Why They Hate 1937

by Edward Spannaus

> "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property."
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> —Judge Josiah A. Van Orsdel, of the U.S. Circuit Court of Appeals for the D.C. Circuit, in invalidating the 1918 Minimum Wage Act for the District of Columbia

Whether this was intentionally written as a perverse parody of I Corinthians 13:13, we do not know. But that it is a repudiation of our Declaration of Independence's commitment to "Life, Liberty, and the pursuit of Happiness," in favor of the evil John Locke's substitution of "property" for the Leibitzian commitment to Happiness, we can be certain.

That unhappy doctrine was, unfortunately, the credo of the U.S. Supreme Court in the decades leading into the Great Depression and Franklin Delano Roosevelt's New Deal.

Some of the most prominent—and notorious—examples, are the court's rulings in:

- *U.S. v.E.C. Knight (1895), nullifying the Sherman Anti-Trust Law in the case of the sugar monopoly;*
- *Lochner v. New York* (1905), invalidating a New York State law setting maximum hours of work;
- *Adair v. U.S.* (1908), allowing employers to fire workers for joining a union;
- *Coppage v. Kansas* (1915), upholding the "yellow-dog" contract, in which it was a condition of employment that a worker could not join a union;
- *Hitchman Coal & Coke v. Mitchell* (1917), that courts could use the injunction to enforce "yellow dog" contracts;
- *Hammer v. Dagenhart* (1918), that Congress could not control traffic among the states in goods made by child labor;
- *Truax v. Corrigan* (1921), that no state could stop its own judges from granting injunctions in labor disputes; and,
- *Adkins v. Children's Hospital* (1923), invalidating a minimum wage law for women and children in the District of Columbia.

This is the "Golden Age," which the restorationists of the "Constitution-in-Exile" movement wish to bring back.

And this was still, by-and-large, the dismal situation when Franklin Roosevelt took office in 1933, and proceeded to immediately utilize the great purposes and the expansive powers of the U.S. Constitution to attack the economic collapse, to attempt to restore industry and agriculture, and to uplift the population.

The Supreme Court's Roadblock

It wasn't until 1935 that challenges to New Deal legislation reached the Supreme Court.

In January, in the "hot oil" case, the Court invalidated legislation authorizing an industrial code setting production quotas for the petroleum industry, as an unconstitutional delegation of power by Congress to the President.

In early May, the Court declared that the 1934 Railroad Retirement Act, which created a pension plan for rail workers, was unconstitutional, and that Congress had exceeded its powers under the Commerce Clause.

Then on "Black Monday," May 27, 1935, the Court struck down the Frazier-Lemke Act, which provided mortgage relief to distressed farmers. At the same time, it invalidated the 1933 National Industrial Recovery Act, in the *Schechter* (or "sick chicken") case, on grounds both of the non-delegation doctrine, and the Commerce Clause.

With this, "all hell" broke loose in the lower courts. Over 1,600 injunctions were issued by Federal judges restraining Federal agencies from carrying out acts of Congress. Among these were an injunction obtained by the Duke Power Co., barring Federal loans for the contruction of hydroelectric plants, and an injunction obtained by the Georgia Power Co. and others, enjoining the Tennessee Valley Authority from constructing tranmission lines, negotiating contracts, or selling power to any additional customers.

In January 1936, the Court invalidated key provisions of the Agricultural Adjustment Act which had succeeded in raising farm incomes from the acute depressed levels hit in 1932.

This was the first case in which the Supreme Court had based a ruling, although negatively, on the General Welfare clause of Article I, Section 8 of the Constitution, which gives Congress the power to collect taxes and duties to provide for the common welfare of the United States.

Solicitor General Stanley Reed had argued that the General Welfare clause should be broadly construed to emcompass whatever was conducive to the national welfare. But the high Court held that agriculture was "a purely local activity," and that therefore regulation of agriculture was outside the powers of Congress, and must be regarded as a power reserved to the states.

Then the Court struck down the most important of the "little NRA" (National Recovery Administration) bills, the one which had re-enacted the bituminous coal industry code after the National Industrial Recovery Act (NIRA) had been invalidated. The ruling also struck down its labor provisions, protecting the right of collective bargaining, and extending other protections to coal miners.

During 1936, the Court struck down the Municipal Bankruptcy Act, and then closed the year by striking down the New York Minimum Wage Law for Women; it did so with language intended to deter any state from attempting to pass any legislation of this type again.

President Franklin Roosevelt's restoration of the General Welfare principle in government, is the real target of the Confederate lobby behind the Bush Administration's push for the "nuclear option."

FDR's Second Inaugural Address

This was the dire situation facing Franklin Roosevelt as he embarked upon his second term. His Second Inaugural Address, delivered on Jan. 20, 1937, is best known for his exclamation that "I see one-third of a nation ill-housed, ill-clad, ill-nourished."

But at the outset, FDR described the situation at the time of his first inauguration, four years earlier:

"Instinctively we recognized a deeper need—the need to find through government the instrument of our united purpose to solve for the individual the ever-rising problems of a complex civilization. Repeated attempts at their solution without the aid of government had left us baffled and bewildered. For, without that aid, we had been unable to create those moral controls over the services of science which are necessary to make science a useful servant instead of a ruthless master of mankind. To do this we knew that we must find practical controls over blind economic forces and blindly selfish men.

"We of the Republic sensed the truth that democratic government has innate capacity to protect its people against disasters once considered inevitable, to solve problems once considered unsolvable. . . . We refused to leave the problems of our common welfare to be solved by the winds of chance and the hurricanes of disaster. . . .

"This year marks the 150th anniversary of the Constitutional Convention which made us a nation. At that Convention our forefathers found the way out of the chaos which followed the Revolutionary War; they created a strong government with powers of united action sufficient then and now to solve problems utterly beyond individual or local solution. A century and a half ago they established the Federal Government in order to promote the general welfare and secure the blessings of liberty to the American people.

"Today we invoke those same powers of government to achieve the same objectives."

FDR also went directly to the issue of greed and the free market:

"We have always known that heedless self-interest was bad morals; we know now that it is bad economics. Out of the collapse of a prosperity whose builders boasted their practicality, has come the conviction that in the long run, economic morality pays. We are beginning to wipe out the line that divides the practical from the ideal; and in so doing we are fashioning an instrument of unimagined power for the establishment of a morally better world."

'Promote the General Welfare'

Two weeks later, FDR proposed his plan to reform the Supreme Court, which he soon took directly to the people, in a Fireside Chat on March 9.

FDR began by describing what had happened when the constitutionality of his 1933 monetary and gold measures was challenged. When this came before the Supreme Court, its constitutionality was upheld only by a 5-4 vote, FDR said. "The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation."

He went on to warn that there was a danger of another 1929, and said that national measures were necessary prevent this and to complete the recovery program, and that these were measures that only the national government could undertake.

To help people understand this, FDR urged that they re-read the Constitution. "Like the Bible, it ought to be read again and again."

"It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original 13 states tried to operate after the Revolution, showed the need of a national government with power enough to handle national problems.

"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 Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and could not be met by merely local action.

"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.' "

That was "the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended, as they said, 'to form a more perfect union . . . for ourselves and our posterity.' "

But this was now being thwarted by the Supreme Court, which, the President said, "has been acting not as a judicial body, but as a policy-making body."

"We must find a way to take an appeal from the Supreme Court to the Constitution itself," Roosevelt said. His proposal was to infuse new blood into the Federal courts by expanding the Supreme Court, to "save our national Constitution from hardening of the judicial arteries."

An Historic Reversal

As it turned out, Roosevelt's call to arms, rather than the details of his plan, was sufficient. Within weeks, the Supreme Court abrupty shifted course, and upheld a minimum wage law. On the same day, it upheld the collective bargaining provisions of the amended Railway Labor Act, and also the amended Frazier-Lemke Act for the relief of farm debtors. A few weeks later, it upheld the National Labor Relations Act, also known as the Wagner Act, using a reinvigorated Commerce Clause.

And in May 1937, as the end of the 1936-37 term neared, the Court issued two rulings on the same day, which affirmed New Deal programs, for the first time, on the basis of the General Welfare clause.

First, the Court upheld the unemployment tax and compensation provisions of the Social Security Act, in deciding the case *Steward Machine Co. v. Davis.* Associate Justice Benjamin Cardozo cited the magnitude of unemployment, noting that the states had been unable to give the requisite relief, and that the unemployment problem "had become national in area and dimension."

"There was need of help from the nation if the people were not to starve," Cardozo wrote. "It is too late today for the argument to be heard with tolerance that, in a crisis so extreme, the use of the moneys of the nation to relieve the unemployment and their dependents is a use for any purpose narrower than the promotion of the general welfare."

At the same time, again citing the General Welfare clause, the Court upheld the old-age benefits provisions of the Social Security Act. In this case, *Helvering v. Davis,* Justice Cardozo expressly adopted the Hamiltonian view of the general welfare power, as opposed the narrower view espoused by James Madison.

"The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison," Cardozo wrote. He said that in response to the nationwide calamity that began in 1929, Congress had enacted various measures conducive to the general welfare, including old-age benefits and unemployment compensation. Only a national, not a state, power can serve the interests of all, Cardozo declared.

"We have always known that heedless self-interest was bad morals; we know now that it is bad economics. Out of the collapse of a prosperity whose builders boasted their practicality, has come the conviction that in the long run, economic morality pays. We are beginning to wipe out the line that divides the practical from the ideal; and in so doing we are fashioning an instrument of unimagined power for the establishment of a morally better world."—FDR's Second Inaugural Address, Jan. 20, 1937

"The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near," Cardozo wrote. And, citing the mass of study and research which had gone into the drafting of the Social Security act, Cardozo declared: "The court did not improvise a judgment when it found that the award of old-age benefits would be conducive to the general welfare." Noting the dangers that would arise in a system of old-age pensions that varied from state to state, he concluded: "Only a power that is national can serve the interests of all."

Thus, in a matter of weeks, the Court had not only reversed many of its most destructive rulings from the previous two years, but it had also overturned its earlier invalidation of wage and hour legislation from the early years of the century, and decades of pronouncements which had left the Federal government powerless to promote economic growth and the general welfare.

As Robert H. Jackson (later a Supreme Court Justice), noted in a 1941 book, the Supreme Court had retreated—"to the Constitution."

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