on April 19, 1935 by a vote of 372 yeas, 33 nays, 2 present, and 25 not voting.

On May 13, 1935 the Senate Finance Committee reported out a somewhat different version of the legislation. It was introduced in the full Senate on June 12. The Senate debates lasted until June 19, when the Social Security bill was passed by a vote of 77 yeas, 6 nays, and 12 not voting. Due to differences between the House and Senate versions, the legislation went back to Conference Committee to reconcile the two versions. Under the Constitution, both Houses of Congress must eventually pass the identical legislation for the bill to become law.[15]

---

[14] The lien is found in section 4(f) of the Economic Security Bill and was retained in the Social Security Act of 1935 under section 2(a)(7). The section reads: "Provides that so much of the sum paid as assistant to any aged recipient as represents the share of the United States Government in such assistance shall be a lien on the estate of the aged recipient which, upon his death, shall be enforced by the State …"

[15] U.S. Constitution, Article 1, Section 7.

The New Deal - Going, Going, But Not Gone!

After the Supreme Court derailed the Railroad Retirement Act and "Schechtered" the National Industrial Recovery Act in May 1935 and fearing the same fate for the Social Security bill and other New Deal legislation pending in Congress, Roosevelt summoned Attorney General Homer Cummings to the White House and demanded Cummings find a solution for achieving the purpose of the New Deal; namely, bringing all industries under control of a central government. Roosevelt's New Deal had taken a severe beating by the Court and he expected the attorney general to stop the bleeding. To help stop this bleeding, Cummings organized a group consisting of six men and one woman, all loyal to the president and all dedicated to Roosevelt's New Deal ideology. The seven member group included Homer S. Cummings,[16] Attorney General; Frances Perkins, Secretary of Labor; Harry L. Hopkins, Federal Emergency Relief Administrator; Harold L. Ickes, United States Secretary of the Interior; Robert F. Wagner, United States Senator; Joseph Taylor Robinson, United States Senator and John G. Winant,[17] Republican governor from New Hampshire. They called their secret group the "Committee of Seven." The name was suggested by Senator Wagner. During the early 1900's Wagner joined the Tammany Society in New York City. The Tammany Society also referred to as "Tammany Hall" was formed in New York City in 1786. Initially a social organization it became increasingly political and by the beginning of the twentieth century had become a significant force in city government and was identified with the Democratic Party machine there. In 1904 with the support of Charles Murphy,[18] a committee was formed which was instrumental in Wagner's election to the New York State assembly. Murphy had named this committee the "Committee of Seven" and Senator Wagner wanted to pay tribute to his old Tammany boss.

With the blessing of Roosevelt, the Committee of Seven immediately set out in secret to work on different scenarios to implement Roosevelt's agenda. One proposed scenario called for amending the Constitution to empower Congress to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate all industry and business in commerce whether interstate or intrastate.

---

16 Cummings served as United States Attorney general from 1933 to 1939. He was the chief protector of New Deal programs, and personally argued the right of the government to ban gold payments before the Supreme court and won the "gold clause" cases.

17 Winant had served on the Advisory Council within the Committee of Economic Security which drafted the Economic Security Bill.

18 Charles Francis Murphy was the most powerful boss in Tammany's history.

However, after an exhaustive review, the amendment option was discarded as politically unfeasible – taking years or perhaps decades for ratification.[19] President Roosevelt had a schedule to keep. He wanted government control over all business activity NOW! Any proposal for a centralized and coordinated control had to be within the constitutional bounds set down by the Supreme Court. After further study, it was concluded that in light of recent adverse Supreme Court rulings invalidating New Deal Acts and expecting future adverse ruling by the courts, the only foundation upon which any proposal would rest was with the power of Congress to regulate interstate commerce.

A Federal Incorporation Act

After weeks of tedious work by the Committee of Seven, Cummings met with Roosevelt and presented him with one possible solution, the enactment of a "Federal Incorporation Act." If Congress had the power under the commerce clause to regulate interstate commerce, including state corporations engaged in commerce, then why couldn't Congress enact a federal incorporation act with regulations applicable to the commerce of newly created corporations? A federal incorporation act seemed like a workable solution to Roosevelt. The idea of federal incorporation for companies engaged in interstate commerce was not new and it was well established that Congress had the authority to organize corporations as a means of exercising any of the functions conferred upon it by the Constitution. There was little doubt that Congress could authorize the incorporation of privately owned companies for the purpose of engaging in interstate and foreign commerce. It must be remembered that a corporation is a creature of the state, whereas the citizens are the creator of the state. In considering the constitutionality of the federal government's regulation of corporations, it was acknowledged at the outset that in dealing with corporations the government was managing its own creatures.

Although federal incorporation was mentioned by Alexander Hamilton as early as 1791,[20] it was not until the period between 1904 and 1920 that

---

19 Amending the Constitution is a two-part process: Amendments must be proposed and then they must be ratified. Amendments can be proposed one of two ways: A two-thirds majority vote in both Houses of Congress or two-thirds of the legislatures of the states can call a Constitutional Convention to consider one or more amendments. If the amendment passes both the House and the Senate with two-thirds majority, it then goes to the states. Three-fourths of the states must ratify the amendment. The most recent amendment, the Twenty-seventh was ratified in 1992, more than 202 years after its initial submission in 1789.

20 *The Federalist Papers*, pg. 657. In arguing for the constitutionality of the act under which the First Bank of the United States was incorporated, Hamilton argued that the power existed in congress under the commerce clause to create trading corporations.

the measure received serious attention. During this period a federal incorporation act was advocated by President William Howard Taft, and was discussed by President Theodore Roosevelt and Woodrow Wilson.

In 1904 a plan was proposed for regulating state corporations engaged in interstate commerce by prohibiting them from engaging in such commerce, except upon obtaining a federal license to be issued only upon compliance with prescribed regulations. The opponents of the legislation argued that the Constitution does not confer upon Congress power to prohibit interstate commerce, but only confers power to regulate it; that the power of regulation extends only to acts done in carrying on commerce and to matters connected directly with the transaction of commerce.

After lengthy and acrimonious debate in Congress concerning the constitutionality of the proposed plan, it was voted down by the Senate and the proposal for federal incorporation never became law.

A Federal License for "Persons" to Engage in Interstate Commerce

After further review of previous federal incorporation bills introduced in Congress; congressional debates on the constitutionality of the bills; the hesitancy of Congress to pass prior federal incorporation bills; and recent Supreme Court opinions invalidating key New Deal acts as beyond the reach of congress to regulate local intrastate activities, it was decided by the Committee of Seven another avenue needed to be explored.

The other avenue came from Cummings late one evening while he was in his Justice Department office mulling over the problem of how to insure the constitutionality of the New Deal, including the pending Social Security bill, in light of recent adverse Supreme Court decisions. After reviewing several law journals and court cases, he remembered a legal treatise he had read years earlier discussing the history of congressional control over interstate commerce. This treatise presented the hypothetical case of a federal license for "persons" to engage in commerce. The author had limited it to corporate entities, but Cummings thought why not expand it to individuals. The next morning, Cummings contacted members of the Committee of Seven to explain his federal licensing idea. He then hurried to the White House. Roosevelt was completely delighted with the plan. "I love it! I love it!" he said smiling.

Federal incorporation was officially abandoned and the Committee of Seven proceeded to work out the legal and technical details of the federal licensing plan. Although not an official member of the Committee of Seven, Felix Frankfurter[21] provided legal expertise on issues concerning the commerce clause. In 1915 Frankfurter while a professor at Harvard

[21] Professor of Law at Harvard. He was appointed to the Supreme Court in 1939.

published a treatise entitled "*Cases Under the Interstate Commerce Act*" and was highly respected for his expert knowledge of the commerce clause.

After several weeks the federal licensing scheme was formalized and Cummings presented the report to Roosevelt for his approval. In this confidential report entitled "*Federal licensing under the Commerce Clause*,"[22] the Committee compared the advantages and disadvantages of a federal corporation act to a federal license act and concludes the creation of a federal license for "persons" to engage in interstate commerce would be a more workable solution than federal incorporation, for, by leaving incorporation to the states, it would tend to produce a greater degree of uniformity; *first*, by eliminating the possible divergence between the federal statute and various state corporation laws; *second*, by offering the states the incentive to retain revenue from incorporating companies within their jurisdiction; and *third*, avoid a possible court challenge by a state.

The federal licensing scheme would contain two separate voluntary licensing avenues for "persons" to engage in interstate commerce. One avenue for "artificial persons," i.e. corporations, partnerships, etc., and one avenue for "natural persons." These two avenues would provide Roosevelt with the necessary tools to fulfill his vision of a new socio-economic order and if successful would bring the majority of "U.S. Persons" under the control of a central government.

When Cummings first presented Roosevelt with the idea of federal licensing, he (Roosevelt) insisted upon mandatory licensing for all corporations and individuals. However, there was one serious drawback with a mandatory requirement. The Committee of Seven determined any *mandatory* federal licensing scheme which prohibits an individual from engaging in interstate business without first procuring a federal license, could be attacked by the individual who would contend that their right to engage in "private commerce" was unconstitutionally restricted under a mandatory scheme. They concluded Congress unquestionably has the authority to license and regulate a corporation created by a state, so far as its activities are strictly within the scope of the commerce clause. However, it was pointed out that this power of Congress is subject to limitations imposed by other provisions of the Constitution, notably the Fifth Amendment, forbidding the federal government to deprive any individual the right of life, liberty, or property,[23] including the right to engage in "private commerce" without due process of law. The doctrine

---

[22] General Correspondence, compiled 1933-1940; Confidential Political Files, compiled 1935-1938. Franklin D. Roosevelt Library (NLFDR), Hyde Park, New York.

[23] See Book Two for a discussion on the Right to Property & Labor.

was confirmed in *Adair v. United States*, 208 U.S. 161, 181 (1908) when the Court stated:

> We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution.

The report then examines the distinction between the right to engage in commerce as a corporation and such right as an individual. These rights are essentially different in character. In *Hoxie v. N. Y., N. H. & H. R. R. Co*. 73 Judge Baldwin addressing the right of the individual to engage in commerce said:

> The right to engage in commerce between the states is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed as a privilege inherent in American citizenship.[24]

The right of the individual to engage in "commerce" is a property right. In its Memorandum of Law, the report cites several important cases, including the 1916 case of *Yee Gee v. City and County of San Francisco*, which the court reaffirmed the principle of law that labor is a right of property by declaring:

> The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution.[25]

In order to prevent an individual from attacking the licensing scheme on the ground that their right to engage in "private commerce" was unconstitutionally restricted because they failed to obtain a federal license, the report states "the federal license must be voluntary and not compulsory."[26] With the combined help of federal agencies, state government, labor unions and a pro-Roosevelt press, a coordinate effort would be launched to convince - and if necessary - compel the individual

---

[24] 73 Atl. Rep. 754, 759 (1909).

[25] 235 Fed. 757, 759.

[26] Note 22, *supra*.

into obtaining this license. The government would implement a series of directory[27] regulations to help encourage "voluntary compliance."[28]

Why is "Voluntary Compliance" Important?

Once an individual voluntarily accepts this federal license to engage in interstate commerce they would be subject to the regulations issued pursuant to the licensing scheme. If a license holder brought a cause of action in court questioning the constitutionality of the licensing scheme, the doctrine of estoppel[29] would prevent the license holder from arguing this point. In *Guardian Trust Co. v. Fisher,*[30] the Supreme Court stated:

> An individual may be under no obligation to do a particulate thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it.[31]

Once the individual voluntarily accepts to act a certain way, he is under an implied obligation or contract to act. If they accept the federal license they are obligated to follow the rules and regulations associated with the license. In 1936 the courts created the Ashwander doctrine. In *Ashwander v. Tennessee Valley Authority*[32] the Court declared:

> …one who accepts the benefit of a statute cannot be heard to question its constitutionality. Great Falls Manufacturing Co. v. Attorney General, 124 by U.S. 581; Wall v. Parrot Silver & Copper Co., 244 U.S. 407; St. Louis Casting Co. v. Prendergast Construction Co., 260 U.S. 469.

---

[27] A provision in a statute, rule of procedure that is a mere direction or instruction of no obligatory force and involves no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed.

[28] Proceeding from the free and unrestrained will of the person. Done by design or intention. Produced in or by an act of choice. Resulting from free choice, without compulsion or solicitation. *Black's Law Dictionary*.

[29] Estoppel is a term of wide implication, and implies that one who by his deed or conduct has acted in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct. To use the language of Lord Coke, under the doctrine of estoppel, "a man's owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." See Dulocracy in America, Book II for a discussion on Estoppel.

[30] 200 U.S. 57 (1906).

[31] 200 U.S. 57 at 69.

[32] 297 U.S. 288, 323 (1936).

Under the Ashwander Doctrine a person is estopped from bringing forth any constitutional question concerning a statute, regulation, etc. Accepting the "benefit" associated with the statute would estop the individual from attacking the statute.

The Ashwander Doctrine – How it Works Today![33]

Let us leave Roosevelt and the Committee of Seven to briefly discuss how the Ashwander Doctrine could be applied today to prevent an individual from bringing forth a constitutional challenge to a federal statute. Bill Davis, a "United States citizen"[34] gets a Social Security Number. He applied for one by filling out Form SS-5, "Application for Social Security Card," or his parents received a SSN for Bill under the "Enumeration at Birth" program.[35] The issuance of the Social Security Number now places Bill Davis under an obligation to comply with the federal regulations promulgated under the Social Security Act. One day Congress in order to reduce the enormous federal deficit decides to amend the Act by repealing several sections of the Act. Bill Davis now a hardworking farmer thinks the changes to the Act are unconstitutional and decides to initiate a court challenge. He finds an attorney to take his case. He sells the family farm to pay the mounting legal fees. After his attorney files pages and pages of legal motions, briefs, etc. with the court and after Bill Davis receives pages of pages of billable hours; his day in court finally arrives. The government files a motion to dismiss for lack of standing. The judge grants the motion ruling Bill Davis is estopped from attacking the statute. The judge dismisses the case "with prejudice"[36] citing *Ashwander*. Bill Davis leaves the courtroom with unanswered questions and his attorney leaves with Bill Davis' final check for legal services.

Bill Davis takes the bus back to his studio apartment and wonders why the judge ruled against him. "I wasn't receiving any social security benefits. How could I have been estopped from proceeding with my case," he says to himself. "But I wasn't receiving any benefits," he mumbles as he drinks his dinner.

---

33 The following is a very simplified example of the Ashwander Doctrine at work.

34 The term United States citizen does not have the same legal meaning as Citizen of the United States.

35 See Dulocracy in America, Book Two for a discussion of "Enumeration at Birth" (EAB).

36 When a case is dismissed for good reason and the plaintiff is barred from bringing an action on the same claim.

It seems his crackerjack attorney forgot to tell his client that the courts have ruled that "the Social Security number is the benefit." In *Jones v. Bowen*[37] the court said:

> … a social security number, or corresponding card, constitutes a benefit created by statute (42 USCS §405(c)(2)(D).

So we see that if an individual, (Bill Davis in our example above) voluntarily agrees to place himself under the jurisdiction of Congress by accepting a Social Security Number (federal license to engage in interstate commerce) he would estopped under Ashwander from bringing a challenge to any statute, document, etc. were the number or "federal license" is used. Could this be the reason, you are constantly being asked, "What's Your Sosh?"

The Social Security Act as the Vehicle for Federal Licensing – Part 1

(Editor's Note: Space does not permit a full rendering of the chronology of events which took place in the congressional committees and behind closed doors that led to the decision to use the Social Security Act as the vehicle for the federal license to engage in interstate commerce. A full and complete genealogy of the licensing scheme from its conception in June 1935 to its birth on November 16, 1936 is contained in Dulocracy in America, Book Two.)

Let us now return to our discussion of the federal licensing plan. After his meeting with Cummings, Roosevelt found the federal licensing plan not only intriguing, but the perfect vehicle to finally achieve his New Deal vision. After looking through the report he agreed with the recommendation that the federal license must be voluntary. Roosevelt told Cummings the way the Supreme Court has recently ruled on the New Deal "we can't afford another embarrassment for the administration and the party." Cummings wholeheartedly agreed. The two men discussed several options to accomplish the federal licensing scheme. One option was to have Roosevelt make a direct appeal to the people for the federal licensing plan. He could sell the voters on the idea, claiming that with the courts *laissez faire*[38] attitude, unique government intervention was necessary to

---

37 692 F.Supp. 887 (1988).

38 "Laissez faire" is a term used to describe a policy of allowing events to take their own course.

relieve the pain and suffering they were feeling because of an out of control Supreme Court. In previous public speeches and news conferences the president spoke of the expansion of social welfare legislation, the creation of federal minimum wages, and maximum hour standards and the continuation of his New Deal policies. Roosevelt would just add the licensing plan to his talking points.

The attorney general reminded Roosevelt that with the Supreme Court's recent flurry of decisions against the New Deal, people were beginning to question the administration's entire recovery plan, and some, including members of his own party were becoming disillusioned and felt they had been "fighting a losing battle" for the past two years. Cummings warned Roosevelt that some commentators where suggesting that the president through his advocacy and approval of such measures as the Gold Clause Act, the National Industrial Recovery Act, the Agricultural Adjustment Act and the Railroad Retirement Act, had undertaken to destroy the fundamental foundation of the American government. "Giving our enemies time to read and fully analyze a federal licensing bill may not be a wise decision," said Cummings. After further discussion Cummings made the suggestion that perhaps the licensing scheme could be inserted into another piece of pending legislation. "Homer, I don't care what you do, as long as my agenda is advanced," responded Roosevelt. With Roosevelt's blessings the Committee of Seven went back to work looking for the proper piece of legislation for the licensing scheme.

The Social Security Act as the Vehicle for Federal Licensing – Part 2

After the *Schechter* and *Alton* decisions, several key members in Congress began to realize the court decisions might jeopardize the Social Security Bill. By mid-June 1935, both Houses of Congress had passed their own versions of Social Security and now the bills were back in conference to hammer out a compromise. Committee members soon realized that unless there was a major redraft of the legislation there was a high probability the legislation would be declared unconstitutional by the Supreme Court. Several special interest groups who supported social security recognized the potential danger to the bill if not redrafted to conform to constitutional standards set down by the Supreme Court. On June 22, 1935 the American Association for Social Security stated unless the social security measure was altered considerably to meet objections of unconstitutionality it was "in danger of being nullified."

The Committee of Seven met frequently to look for the proper piece of legislation for the licensing scheme. It was during one meeting when Senator Robinson suggested the licensing scheme would be a perfect fit in the Social Security Bill. The bill was in conference committee and could easily be revised to accommodate the licensing scheme. Finally after weeks of discussions and debate, it was unanimously agreed the vehicle for the federal license would be the Social Security Bill.

It was during the congressional committee meetings in July that the federal scheme was secretly introduced to House Speaker Joseph W. Byrns, Sr., a loyal Democratic Party leader and a true believer in Roosevelt's vision of a centralized government.

With Wagner and Robinson in the Senate, and Speaker Byrns as their inside man in the House of Representatives, the Committee of Seven would remain in constant communication with committee leadership as they met throughout the month of July and into the first week of August. During the congressional hearings on the Social Security Bill several important changes and amendments were passed in order accommodate the federal licensing scheme[39]

By August 7 the Conference Report on the Social Security Bill with its federal licensing amendment was ready for a vote. At the last minute some congressional members who had secretly been involved in the licensing scheme started to have second thoughts about voting for scheme. They could not bring themselves to vote for a licensing scheme that had the potential of destroying the very fabric of a free society, by converting its people into little more than human resources. Whether they really worried about the ramifications associated with a federal license, or whether they worried more about their own legacy, will never be known. Perhaps they didn't want their names consigned to the "dung heap of history."

The members brought their concerns to the Democratic leadership. To ease the politicians' consciences, Senate Majority Leader Robinson and House Speaker Byrns decided the wavering men need strong congressional medicine – a cure-all treatment for what ails a politicians soul - the "Congressional Purgative" - Better know as the "Voice Vote." The future of the Republic would be decided via voice vote. Final congressional action took place when the Conference Report on Social Security was passed by voice vote on August 8 in the House and on August 9 in the Senate.[40]

---

[39] It was decided in late July that Title VIII and Title IX would be the vehicle used for federal licensure. A detailed history of the congressional hearings and changes to the social security bill while it was in committee is examined in Dulocrary in America, Book Two.

[40] Congress did not actually vote on the Social Security Bill. They voted on the Conference Report which contained various amendments to the bill, the debates concerning the amendments and the federal licensing scheme. Many members of Congress did not even read

What is a Voice Vote?

A voice vote is a vote in which the Presiding Officer states the question, then asks those in favor and against to say "Yea" or "Nay," respectively, and announces the result according to his or her judgment. The names or numbers of legislators voting on each side are not recorded.[41]

There are a number of reasons to use a voice vote. Sometimes, a voice vote will be called for when a measure is not very controversial. Small legislative bodies such as city councils may also use the voice vote system because there are only a few members, and it's easy to tell which side has the most votes. Sometimes, a voice vote will also be used in the case of a measure which is more controversial, because legislators appreciate the lack of a formal record which would tell people how they voted. The voice vote acts as a political cover, allowing politicians to vote on a particular piece of legislation as instructed by party leaders. If the legislation yields positive benefits for the nation, the politician can take the credit. If it's a complete and total disaster, they can walk away with little to no political damage.

Federal Licensing, Signed, Sealed and Delivered

Roosevelt signed Social Security into law at a ceremony in the White House Cabinet Room on August 14, 1935. After signing the Act, Roosevelt said:

> We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.
>
> This law, too, represents a cornerstone in a structure which is being built but is by no means complete.[42] It is a structure intended to lessen the force of possible future depressions. It is, in short a law that will take care of human needs and at the same time provide the United States an economic structure of vastly greater soundness.

---

the Conference Report and had no idea of what it contained, but they cast their voice vote per party leadership instruction.

41 United State Senate Reference Desk.

42 The structure being a centralized government with complete control over the lives of the American people.

Nearly everyone in attendance at the signing ceremony including Roosevelt knew that in order for the federal licensing scheme to succeed, Roosevelt needed to win re-election[43] in 1936.

Act I - Let the Enumeration Begin

When the Social Security Act was signed by President Roosevelt it created a Social Security Board with three members appointed by the President to administer the program. Roosevelt asked John G. Winant to become the first head of the Board. As a member of the Committee of Seven, Winant would be instrumental in creating and overseeing the organization that would carry-out the issuance and processing of the federal licenses to engage in interstate commerce. Winant kept the Committee of Seven updated on the day-to-day progress of the Board while Cummings reported directly to Roosevelt. On August 23, 1935 Winant was confirmed by the Senate to the Social Security Board. Joining him on the Board was Vincent Miles, a former Democratic Party official from Arkansas and Arthur Altmeyer,[44] who was a member of the President's Committee on Economic Security.

The biggest challenge facing Winant and the Committee of Seven was the enumeration of not only employers under the Social Security Act, but the "attempted enumeration" of every individual falling outside the scope of the Act. Although the taxing provisions of the Act applied only to industries in interstate commerce, Roosevelt demanded the federal licensing scheme encompass every "person" whether engaged in commerce or not. Under Title VIII and Title IX of the Social Security Act the collection of the employment taxes were to start on January 1, 1937. The federal licenses needed to be issued before that critical date. This gave the Board about sixteen months to formulate plans for the collection of the Title VIII and IX taxes while the Committee of Seven worked on the plan for the issuance of federal licenses.

One early key decision facing the Board was the system for reporting employee earnings. Altmeyer was convinced that a stamp book system like those in use in Europe was the best plan. Under the stamp book system workers would have a stamp book in which the employer would purchase special stamps from the post office and paste them into the employees stamp book indicating payment of employment taxes. Winant rejected the stamp book system. In fact, Winant had to reject it. A stamp

---

43 On November 3, 1936, Roosevelt won by a landslide, carrying 46 of the 48 states. Maine and Vermont went to Landon. Roosevelt received 523 electoral votes to Landon's 8 electoral votes.

44 Altmeyer was not aware of the federal licensing scheme.

book system would never be mistaken for a federal license to engage in interstate commerce. Several times Altmeyer tried to push the stamp proposal through the Board but Winant blocked the action and eventually Altmeyer gave up.

While the Board continued to review plans for the implementation of the collection of the employment taxes, the Committee of Seven was busy working on a solution to the federal licensing scheme. It eventually became evident that neither group could decide how to do the enumeration, when to do it, or who should do it. A consultant hired by the Board estimated it would take over 15,000 employees to do the job and recommended that the Board contract the function out to the United States Employment Service (USES) of the Department of Labor, which had a national network of field offices. The Board approved the recommendation of the consultant and Winant volunteered to contact the USES. He reported the recommendation of the consultant and the action of the Board to the Committee of Seven.

The Committee of Seven debated the consultant's recommendation and decided that the less governmental agency involvement the better; that enumeration should be kept under the control of the Social Security Board. Frances Perkins who was Secretary of Labor and a member of the Committee of Seven was given the assignment to direct the head of the USES to decline the Board's request for help in the enumeration process. Winant met with the USES and reported their refusal to Altermyer and Miles. When other federal agencies also declined to cooperate in the enumeration process,[45] the Board decided to carry out its own enumeration.[46] It was decided that two enumerations would be conducted, first one of employers and then one of employees. The Board settled on a nine-digit account number used for the collection of taxes under the newly enacted Social Security act and the Committee decided that the account numbers would be used to identify the federal license holders.

The Board authorized the opening of over 80 district offices and up to 500 branch offices across the nation to handle the enumeration process so that enumeration would be conducted as rapidly as administratively possible. However, by mid-July 1936 it was clear that the majority of offices would not be opened until January 1937. Not wanting to delay the enumeration process, the Board formally asked the Post Office Department to take over the job, but the Post Office refused. Winant alerted the Committee of Seven to this delay. While the Committee debated whether to reconsider their decision and allow the USES to handle the enumeration, Cummings took the issue to the president. A few days later, Winant was

---

[45] Frances Perkins saw to it that the agencies would refuse.

[46] The decision was already made by President Roosevelt and the Committee of Seven.

invited to the White House for a visit. Winant went to Roosevelt to persuade him to use USES or another federal agency for the enumeration. Without additional agency help federal licensing may never become a reality, he warned Roosevelt. "Gil,[47] don't worry, I'll work something out with the postmaster general," Roosevelt assured Winant.

In early September the actual plan for the first enumeration was finalized. It called for postal service employees and labor unions to distribute the application forms. Enumeration[48] was now ready to proceed at once.

However, Roosevelt wanted to delay enumeration until after the 1936 elections. There was growing controversy about the Social Security Act and Roosevelt feared the enumeration process would become part of an unproductive political debate if it started before the November elections. During the campaign the Republican challenger Governor Alf Landon of Kansas made repeal of the newly enacted social security program a major plank in his campaign. In September during a speech in Milwaukee, Landon denounced social security as "unjust, unworkable, stupidly drafted and wastefully financed." Landon was soundly defeated by Roosevelt and afterward Landon conceded that his attack on social security had been a mistake. Subsequently he went on record against any attempt to dismantle it.

Distribution of the SS-4 and SS-5 Applications - Federal Licenses Issued Through Local Post Offices

Now with the election over and Roosevelt re-elected, enumeration could begin. There was no time to waste. The enumeration process needed to be completed before the end of the year. On November 5, just two days after Roosevelt's victory at the polls the Bureau of Internal Revenue published regulations outlining the procedure for assignment of identification numbers to employers and employees. Under the regulations the number assigned to an employer was called an "identification number" and the number assigned to an employee was called an "account number."[49] In actuality the account number assigned to the employer and employee would be evidence of federal licensure to engage in interstate commerce. The regulations read:

---

47 John Gilbert Winant was known as "Gil" to his close friends.

48 By September the issuance of social security numbers for tax collection and federal licensing scheme was being referred to by the Committee of Seven as "Enumeration."

49 Regulations 91, Bureau of Internal Revenue, Approved November 5, 1936.

> Article 4. Assignment of identification numbers to employers. (a) Persons who are employers on November 16, 1936. Every person who is an employer on November 16, 1936, shall file an employer's application for identification number on Form SS-4. … The employer shall file each application under this paragraph on or before November 21, 1936.
>
> Article 5. Assignment of account numbers to employees. (a) Individuals who are employees on November 24, 1936. Every individual who is an employee on November 24, 1939, shall file an application for an account number on Form SS-5. … The employee shall file the application on or before December 5, 1936.

Since the Social Security Board did not have a network of field offices in 1936,[50] the Board contracted with the U.S. Post Office to distribute and collect the Employer's Application for Identification Number (Form SS-4) and Employee's Application for Account Number (Form SS-5) through local post offices around the country. On November 4, 1936 the Acting Postmaster General William Washington Howes,[51] signed a *Memorandum of Cooperation With Social Security Board*. Mr. Howes was appointed acting postmaster in August when Postmaster General James' Aloysius Farley was granted a leave of absence to work on Roosevelt's re-elected bid as reported by the White House. However, the real reason behind Farley's leave of absence as Postmaster General was quite different. When the post office refused Winant's request for help with the enumeration, Roosevelt had to confide in Farley about the federal licensing scheme and the need to use the post office for the enumeration. Even though a personal friend of Roosevelt who managed his presidential campaign in 1932, Farley was adamant that his signature would not appear on any instrument endorsing this federal licensing scheme.[52] Farley regretted the fact the postal service and its employees were being used as pawns in Roosevelt's licensing scheme.

Farley had supported most of Roosevelt's New Deal programs and presided over the patronage machine which helped to fuel Roosevelt's social program, but after this meeting with Roosevelt he started to have serious concerns over the presidents vision for the nation and his loyalty towards his boss started to diminish. In 1937 Farley opposed Roosevelt's

---

50 By June 30, 1937, the SSB had established 151 field offices, with the first office opening on October 14, 1936, in Austin, Texas. From that point on, the Board's local office took over the task of assigning social security numbers.

51 Howes was First Assistant Postmaster General.

52 The National Archives, Records of the Post Office Department (POD).

"court packing" plan and in 1940 he opposed Roosevelt breaking the two term tradition of the presidency. Farley would resign as Postmaster General later that year.

SS-4 Applications for Employer to Engage in Commerce

The Memorandum of Cooperation signed by Acting Postmaster General Howes contained instructions to postal employees in obtaining certain information from employers and the assigning of Social Security numbers to employees. Per the instructions, the first step would start Monday, November 16, 1936, when letter carriers from all over the Nation would deliver to every business entity on their mail route, whether subject to the Act or not, the following items: (1) Employer's Application for Identification Number, Form SS-4, with Instructions for Filling Out Form; (2) Form OA-801 – Instructions to Employers Covering the Distribution to Employees of Applications for Social Security Number, Form SS-5 and; (3) a pamphlet entitled "Information of General Interest." The letter carriers were instructed to advise the employer to return the completed Form on or before November 21, 1936.

The SS-4 asked for essential business information, including the name of the business establishment, address, the exact nature of the business and approximate number of "persons" now employed. Each letter carrier was required to prepare a list of the names and addresses of the businesses receiving the Form SS-4. This list was delivered to the local postmaster. When completed, the SS-4 was returned to the letter carrier or mailed to the local post office, were the postmaster would check the list and note each name and number of employees reported on the Form. If a SS-4 was not returned by the business, the Memorandum of Cooperation required the regional postmaster to take the following action:

> In the event a completed Form is not returned, it is desired that appropriate inquiry be made of the employer, if practical, by the postmaster or carrier with a view to obtaining the completed Form by November 21, 1936.
>
> In the event an employer to whom a Form was delivers fails to return the completed Form by November 21, 1936, the postmaster or carrier shall *fill in the first three lines on a blank Form SS-4*, showing thereon the city, county, and State and the employer's name and address and endorse on the Form "Information not furnished."

All completed SS-4 Forms would be mailed to the Social Security Board in Baltimore, Maryland. The list of employers would be retained in the post office where they were prepared. From the SS-4 applications

received at Baltimore, an "*Index of Employers*" would be set up and maintained by the Social Security Board. An identification number would be assigned to the employer by the Bureau of Internal Revenue. In 1939, this "Index of Employers" was transferred to the Bureau of Internal Revenue where it was renamed "*Record of Federal Employers.*"

SS-5 Applications for Employee Licenses

After the first phase of the licensing plan was underway, the initial delivery of Form SS-4's to employers; the second phase would commence approximately one week later. On Tuesday, November 24, 1936, letter carriers would deliver to every business on their mail route, regardless of whether a Form SS-4 was returned by the business, a supply of Form SS-5 – Application for Account Number with instructions for filling out the form. The letter carriers were given "specific instructions" by their local postmasters to advise every employee to return a completed SS-5 on or before December 5, 1936. The employee could return the completed SS-5 by any of following ways: (1) it may be returned by the employer; (2) by any labor organization of which the employee is a member; or (3) it may be handed to the letter carrier, or it may be delivered to the postmaster, either in person or by messenger, or it may be mailed to the postmaster. After the form was received at the local post office, the postmaster would examine the application to make sure it was "fully, properly, and legibly filled out" and then mail the completed SS-5 to the regional typing center.

When the completed SS-5 was received at a regional typing center, an account number would be assigned to the employee and a card bearing the employee's name, account number and date of issue would be returned to the employee through the same channels in which it was submitted to the postmaster. Upon receipt of the Social Security card, the employee was instructed to sign the card on the line marked "Employee's Signature."

Act II – The Licensing Scheme Begins

With the regulations promulgated, application forms printed and with all actors ready for their cue in a drama that had taken months of planning and preparation, the curtain rose on November 6, 1936 when major U.S. newspapers published the several articles explaining the distribution of the SS-4 and SS-5 forms. The *New York Times* printed the following article:

CHAPTER 11

Distribution of Forms to Be Filled Out by Employer and Employes Begins Nov. 16

Postmaster Albert Goldman announced yesterday that distribution of forms to be filled out by employers and employes under the Social Security Act would be started by the postal authorities on Nov. 16.

Distribution by post offices throughout the nation will occur at the same time as distribution here. The first forms, those for employers, will be sent through the New York Post Office to more than 300,000 employers in Manhattan and the Bronx.

The employers form will be sent out on Nov. 16 and must be returned to the Postmaster by Nov. 24, the forms for employes will be distributed through the employers, and these must be returned by Dec 5.

"On Nov. 16," the postmaster continued, "a form known as SS-4 will be furnished to each employer of (interstate) labor by the letter carrier on his route." This form, which is entitled "Employer's Application for Identification Number," will describe the number of employes employed and the nature of the business. Such forms should be returned to the postmaster not later than Nov 21.

On Nov 24 and in accordance with the information furnished on SS-4, Form SS-5 will be distributed. The identification card bearing the employe's account number is issued after return of Form SS-5.

On November 16 with an ample supply of SS-4's in their mail pouches an army of letter carriers from every corner of the nation descended like locusts upon private businesses to carry out the federal licensing scheme. Roosevelt had won a landslide victory over Republican candidate Al Landon and believed he had received a mandate from the people to continue the New Deal and the administration was confident that enumeration would be embraced by every employer and employee. Unfortunately for the administration, the first act of the drama did not go as smoothly as planned. As more and more people examined the Social Security Act with its numerous titles and provisions, the congressional debates and the Committee Reports they began to realize that the Act was not an Act to promote the "general welfare" or a taxing scheme for the federal treasury; is was something more - governmental regulation of local business which many people believed was beyond the reach of Congress. The administration underestimated the will of the American people who were not about to hand control of their lives over to a group of faceless bureaucrats in Washington without a fight.

As proof, business pointed to the regulations promulgated by the treasury department and the instructions contained in the SS-4 and SS-5

packets. The information sheets attached to the employer SS-4 application stated the form is to be filled by employers engaged in "commerce." Likewise the instructions contained in the employee SS-5 application specifically states that its purpose is to bring those "persons employed in the broad field of commerce…under the Social Security Act."

As more people examined the Social Security Act they discovered Congress had reserved the right to repeal any provision of the Act. Section 1104 reads: "The right to alter, amend or repeal any provision of this Act is hereby reserved to the Congress."

In late November, Mr. Winant reported to the Committee of Seven that in major urban of the country less than 30 percent of anticipated employer SS-4 applications and less than 50 percent of anticipated employee SS-5 applications were processed. He also reported that in small towns and rural areas less than 25 percent of employer and employees failed to return the forms. Cummings reported the statistics to Roosevelt who demanded the Board increase compliance by any means available. "Let's put the fear of government in the people and use the press to deliver our message," Roosevelt said.

So with the deadline for filing of employer SS-4 applications having expired on November 21 and with the Employee SS-5 deadline fast approaching (Dec. 5), the Social Security Board in an effort to increase voluntary compliance and instill this "fear" in the people, issued a press release which was published in all the major newspapers. On December 4, 1936 the *New York Times* published the following article:

EMPLOYERS LAGGING ON SECURITY FILING
So Far Behind the Government Institutes Check-Up

> Registration by employers under the Social Security Act was running so far behind expectations tonight that the government instituted a check-up of delinquents. Where it had been estimated that 3,500,000 were affected, only about 1,500,000 applications for identification numbers were reported received at the Baltimore office of the Social Security Board to date, or less than 43 per cent of the estimate. The deadline for the applications passed on Nov. 21. The Board gave no hint of what, if any, action was being considered against employers who do not report. Both employers and employes who fail to supply information required for the pension taxes are subject to a $10,000 fine and a year's imprisonment.

There was one major problem with the press release which the news media overlooked. There was **NO** penalty; civil or criminal for non-compliance. The threat of imprisonment or fine was just that - an idle

threat, intended for one purpose on one purpose only: to increase the number of application fillings. By issuing this press release the Board was gambling that an implied threat of punitive and/or criminal action would result in a rush to comply. On December 5, the *New York Times* printed the following story:

WORKERS FROM ALL OVER NATION ARE HURRYING TO ENROLL BEFORE DEADLINE

> Midnight tonight is the deadline set for 26,000,000 workers to apply for old-age pension account numbers. While employee applications poured in, postal authorities were checking up on employers who fail to apply for identification numbers, Social Security Board officials said that this did not necessary imply punitive action was under consideration.
>
> The board sees no necessity at this time to make such a decision on policy, it said, with the exact proportion of employer compliance depending upon the results of the present drive. Although those who do not meet the deadline in filling out the forms for the Internal Revenue Bureau may be in technical violation of the law, officials apparently intend to exhaust every means for voluntary compliance before resorting to the courts.

Again the Board's implied threat of punitive action prompted more employers and employees to return the forms, but still not as many as they wanted. In New York, for example, fewer than 2,000,000 of the 5,000,000 applications for account numbers sent to employees had been returned to post offices by midnight on Dec. 5. This prompted the Board to issue a ten-day extension of the time for filing the SS-5. The *New York Times* on December 6 reported the extension as follows:

TIME EXTENDED ON SECURITY FORMS
Deadline for filing Employes' Applications Put off Ten Days to Dec. 15

> The Social Security Board announced tonight a ten-day extension of time for the filing of employes' application forms under the old-age pension provisions of the Social Security Act. Withholding its announcement until midnight, the original deadline the board decided to make the dead-line midnight Tuesday, Dec. 15, instead of tonight. The board's statement emphasized again these facts: 1. All employes in the fields of commerce are expected to file applications for social

security accounts. 2. Employes can procure applications forms, known as Form SS-5, from their employers or from any post office.

The Roosevelt administration and the Board worked overtime during this ten day extension to convince employees to submit the forms. John Lewis was even called upon to work his magic with the unions to make sure all union members were properly registered.[53] Roosevelt personally contacted several Democratic governors asking for their assistance in appealing to the public. On December 14 with the new deadline for return of applications set for midnight December 15, Virginia Governor George C. Perry issued a public appeal for prompt filing of employee SS-5's. Governor Lehman said:

> As Governor of this great Commonwealth, I strongly urge all citizens who have not already done so to fill out their registration cards under the provisions of the Federal Social Security Act. I am sure that the people of Virginia are desirous of cooperating in every way in the successful operation of the Federal Social Security Act.

This eleventh hour plea from Governor Perry and other governors resulted in more application filings from employers and employees, but still not as many as the administration wanted. The Board in another attempt to increase voluntary compliance fired off another press release. This "shot that was heard around the world" was carried in all the major U.S. newspapers. On December 16, the *New York Times* printed the following front page story:

> Internal Revenue Officials Are Searching For Persons Who Failed To Register.
>
> Internal Revenue officials have been using income tax records to draw up their own lists of potential taxpayers under the unemployment insurance and old-age benefit titles of the Federal Social Security Act. These lists independent of those being compiled by the social Security Board in its central record office in Baltimore will help in reaching persons who have failed to register through the ignorance.
>
> As a further step toward full coverage under the act, field agents of the Bureau of Internal Revenue will canvass businesses to determine whether the law is being complied with.

---

[53] Lewis was also busy with the "labor insecurity scheme" orchestrated in 1935.

> These plans were made public by Joseph T. Higgins, Collector of Internal Revenue for the Third New York District, as the deadline passed for return to the post office of applications for social security numbers. "Employers and employes who have not already applied for identification numbers are advised to do so immediately," stated Higgins.
>
> It had been reported that returns from post offices up-State New York continue to lag. Only one-third of the 800,000 forms distributed there have been relayed to the post office in the city by mid-afternoon.
>
> The Social Security Board emphasized that current non-possession of an account number is not a bar to the hiring of an employe. Application for account numbers should be made as soon as possible, however, it was said.
>
> The regulations also require an employer to file an application for an account number for any employe who has failed to do so by the time the first information return is due.

This so-called "shot across the bow" with its implied threat of revenuers canvassing the countryside looking for so-called "scofflaws" finally tipped the scale in favor of the Enumeration scheme. Acting under color of law, threat of criminal and civil penalties, last minute extensions, eleventh hour appeals, and finally possible intervention of federal agents from Bureau of Internal Revenue achieved the desired goal. When the Committee of Seven reported to Roosevelt in January, 1937 that more than 22 million completed applications for federal licenses had been received from employees, it was reported by those in attendance that the president smiled and said, "We have them now!"

In fact the government's intimidation worked so well in scaring the public into compliance that some Americans took drastic measures to insure they would not forget their social security number. On January 13, 1937, the *Nashville Banner* printed the following:

> Security Number is Tattooed
>
> Leon Roofener, 45-year-old building engineer for a Memphis theatre, is almost certain he will not lose his Social Security Act number. He has it tattooed on his left arm.

What's Your Sosh?

The following is an excerpt taken from the pamphlet "*History of the Social Security Number*" published by the Social Security Administration:

> Social Security numbers were grouped by the first three digits of the number (called the area number) and assigned geographically starting in the northeast and moving across the country to the northwest. The lowest area numbers are assigned to New Hampshire, rather than to Maine, even though Maine in the most northeasterly of the states. This was apparently done so that SSN 001-01-0001 could be given to New Hampshire's favorite son, Social Security Board Chairman John G. Winant (Winant was the former three-time Governor of New Hampshire). Chairman Winant declined to have the SSN registered to him. Then it was offered to the Federal Bureau of Old Age Benefits' Regional Representative of the Boston Region, John Campbell, who likewise declined. It was finally decided not to offer this SSN as a token of esteem but instead to issue it to the first applicant from New Hampshire. This proved to be Grace D. Owen of Concord, New Hampshire, who applied for her number on November 24, 1936 and was issued the first card typed in Concord, which, because of the area number scheme, also happened to be the card with the lowest possible number.

Did John Winant have a good reason to decline the Social Security number? Did he prefer personal freedom over government control via a federal license he helped create? Even though the federal government in November 1936 threatened fines and imprisonment and in December 1936 threatened to unleash an army of revenue agents to make sure all American citizen were enumerated, still some individuals remained un-enumerated their whole lives.

Let’s take a look at the cast of characters which have wandered across the pages of in our drama and ask: What’s your Sosh?

Cast of Characters

PRESIDENT	**SSN**	**DIED**
Franklin Roosevelt	None	1945
THE COMMITTEE OF SEVEN		
Homer S. Cummings	None	1956
Frances Perkins	None	1965
Harold LeClair Ickes	None	1952
Robert F. Wagner	None	1953
Joseph Taylor Robinson	None	1937
John G. Winant	None	1947
Harry L. Hopkins	None	1946
SENATE AND HOUSE MEMBERS		
Robert F. Wagner	None	1953
Joseph Taylor Robinson	None	1937

THE SUPREME COURT		
Charles E. Hughes	None	1948
George Sutherland	None	1942
Benjamin N. Cardozo	None	1938
Wills Van Devanter	None	1941
Owen J. Roberts	None	1955
James McReynolds	None	1946
Louis Brandeis	None	1941
Harlan Stone	None	1946
Pierce Butler	None	1939
Felix Frankfurter	None	1965
SOCIAL SECURITY BOARD AND STAFF		
John G. Winant	None	1947
Arthur J. Altmeyer	Yes	1972
Vincent M. Miles	None	1947
Thomas Hopkinson Eliot	Yes	1991
SUPPORTING CAST MEMBERS		
Eleanor Roosevelt	None	1962
John L. Lewis	Yes	1969
Alfred “Alf” Landon	Yes	1987
James A. Farley	Yes	1976

Act III - The Fair Labor Standard Act

The Fair Labor Standards Act of 1938 (FLSA)[54] also called the Wage and Hours Bill was signed into law by President Roosevelt on June 25, 1938. The provisions of the FLSA applies to “employees engaged in interstate commerce or employed by an enterprise engaged in commerce or in the production of goods for commerce, …” The FLSA established a national minimum wage, guaranteed time and a half for overtime in certain jobs, and prohibited most employment of minors in "oppressive child labor," a term defined in the statute. Fundamentally, the FLSA is legislation for the control of minimum wages and maximum hours, for "employees engaged in interstate commerce.”

By 1938 virtually all employers and employeees had applied for and received a federal license to engage in interstate commerce. The FLSA provisions relied on one power and one power only for its enforcement -

[54] The Fair Labor Standards Act of 1938 (FLSA, ch. 676, 52 Stat. 1060, also called the Wages and Hours Bill, applies to employees engaged in interstate commerce or employed by an enterprise engaged in commerce, etc. The FLSA established a federal minimum wage, etc.

the government's ability to regulate interstate commerce. Employers and employees engaged in interstate activity were subject to the statute and by 1938 that include the majority of American workers who had been issued licenses to engage in interstate commerce.

Employer – Employee
Federal Employer - Federal Employee[55]

After enactment of the FLSA the employment relationship between the employer and employee who obtained a federal license to engage in interstate commerce was called "Federal Employment." The Bureau of Internal Revenue designated the employer a "Federal Employer" and the service rendered by the employee to this "employer" was called "employment effectively connected with a trade or business in interstate commerce." The latter term was eventually shorted to "employment effectively connected with a U.S. trade or business." This term is known in social legislation as "covered employment."

When is an employer and employee not considered an employer or employee under the common-law definition? When the employment is being conducted under a statutorily define purpose. It is important to know the definitions of terms, (i.e. employer, employee, employment) used in federal statutes; the purpose and legislative intent behind the statute; and the object and subject of the statute.[56] Voluntarily placing yourself under the jurisdiction of the statute allows the regulatory laws promulgated pursuant to the statue to directly affect you.

It is also important to understand that when dealing with federal social welfare legislation the courts have declared that the terms employment, employer and employee are **NOT** to be construed in their common law[57] senses. *N.L.R.B. v. Hearst*, 322 U.S. 111 (1944), and *Bartels v. Birmingham*, 332 U.S. 126 (1947). Rather, their meaning is to be determined in light of the purposes of the legislation in which they were used.

---

55 See Exhibits.

56 The "object of a statute is the aim or purpose of the enactment, the end or design which it is meant to accomplish, while the "subject" is the matter to which it relates and with which it deals. *Black's Law Dictionary* (3rd Ed. 1933)

57 As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts. *Black's Law Dictionary* (3rd Ed. 1933)

In *Fahs v. Tree-Gold Co-op. Growers of Florida*, Inc., 166 F.2d 40, at 44 (1948), the court said that in determining the employer-employee relationship and its meaning, "the ultimate criteria are to be found in the purpose of the act."

It is submitted the term "Federal Employer" means any person licensed to engage in interstate commerce, as distinguished from an employer engaged in local intrastate commerce. The term "Federal Employment" means any person licensed in interstate commerce and is employed by a federal employer is said to be in engaged in federal employment. The term "Federal Employment Tax Forms" mean forms W-2 and W-3 provided to any person employed by a federal employer in federal employment.[58]

Act IV – A Federal License Transforms into a Pledge of Surety

(Editor's Note: A full and complete genealogy of the federal licensing scheme from its birth on November 16, 1936 to its metamorphoses into a pledge of surety in 1939 is contained in Dulocracy in America, Book Two.)

During the "Great Depression" the federal government acquired massive debt in order to finance Roosevelt's New Deal legislation. By 1939, the national debt had grown to such proportions that the entire federal government was on the brink of bankruptcy and its creditors were growing nervous. From that year, all of the Legislative bodies of the federal government passed Public Policy statutes in the interest of the nation's creditors. In order to continue financing the expenditures of the federal government, capital needed to be increased. Federal Reserve Notes which became "legal tender" under the Thomas Amendment (H. J. Res. 192, Public Resolution No. 73-10) passed by Congress in 1933, were made the medium of exchange for this capital. Previously, these notes were redeemable in gold on demand at the Treasury Department of the United States at Washington in the District of Columbia, or in gold or "lawful money" at any reserve bank, which then could be used as capital and devoted to production. However, in order to have capital there must first be property. Property may be pledged and also the rights thereto, and converted into capital by the pledgee.

From 1936 to 1939, social security numbers and federal employer identification numbers were issued to individuals as a license to engage in interstate commerce and to businesses effectively connected with a trade or business in interstate commerce. In order to refinance the debt annually and avoid default, Congress on August 10, 1939 amended the Social

---

[58] See Exhibits.

Security Act of 1935, with Public Law 379, Chapter 666,[59] thus allowing for the issuance of another class of social security number to individuals which in addition to the license to engage in interstate commerce component, added a pledge of SURETY[60] against the national debt[61] in exchange for the perceived promise of cradle to grave protection. This pledge as surety in exchange for cradle to grave protection is called *"Welfare Enumeration."* The condition of such promise of protection throughout life provided no vested rights in the pledgee and the terms of the agreement was left solely to the discretion of the body of policy makers (Congress) operating as agents of the trustee in bankruptcy representing the interest and rights of the creditor(s).

Property rights relating to future performance (labor) and contract are protected absolutely as they relate to the personality of an American citizen. Execution of those rights may produce a translation of property but not necessarily a corpus of capital dedicated to the purpose of income production. A self declaration of bankruptcy by pledging one's property as surety against the national debt in essence converts one to a perpetual bankrupt and one's property so pledged to a bankrupt corporation (United States), a capital asset to be utilized by said corporation for the purposes of capitalization and revenue production earmarked as interest payable in discharge of the national (public) debt.

Until 1973, a Citizen of the United States could walk into a Social Security Field Office to apply for a "non-welfare enumerated" number.[62] These numbers were assigned to individuals without the pledge of surety. In 1973, policy was changed and all social security numbers are now issued from the Social Security Administration's Central Office in Baltimore, Maryland. Today virtually all applications for social security numbers including "Enumeration at Birth"[63] requests received at the central office are processed as requests for "Welfare Enumeration." The

---

59 53 Statutes at Large Chapter 666 (1939). 76th Cong. 1st Session, Chapter 666, Aug. 10, 1939, pg. 1360. Other federal statutes mandating the disclosure of a SSN include: Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Codified as 42 U.S.C. 666 (a)(13). Mandates that states have laws in effect that require collection of SSN on applications for driver's licenses and other licenses; requires placement in the pertinent records of the SSN of persons subject to a divorce creed, child support order; requires SSN on death certificates; creates national database for child support orders.

60 A Surety is a person who agrees to be responsible for the debt or obligation of another.

61 The National Debt is over $13 Trillion. Each enumerated citizen's share of this debt is over $40K. Source: US Debt Clock. www.usdebtclock.org/

62 See Investigative Report: "My Day At The Social Security Field Office."

63 The Enumeration at Birth (EAB) program was established in 1989. Participation in the EAB program is voluntary.

management and control of this national welfare policy was delegated by the Congress to the President.

The states were seduced into the new policy with promises of federal money flowing back to states. In return for this continual flow of money, the states agreed to uphold and maintain the pledge of labor and property of their respective citizenry as surety for the debt obligations of the federal government. The politicians of these respective states gladly complied, because they viewed this as an opportunity to increase their own political power, letting the next generation of office holders worry over the long term, the consequences of their acts.

12

CONCLUSION

"If ye love wealth better than liberty, the tranquility of servitude better than the animating contest of freedom, go home from us in peace. We ask not your counsels or arms. Crouch down and lick the hands which feed you. May your chains set lightly upon you, and may posterity forget that ye were our countrymen." Samuel Adams, 1776.

A equilibrium of balance within the federal government itself has not always been obtained in our national history, but it is correct to say that with the exception of a state of war, there never has been heretofore such vast concentration of congressionally delegated power in the office of the Chief Executive as existed under Roosevelt's New Deal administration. In 1933, the justification for such a deposit of power was that the emergency nature of the times demanded it and that the Chief Executive himself, or his office, could with greater efficiency exercise or execute it. As in a state of war, the president is empowered by Congress to declare by public proclamation when this emergency status had ended. This has not yet been done, even seventy years after the so-called "great depression" ended, and the view now widely held in Congress is that the powers delegated to the Executive arm will be

retained indefinitely, or until Congress itself reassumes the powers or repeals the statutes.

Under the Constitution, of course, there was no legal machinery to prevent this deposit of power by Congress, in the first instance, or to compel repeal of such legislation. The only possible constitutional remedy was for a private litigant in a proper case or controversy to question exercise of a given instance of such power, if he could prove special damage. This might be difficult to prove.[1] The recipients (a state or individual) of any benefit or federal funds would not challenge the source of power and even had they done so would not have been met by well established judicial doctrines of estoppel or waiver, as the case might be. Government by executive order or decree has been made possible under the vast powers thus entrusted to the president by a compliant Congress, thus substantially destroying, for the time, equilibrium of power within the federal framework. That Congress during the 1930's or even today may have been or may be motivated by laudable intentions does not validate it as constitutional.

Franklin Roosevelt's View of the Constitution and the Functions of the Supreme Court

In tracing the various forces and events which led to a "streamlined" Constitution, special attention should be drawn to the views held by Franklin Delano Roosevelt - the Chief Executive of the Constitution, because by virtue of this high office such views had wide influence upon the American people, and undoubtedly millions of them agreed with Roosevelt, but equally other millions did not.

While deciding whether or not to run for an unprecedented third term, Roosevelt received several telegrams from various supporters urging him to run for the sake of the nation and the people. One labor group adopted the following resolution:

Resolutions of the Missouri State Federation of Labor and the Kansas City Labor Union

> Whereas we have today in the White House a Chief Executive of unsurpassed ability and statesmanship; a man of unimpeachable character and stainless record, whose great sympathy and understanding of the needs of the common people have endeared him to the masses of this Nation, and whose championing of the cause of the wage earners of our country has brought down upon his head the enmity and the hatred of the privileged class; a man whose recognition, support, and encouragement to our American

[1] Ashwander doctrine.

labor movement have enable us to carry on in our resistless march toward the liberation of the American working man and woman; and

Whereas this great humanitarian, President Franklin Delano Roosevelt, has by his liberal and progressive administration, his persistent and resolute opposition to the chiseler and the profiteer, the exploiter and the parasite, aroused against him all of the reactionary forces of the Nation; and

Whereas there is no legal nor logical reason why our great president cannot accept a third term as Chief Executive, and in view of the overwhelming sentiment of the great mass of people in his favor: Be it therefore

Resolved, That the forty-third annual and third biennial convention of the Missouri State Federation of Labor go on record as urging upon Franklin Delano Roosevelt, in the name of the common people, for the sake of the "forgotten man," and in the cause of humanity, to accept a third term as President of the United States, and thereby pledge our loyal support to his success; and be it further …

Following the decision of the Supreme Court invalidating in large part the National Industrial Recovery Act, Roosevelt expressing his disappointment, if not resentment with the decision, referred to the Constitution as a relic of the "horse and buggy" era. On other occasions, Roosevelt, criticizing the Court's position on minimum wages stated that the Constitution as thus interpreted created a "no man's land" where neither the federal government nor the several States could legislate, which in his opinion was a *reductio ad absurdum*.[2] His conception thus exhibited seemed to be that the federal government should be all powerful and not subject to those heretofore well established rights of the individual against governmental invasion. In another public address Roosevelt stated that the "general welfare" clause in the body of the Constitution (not the preamble) justified blanket legislative power unconnected with the spending power, a view which would clearly negate the rule that the central government was one of delegated power, for if that government was to have blanket power there would have been no rationality in the drafters of the Constitution in specifically enumerating the powers delegated. Now, criticism of the Supreme Court on the part of the Chief Executives of the past is not without precedent in our national history - Andrew Jackson and Thomas Jefferson and even Lincoln being notable examples. President Theodore Roosevelt had emphatic views of the extent of powers granted the Executive, but he did not put himself on

[2] Latin meaning “reduction to the absurd."

record publicly to the extent that President Roosevelt did in 1937. Such criticism on the part of the Chief Executive was but systematic of the temper of the American people, struggling with economic depression, and looking to government for material aid and assistance.

Equally striking is the viewpoint of Roosevelt with respect to the nature of the Supreme Court's functions and duties. Early in his administration, in seeking emergency power through legislation to combat the depression, Roosevelt is said to have privately sounded out Chief Justice Hughes on the question of the Supreme Court's co-operation with the two other branches of the government in the likely event that the Court would be asked by litigants to review the validity of the measures enacted. He is said to have received an unfavorable reaction on the ground that the Court's functions did not permit such cooperation promised in advance, and that the admitted gravity of the times afforded no justification for any departure from the established practice. Roosevelt is said to have cited as precedent for his action similar cooperation given him by the New York Court of Appeals when he was Governor of the State. That the Supreme Court could not cooperate with Roosevelt is amply illustrated by its subsequent decisions during the first four years of the New Deal administration, but prior to the defeat of his “court-packing” bill in 1937.

On one public occasion, Roosevelt illustrated his conception of judicial cooperation with the other branches of the government by drawing an analogy with a three-horse team plowing a field; in order to have the field properly plowed, he reasoned, it was necessary for all to pull together. Democracy could be made to work in America, he said, only by this method, and not by allowing one of the horses-presumably the judiciary in his analogy-to pull in an opposite direction from the other two. And in still another public address, Roosevelt stated that in the Constitutional Convention of 1787 a plan had been brought forward, but rejected, to give the federal judiciary *veto* power over acts of Congress and the president. The inference drawn by Roosevelt was that the federal courts today should not have the power to declare acts of Congress or the president unconstitutional. What he did not make clear was that *veto* power standing in isolation is in reality a part of the legislative or executive power, whereas the power to declare laws unconstitutional in proper cases and controversies only, is totally different. The federal judiciary never had the so-called veto power, because this was not a proper judicial function, and the delegates were on sound ground in voting such proposal down; but the judiciary did rightfully have the power to declare laws unconstitutional because of the essential nature of the governmental framework created by these same delegates in the Constitutional Convention.

By the early 1940's, after nearly a decade of governmental handouts, the issuance of federal licenses to engage in interstate

commerce in 1936 and the conversion of the citizenry into surety for the national debt in 1939, the people were finally ready for the last phase of Roosevelt's New Deal - the indoctrination of a new generation of Americans into Roosevelt's vision of an all-powerful centralized government. Unlike the war raging in Europe and the Pacific, the war in America for control over the minds of the people had been won without a single shot being fired. This is evident in Roosevelt's State of the Union address, delivered January 7, 1943, in which he claimed victory over the minds of the people by declaring:

> When you talk with our young men and women, you will find they want to work for themselves and for their families; they consider they have the right to work; and they know that after the last war their fathers did not gain that right.
>
> When you talk with our young men and women you will find that with the opportunity for employment they want assurance against the evils of all major economic hazards - assurance that will extend from the cradle to the grave. And this great government can and must provide this assurance.
>
> And if the security of the individual citizen, or the family, should become a subject of national debate, the country knows where I stand."

In order for this peaceful counter-revolution to continue a new generation of compliant citizens had to be taught and trained to uphold and sustain this new way of their fathers. The job fell upon the public school system to continue the job of indoctrinating teachers and students by preparing teaching materials designed to "influence the social attitudes, ideals, and behavior of coming generations." Completely new textbooks were needed. Millions of school children learned American political and economic history and structure in the 1940's from several books.

The class struggle theme was the vehicle used to advocate cradle-to-grave welfare care for all. F.A. Magruder[3] in his *American Government* textbook[4] openly advocates this cradle to grave mentality. Magruder says:

> From birth to death our governments act as guardians. They provide free education and require children to avail themselves of

---

[3] Dr. F.A. Magruder joined the Oregon State College staff in 1917 as an assistant professor of political science and was the author of *American Government*, which he revised annually and kept in print for decades as the most widely used high school textbook in this subject.

[4] 1940, pg. 8.

> it, they provide employment or relief for the middle-aged, and they provide old-age pensions or benefits for the aged who need them.

In a later edition of the *American Government* textbook, Magruder equates opposition to the welfare state with selfishness of the few. In a section blatantly entitled, *Welfare of the People from the Cradle to the Grave*, Magruder says:

> The United States has increasingly curbed the selfish and provided for the welfare of the many. The Government has established the Children's Bureau to look after the welfare of every child born in America. (pg. 15)

Indoctrination in the availability and rightness of the free handout was not limited to high school students. The re-education started in the first grade. Recall the story about the hardworking little squirrel that gathered and stored nuts for the winter. The story has a moral: Work hard and save wisely for uncertain days ahead.

But in 1961, the story was rewritten. The new version was found in a first grade textbook entitled, *The New Our New Friends*, published by Scott, Foresman & Company in 1956. The chapter was entitled, *Ask for It*. In it, a little squirrel named Bobby ate nuts from a tree during the summer. Other squirrels suggested that Bobby put some nuts away for winter. As Bobby Squirrel didn't like to work, he ignored the advice. Winter came and one morning Bobby awakened to find the world covered with snow - and all the nuts were gone from the tree. He got awful hungry but remembered that a boy who lived in a white house had taken some of the nuts from his tree during the summer. Bobby went to the white house and gave a squirrel call. A door opened and a "fine brown nut" rolled out. Bobby Squirrel learned his lesson. The story concludes, "Well! thought Bobby. I know how to get my dinner. All I have to do is ask for it."[5]

But at what cost. A loss of our unique national character. Or perhaps a loss of personal freedom for ourselves and our posterity. Viewing the current state of affairs of the Nation, one can only wonder if the benefit or in Bobby's case, the "fine brown nut," was worth the price.

To conclude, let us turn to the authority of the universally esteemed Justice Joseph Story,[6] as to the high responsibilities of the

---

[5] 1961, pg. 159.

[6] Justice Joseph Story (1779-1845) was a famous jurist, and his *Commentaries on the Constitution of the United States* is a very influential treatise on constitutional law. Justice Story was one of the United States' most influential Supreme Court justices. His tenure on the Supreme Court spanned three decades, from 1811 to 1845. His views on the Constitution are still widely respected.

people, and the proper means of guarding their individual liberties. In reference to the Constitution of government he says:

> It must perish, if there be not that vital spirit in the people, which alone can nourish, sustain, and direct all its movements. It is in vain that statesmen shall form plans of government, in which the beauty and harmony of a republic shall be embodied in visible order, shall be built up on solid substructions, and adorned by every useful ornament, if the inhabitants suffer the silent power of time to dilapidate its walls, or crumble its massy supporters into dust; if the assaults from without are never resisted, and the rottenness and mining from within are never guarded against. Who can preserve the rights and liberties of the people, when they shall be abandoned by themselves? Who shall keep watch in the temple, when the watchmen sleep at their posts? Who shall call upon the people to redeem their possessions, and revive the republic, when their own hands have deliberately and corruptly surrendered them to the oppressor, and have built the prisons or dug the graves of their own friends? This dark picture, it is hoped, will never be applicable to the Republic of America. And yet it affords a warning, which, like all the lessons of past experience, we are not permitted to disregard. If ever the day shall arrive, in which the best talents and the best virtues shall be driven from office by intrigue or corruption, by the ostracism of the press, or the still more unrelenting persecution of party, legislation will cease to be national. In a free state, every man, who is supposed a free agent, ought to be concerned in his own government; therefore the legislative power should reside in the whole body of the people, or their representatives. The political liberty of the citizen is a tranquility of mind, arising from the opinion each person has of his safety. The enjoyment of liberty, and even its support and preservation, consists in every man's being allowed to speak his thoughts, and lay open his sentiments.

INVESTIGATIVE REPORTS

The following reports are true.

The following reports lend evidence to the fact that critical changes have taken place in our government and further show how a once free and self regulating People, have been converted into little more than commodities or resources, to be consumed and controlled for the purpose of promoting a hopelessly insolvent welfare state.

MY DAY AT THE SOCIAL SECURITY FIELD OFFICE

While researching this book, I happened upon an individual who related the following story of his experience while visiting a Social Security Field Office in 1970.

When I was a teenager I perceived that social security was a scheme developed to promote socialistic ideals and as such, was in direct opposition to the established principles of Christian morality and Law upon which the existence of the free institutions of our American constitutional Republic depend. It puzzled me that apparently no American could work without completing certain government regulatory forms that on there face evidenced compliance to numerous federal regulations. I had been taught by my parents and teachers that the liberty to labor for one's support and living was an inherent obligation founded in the commandments of God and that there could be no logical reason to subjugate the exercise of one's right to the liberty of the free marketplace unless one desired to participate in programs founded in socialist principles. How it was that virtually every employer could demand that a man or woman, born in the United States of America, submit to alienating practices in order to work for them

appeared to me a great mystery. After all, Americans were born free and did not have to seek permission to exercise the liberty to occupy fields of common right, nor could they be legally penalized for refusing to alienate their inherent liberties. With this general background in view, the reader may find the following recital understandable, and perhaps even reasonable.

In the later years of my minority, it became apparent that I would have to approach the Social Security Administration concerning questions I had relative to obtaining a Social Security Number. I had deferred this as long as I could without placing myself into a position which I felt would lead to possible difficulties. I had read the materials furnished in high school, through the courtesy of the federal government concerning income tax filing and the various penalties that could befall one for not properly dealing with various tax obligations. In general, the material was confusing and contradictory.

However, there was always the clear flavor of threat running throughout it. And again, it appeared that you had to get a Social Security Number to fulfill the obligations the literature focused on. Accordingly, in the spring of 1970, I went to a field office of the Social Security Administration. Upon entry I presented myself to an officer of the agency. She kindly asked if I was there to apply for a Social Security Number. I replied with a mild look of disgust on my face that I supposed that was right. In seeing my response, the field officer replied that it didn't appear to her that I was very excited about the prospect. I then took the opportunity to express to her my feelings on the matter, telling her frankly that I resented the fact that apparently the whole world was intent on my procuring a number and I wondered why it was that such an undertaking was necessary. I stated that I understood applying for a Social Security Number was to be voluntary but that this idea was apparently a joke of some kind and could not understand how application could be mandatory. She asked if I desire to have social welfare benefits. This question went against the grain and I emphatically told her that promoting or receiving government welfare benefits was contrary to my personal religious beliefs and that I absolutely had no interest obtaining, or in doing anything that would render me eligible to obtain any such benefits. I stated that "Government benefits were exactly what I do not want." Looking at me she asked if I was sure about that. She then asked if I didn't think I might want such security in the future, to which I replied that I was willing to take responsibility for myself and that I believed that I should place my faith in God and not government welfare.

She stated that my position could be a problem because "welfare was what the whole program was about nowadays." I said that such an idea seemed clear enough but that I still could not understand why a Social

Security Number was demanded by so many different people and agencies. She then asked straightway if I were a "U.S. citizen." By this time I was feeling a little bolder but at the same time uncertain. In other words, I was beginning to "smell a rat." I replied that I was born in the United States. However, she quickly stated that that is not what she was asking. I was now confused and I told her that my understanding of law was that being born in one of the states made me a citizen of the United States. She stated I still was not answering the question correctly and that a “U.S. citizen must have a Social Security number in order to work as an employee or under self-employment.” I replied that I didn't believe I was a U.S. citizen then, because it was my birthright to be able to work without governmental permission as long as I didn't break the law.

She asked where I was born. I answered, “I was born in Utah.” She then said, “then you do have the right to work without permission from the government." I inquired how I could work for someone else without a Social Security number. She informed me that unless I wanted to work at some congressionally regulated interstate occupation, there was no law that could compel me to use a Social Security Number. She stated that virtually all employers in the private sector are actually classified under social security and tax law as “federal employers” so that they could "cover" the obligations of all of the U.S. citizens that worked for them and were subject to social security taxes, employment taxes and income taxes. It was her opinion that as long as we still were a nation under law, if any employer were to hire me and later threaten me with termination if I did not furnish a Social Security number, I would have a lawful cause of action against that employer. She asked me if I thought I might want to someday work in “covered employment.” I stated I did not anticipate such an eventuality but I didn't want to do anything that would reduce my options as long as I did nothing that would impair any fundamental rights. She replied my position would be honored, that she would note my reservation of rights on a SS-5 form and assured me the Social Security Number issued would not be associated with "welfare/suretyship enumeration."

She then left for a few minutes and returned with an addendum form for me to complete. She stated that since I did not desire welfare enumeration, she could not issue me a pre-printed social security card from the field office and that my Social Security card would be issued from the central office in Baltimore, Maryland. She then left again to call the central office to obtain my social security number and to complete and attach this addendum to my SS-5 application giving further details on the qualification and reservations that characterized the Social Security number being issued to me.

As we waited for the response from Baltimore, she looked at me and said she needed to ask me one more question. She asked, "Do you want to

pledge yourself as surety for the national debt." After contemplating this offer for a moment, the thought came into my mind "avoid debt like the plague." I responded in the negative. We then engaged in some general discussion and she stated that the legal authority for issuing the type of Social Security number I would receive was found in the original Social Security regulations concocted in the late thirties linking the participant to regulated interstate commerce, but as no government program was currently being administered under the original law, my number would carry no obligation under interstate commerce or the current scheme of welfare enumeration and suretyship for a bankrupt, namely, the U.S. Government.

Shortly thereafter, the Social Security Number was received from Baltimore and she handed me the SS-5 application to sign. Before signing, I again wanted her to verify the fact that I had done nothing relative to our proceedings that would impair my status relative to my standing in law. She assured me I had not. She said if I did not receive my social security card in a couple of weeks, or if the number was different than the one Baltimore had processed, I should bring it to her and she would “correct the problem.”

Before I left, I asked her if all Social Security Administration officers were as knowledgeable as she. Her reply was that she suspected not, although they were required to know the law relating to their official duties. She stated that a person couldn't be working with the Administration as long as she had been and not pick up some things along the way.

CONFESSION OF A WASHINGTON STATE SUPREME COURT JUDGE

In 1998, I spoke with a healthcare professional who related the following story of a judge he happened to meet one day in Seattle, Washington.

In May 1984, a Washington State Supreme Court Justice, who was in the last stages of a terminal condition, decided to visit a doctor whose sign he had noticed while passing in his car. The doctor's sign was strange to the judge because it displayed a title that was unfamiliar to him. The doctor was a naturopathic physician. The judge's curiosity was peaked, so he decided to inquire into the nature of the practice in which the doctor engaged. After a few minutes of discussion with the doctor, who had started his practice just a few months before, it became evident that there was nothing of value that the doctor could do for the judge. The young doctor felt badly and apologized for having to disappoint the sick man who had expressed an interest in his methods and philosophy. To the surprise of the doctor, the judge remarked, "Don't apologize! You have done more for me than you will ever know. You have told me the truth even though

the thought may have entered your mind to take advantage of me because of my desperate condition."

The judge went on further, "I perceive you are a seeker of truth." He then inquired, "Have you ever heard of Diogenes?" Diogenes was the ancient Greek philosopher/teacher. Towards the end of his life, he went about naked, sitting in a tub as it was carried about at night by his students, from town to town. As the sage was thus conveyed, he held forth a lantern. When questioned by a curious bystander as to the purpose of this gesture, Diogenes replied, "I am looking for an honest man." The judge seemed happy that the doctor knew the story of Diogenes.

The judge said, "You told me the truth in a straightforward manner, and you never have to contradict yourself or prevaricate when you follow that course. I have finally met an honest man!" Then the judge made a curious statement. He said, "You have done something for me; now I would like to return the favor." He immediately inquired as to why the doctor had obtained various licenses, particularly, a driver's license. The doctor, somewhat perplexed by this, advanced the best answer he could muster, saying, "Because I want to be a law abiding citizen."

The judge responded in a manner that shocked the young doctor by retorting, "You have founded your response to my inquiry upon two equally irrelevant points. It does not have anything to do with the law, and I really doubt that your citizenship has anything to do with it either. Don't you have the Right to travel as you please, and where you please, for your own private purposes and pleasure?" The doctor thought for a moment and agreed.

Another question came quickly, "Well, why then do you have a driver's license?" The judge went on to explain that a license to drive was required only if one desired to engage in some sort of privileged, quasi-commercial activity which required the use of the public roads and highways. He said that not only would the commercial driver then need a license, but the vehicle would also need to be registered with the State, since he would be operating a vehicle for commercial purposes.

The judge went on to explain that the legal reasoning behind the policy of requiring everybody to obtain a driver's license operating a car on the road was an attempt to obtain some degree of accountability, and to insure that incompetent people did not go out on the roads and cause accidents. He indicated that the State has a legitimate need to provide for the safety and welfare of the people within its boundaries. However, state governments faced a peculiar problem, because the state constitutions never evidenced a power granted to the state, by the People, to allow that government to directly control the peoples' private lives. The Judge stated, "The government was established to protect the people in the enjoyment of their Rights, not to compete with them in the marketplace." However, to

overcome this obstacle, our “public servants” devised methods by which they could induce the people into approaching them, voluntarily, seeking a privilege – a privilege which belonged within the legitimate realm of the government's absolute jurisdiction.

Over the next decades, the driver's license, (which had been previously limited to commercial drivers of horse drawn carriages, wagons, etc.), was extended to include virtually all people operating any automobile. The system was promoted as “the proper thing to do” to enhance safety on the roads, and the people bought it. Now the state could dictate to its official agents, (the drivers), how they should conduct themselves.

With the growing number of vehicles on the roads, the States soon perceived that they were looking at a pretty lucrative business opportunity. As long as the People are inhabiting, or in other words, “residing” within the state's corporate venue, the sky’s the limit. This change of venue was accomplished by the voluntary application for the privilege of engaging in the official state business of “driving.”

The judge again pointed out to the surprised doctor (now pupil) that the Law only protected the liberty to travel, along with all associated Rights and Immunities. In fact, he said that our basic, inherent Rights were equivalent to Immunities; this fact meant nothing more than that the government was barred from controlling such rights.

However, the strategy of the states has been extended to such a degree now that it involves almost every aspect of our once private lives. We have lost almost all of our status as private Citizens, because we have voluntarily applied for so many different licenses - all of which have been created to lock us into privileged quasi-commercial activities.

The judge asked the doctor if he knew that it was unlawful for the state or federal government to coerce a private Citizen into applying for a license in order to perform an act that in fact the Citizen had the right to engage in before obtaining a license. The doctor replied that the judge’s theory made sense.

The judge said that many of the so-called patriots that he had heard of or dealt with apparently thought that the Fourteenth Amendment to the U.S. Constitution was the root of all of the difficulties they were having in maintaining their various causes in the courts. This amendment certainly played some role in the difficulties that bothered the patriotic groups, but in reality, the amendment was not, in and of itself, responsible for the loss of the liberties of the Citizenry. The judge went on to explain that the Fourteenth Amendment was never intended to affect the rights of the Citizenry at all. Actually, the Fourteenth Amendment was designed to provide a means for the federal government to project its municipal power beyond the boundaries of Washington D.C.

Next, the judge explained that Congress focused on the title of "citizen of the United States" as a way of using the federal Constitution as a tool for standardizing individual standing before the law. This particular title appeared in the first paragraph of the Fourteenth Amendment. The term "citizen of the United States" though mentioned in the national Constitution was not defined there, nor had it been defined by the Supreme Court directly.

The key to interpreting the true scope and effect of the Fourteenth Amendment was to perceive the meaning of the word “persons” used in it. This amendment specifically overturned the *Dred Scott* decision, in effect, by declaring all “persons” who were “born or naturalized in the United States and subject to the jurisdiction thereof” were citizens of the United States and of the states wherein they resided. The amendment ostensibly provided a means for Congress to protect the interests of all citizens of the United States through controlling the states as to their interactions with all citizens.

The use of the term, “jurisdiction” could only be understood as it related to international law, meaning “amenable to the general laws of that nation, allegiance thereto and eligible for protection under its laws.’ The judge felt the language of the Fourteenth Amendment could have been better and that there were well documented irregularities attendant to its adoption.

The judge then commented that the adoption of the Thirteenth Amendment effectively ended common law in the nation, because it prohibited the enforcement of the civil penalties for which the common law provided. No servitude (in other words, no redress to the victim which would restore him to his original economic status), could be enforced outside of conviction for criminal offenses. Now a damaged party could not get the trespasser to work off the damage he had done, even after a jury order. Redress was limited to monetary compensation, accomplished by seizure of the defendant's assets.

The judge went on to say that since the 1930's, government has ceased to function under traditional perimeters of law and equity; in fact, common law had basically ceased to be the foundation for federal procedure, beginning at about the turn of the century.

Now administrative regulations control the process in virtually all of the courts of the land. Courts are now functioning under the brooding presence of emergency policy, dictated by the executive branch of the federal government.

Judges are not in court to protect the rights of the private individual; instead, they are there to trick that person out of their rights. Judges accomplish this by getting defendants to engage "the big Spook," as he called it. In other words, defendants unwittingly join issue with a legal

fiction. He then declared, that judges today view all parties as effectively "bankrupt and without standing before organic law." Usually the private citizen is intimidated into answering accusations in ways which traverse a claim and join issue before the court. At that point, the judge is established as a *de facto*[1] officer.

In common law, if the accuser cannot appear in flesh and blood, there is no accuser at law. If there is no accuser, there is no case. If no *corpus delicti*[2] can be produced, there is no crime at common law. It is the right of every citizen and private person to have due process at legitimate law where issues involving their liberties and properties are involved.

Whenever a civil action is undertaken nowadays, there must be a colorable commercial connection with the government. All of the various licenses, permits, and certifications issued by government agencies are *prima facie*[3] evidence that a private party is legally connected with commercial activity over which the government (almost always federal) has asserted regulatory control (usurped the field). The judge said that even the birth certificate was essentially a commercial document.

All of the courts in the United States, and internationally, are operating in a commercial venue, by treaty or otherwise. When a person appears before these courts, "he is basically viewed as an incompetent and a bankrupt by virtue of his status as an individual surety for the national debt. Therefore, his rights become subservient to the administration of "public policy" which is designed to serve the needs of the many, at the expense of the few. This is the spirit of the new 'equity' jurisdiction asserted in the courts."

The Judge then asked the doctor if he had a Social Security Number. The Judge commented that he and some of his colleagues were studying social security and welfare legislation and felt that the enactments relating to them were the turning point in this loss of liberty. He suspected the Social Security Number was the lynchpin in transforming the private citizen into a person of commerce subject to congressional control. How this was accomplished, he did not know, but was hopeful he would live along enough to discover the legal mechanism behind this conversion.

In closing, the judge lamented that when he entered the legal profession it was the king of professions. "Now it's a whorehouse."

---

[1] In fact, in deed, actually. This phrase is used to characterize an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate.

[2] The body of a crime. The body (material substance) upon which a crime has been committed.

[3] At first sight; on the first appearance; on the face of it; so far as can be judge from the first disclosure; presumably.

EXHIBITS

EXHIBIT A
Evolution of the SS-5 – Application for Account Number

The Form SS-5 "Application For Account Number" has evolved since its introduction in November 1936. The chart below lists some of the substantial changes in the application from a federal license for the employee to engage in interstate commerce to a pledge of surety.

1936	1941	2006
Application For Account Number	Application for Social Security Account Number. Required Under the Federal Insurance Contributions Act	Application for a Social Security Card
Line 1. Name of Employee[1]	Line 1. Shown Name You Gave Your Present Employer; or if Unemployed, the Name You Will Use When Employed.	Line 1. Name to be Shown on Card
	Line 3. Enter Full name Given You at Birth if Different From Item 1.[2]	Line 1b. Full Name at Birth of Other Than Above
Line 4. Business Name of Present Employer	Line 12. Business Name and Address of Employer.	Line 8B. Mother's Social Security Number[3]

[1] Instructions for filing form reads: If you are known to your employer by a name other than that in Item 1 and desire your account set up in such name, attach signed request to your application.

[2] Instructions for filing form reads: Your account number card will be issued in the name shown in item 1, unless you wish to have it issued in the name shown in item 3. If you want your account number card to bear the name shown in item 3, attach a signed request to this form.

[3] The Taxpayer Relief Act of 1997 required the Social Security Number (SSN) of each parent to be on the application for an original SSN for a child under 18. Request for parents SSN, was incorporated into the 1999 Amended SS-5 Form.

Note: Application Form contains Four Leaf Sections. In leaf 4 it reads in part: This is an application for the assignment of a number to your Social Security account.… Its purpose is to bring to those persons employed in the broad fields of commerce…	Note: Application Form contains a front and back page only. Back of application contains reads: Instructions For Filling In Form.	Note: Application Form Contains four section: (1) How to complete the application, (2) Evidence Documents we need to see. (3) Privacy Act statement and (4) application.

EXHIBIT B
Employer Identification Number (EIN) vs. Federal Employer Identification Number (FEIN). What's the Difference?

A Federal Employer Identification Numbers (FEIN) is apparently the same thing as an Employer Identification Number (EIN). So why does the Internal Revenue Service have a problem calling the identification number assigned to the employer by its correct name - Federal Employer Identification Number? I wanted to find out. After repeated calls to the IRS in Washington, D.C. asking for clarification of the difference between the EIN and FEIN an IRS representative stated she was unaware of a FEIN. When presented with contrary evidence (see chart below), I was transferred to a supervisor who explained that the IRS doesn't use the word "federal" in the "federal employment identification number," and no longer uses the "F" in the FEIN. "It's probably just a way the data is stored in their computers," she said. After asking a few more questions, the supervisor abruptly hung up on me. It appears other federal agencies and state agencies do not have a problem calling the employer identification number by its true legal designation: Federal Employer Identification Number or FEIN.

Internal Revenue Service[4]	An Employer Identification Number (EIN) is also known as a Federal Tax Identification Number...

[4] irs.gov/businesses/small/article/0,,id=98350,00.html

United States Department of Labor[5]	An Employer Identification Number (EIN), also called "**Federal Employer Identification Number**" (FEIN), is...
U.S. Chamber of Commerce[6]	Employers must apply for and obtain a **Federal Employer Identification Number** from the Internal Revenue Service.
New York State Department of Labor[7]	Your **Federal Employer Identification Number** (FEIN) is an important piece of information…
District of Columbia: Business Resource Center[8]	A **Federal Employer Identification Number** (FEIN), also known as a Federal Tax Identification Number…
State of Rhode Island Division of Taxation Employer Tax Section[9]	Federal regulations require you to report your **federal employer identification number** to this

EXHIBIT C
The IRS and "Federal Employment" Tax Forms

The following information below is taken from IRS Publication 393. Notice the name of the publication. It appears the Internal Revenue does use the term "Federal Employment" and Federal Employer Identification Number (FEIN) after all. Let's look at an IRS publication.

IRS Publication 393

Federal Employment Tax Forms W-2 & W-3

W-2 - Wage and Tax Statement (IRS Form W-2) - each employer must provide each employee with a Form W-2 showing total wages, federal income tax withheld, FICA (Social Security) taxes withheld,

5 dol.gov/oasam/library/law/lawtips/employeridentificationnumbers.htm

6 business.uschamber.com

7 labor.state.ny.us

8 brc.dc.gov/nonprofit/requirementsorg/obtain_fed_tax_id.asp

9 tax.state.ri.us/forms/2000/det/tx-139.pdf

state taxes withheld and other pertinent information as required on the form. This form must be provided to the employee on or before Jan. 31, or at the end of employment. On or before Feb. 28, these forms must be mailed to the IRS, along with a form W-3, Transmittal of Income and Tax Statements.

An employer would use Form W-2c to correct errors on Form W-2 and Form W-3c to correct errors on Form W-3. Notice in the chart below the W-2 and W-3 asks for the Employer identification number (EIN) while the W-2c and W-3c asks for the Employer's Federal EIN. Is this just an innocent typo on the forms, or something they don't want you to know? We'll let you decide.

FORM W-2 & W-3	**Instructions on Forms**
Specific Instructions on Form W-2	Box b: Employer identification number (EIN). Show the employer identification number (EIN) assigned to you by the IRS (00-0000000).
Specific Instructions on Form W-3	Box e: Employer identification number (EIN). If you received a preprinted Form W-3 from the IRS with Pub. 393, Federal Employment Tax Forms, or Pub. 2184, …
FORM W-2c & W-3c	**Instructions on forms**
Specific Instructions on Form W-2c	Box b: Employer's **Federal EIN**. Show the correct nine digit EIN assigned to you by the IRS in the format 00-0000000.
Specific Instructions on Form W-3c	Box e: Employer's **Federal EIN**. Enter the correct number assigned to you by the IRS in the following format 00-0000000.

The United State Code and the Code of Federal Regulation
What is the United States Code?

The United States Code (USC) is the codification by subject matter of the general and permanent laws of the United States. It is divided by broad subjects into 50 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives.

According to the Office of the Law Revision Counsel of the United States House of Representatives, certain titles of the United States Code have been enacted into *positive law*, and pursuant to section 204 of Title 1 of the Code,[10] the text of those titles is legal evidence of the law contained in those titles. The other titles of the Code are *prima facie* evidence of the laws contained in those titles. The following titles of the Code have been enacted into positive law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 44, 46, and 49.

What is the Code of Federal Regulations?

The Code of Federal Regulations (CFR) is the codification of the general and permanent rules and regulations (administrative law) published in the Federal Register by the executive departments and agencies of the federal government. It is divided into 50 titles that represent broad areas subject to federal regulation.

Administrative law exists because the Congress often grants broad authority to executive branch agencies to interpret the statutes in the United States Code which the agencies are entrusted with enforcing. Under the Administrative Procedure Act, the agencies are permitted to promulgate detailed rules and regulations through a public "rulemaking" process where the public is allowed to comment, known as public information.

EXHIBIT D
Database Search Using "Employer Identification Number and Federal Employer Identification Number

Using the internet we performed a database search at the United States government website[11] for the following terms: Employer Identification Number and Federal Employer Identification Number. The results are below.

---

[10] 1 USC section. 204(A): The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: Provided, however, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

[11] gpoaccess.gov

Employer Identification Number	**Federal Employer Identification Number**
United States Code (2006) Total Hits: 29 12 Hits in Title 26. 8 Hits in Title 42	United States Code (2006) Total Hits: 1 42USC Sec. 503. State laws
Code of Federal Regulations Total Hits: 120 33 Hits in Title 26. 48 Hits in Title 27. No Hits in Title 45. 2 Hits in Title 20.	Code of Federal Regulations Total Hits: 30 18 Hits in Title 20. 7 Hits Title 45. No Hits in Title 26

USC Title 42 – The Public Health & Welfare.
USC Title 26 – Internal Revenue Code.
CFR Title 20 – Employees' Benefits
CFR Title 26 – Internal Revenue
CFR Title 45 – Public Welfare
CFR Title 27 - Alcohol, Tobacco Products and Firearms

Listed below is a sampling of the hits obtained from our database search. The statute and regulation are printed.

USC TITLE 42--THE PUBLIC HEALTH AND WELFARE CHAPTER 7--SOCIAL SECURITY SUBCHAPTER III--GRANTS TO STATES FOR UNEMPLOYMENT COMPENSATION ADMINISTRATION 42USC Sec. 503(h)(3)(A)	(3) For purposes of this subsection-- (A) the term ``wage information'' means information regarding wages paid to an individual, the social security account number of such individual, and the name, address, State, and the **Federal employer identification number** of the employer paying such wages to such individual; and…
CFR Title 45 – Public Welfare 45CFR61-- Subpart B Reporting of Information Section 61.7(3)(b)(3)(iii)	**Federal Employer Identification Number** (FEIN), or Social Security Number (or ITIN) when used by the subject as a Taxpayer Identification Number (TIN);

CFR TITLE 20--EMPLOYEES' BENEFITS 20CFRSec. 666.150(c)	``Quarterly wage record information'' means information regarding wages paid to an individual, the social security account number (or numbers, if more than one) of the individual and the name, address, State, and (when known) the **federal employer identification number** of the employer paying the wages to the individual.
CFR TITLE 20--EMPLOYEES' BENEFITS 20CFR Sec. 655.730(6)(e)(iii)	(iii) **The Federal Employer Identification Number** (FEIN) of the new employing entity (whether or not different from that of the predecessor entity); and…
TITLE 26--INTERNAL REVENUE PART 301_PROCEDURE AND ADMINISTRATION--Table of Contents - Definitions Sec. 301.7701-12 Employer identification number.	For purposes of this chapter, the term employer identification number means the taxpayer identifying number of an individual or other person (whether or not an employer) which is assigned pursuant to section 6011 (b) or corresponding provisions of prior law, or pursuant to section 6109, and in which nine digits are separated by a hyphen, as follows: 00-0000000.

The Constitution of the United States[1]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] [2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand,[3] but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

---

[1] The Constitution is presented in its original form without its amendments. Items which have since been amended or superseded, as identified in the footnotes, are bracketed.

[2] Changed by section 2 of the fourteenth amendment.

[3] Ratio in 2010 was one to over 700,000.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,][4] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.][5]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

---

[4] Changed by section 1 of the seventeenth amendment.

[5] Changed by clause 2 of the seventeenth amendment.

The Congress shall assemble at least once in every Year, and such Meeting shall [be on the first Monday in December,][6] unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time: and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if

[6] Changed by section 2 of the twentieth amendment.

approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[7]

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

[7] See the sixteenth amendment.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of

Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.][8]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.][9]

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.
Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

---

[8] Superseded by the twelfth amendment.

[9] This clause has been affected by the twenty-fifth amendment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.
Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate

Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.
Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.][10]

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

---

[10] Superseded by the thirteenth amendment.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.