LIBERTY TREE

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Judicial integrity

By Dick Greb

In last month's Liberty Tree, we saw that Supreme Court Chief Justice John Roberts gave his blessing to the individual mandate portion of the Patient Protection and Affordable Care Act (P.L. 111-148) under the pretext of a so-called Congressional power to "tax and spend." However, the seditious conspiracy engaged in by all three branches of government to enlarge their power beyond the limits explicitly set by the Constitution is typically a gradual process, meant to acclimate *we the victims* to ever decreasing liberty at a rate that doesn't trigger a negative response, much like the gradual heating of water lulls the frog into complacency until it is cooked.

Supreme Court Justice Owen Roberts, who, siding with the "Four Horsemen," was instrumental in invalidating early New Deal legislation. His subsequent change of allegiance to support the New Deal was called "the switch in time that saved nine."

The judiciary's part in this conspiracy – as Roberts did in the ObamaCare case – is simply to give a gloss of legitimacy to every usurpation of the other two branches by rationalizing it as a legitimate exercise of Constitution-granted power. It's an added bonus when it can be done in a way that allows for future expansions by following the same twisted logic. As mentioned last month, Roberts didn't come up with the "tax and spend" scam, he just continued on the path blazed by former judicial shills.

And to be sure, the Supremes got plenty of mileage out of the old 'tax-and-spend' ploy during Franklin Roosevelt's reign. In fact, it was the basis for upholding much of the New Deal legislation pushed through during his administration.

Do more justices equal more justice?

Of course, another factor was Roosevelt's threat in early 1937 to push legislation to allow him to appoint additional judges to any federal court which had sitting judges age 70 or older who refused to retire. In the case of the Supreme Court, that would have meant he could appoint six new justices, thereby increasing their number from nine to fifteen. At that time, four of the sitting justices – Van Devanter, McReynolds, Butler and Sullivan – were opposed to Roosevelt's New Deal, and together with "swing-voters" Owen Roberts or Chief Justice Charles Evans Hughes, were able to invalidate some of that legislation, including the Railroad Retirement Act (48 Stat. 1283; June 27, 1934),[1] the National Industrial Recovery Act (48 Stat. 195; June 16, 1933),[2] and the Agricultural Adjustment Act (48 Stat. 31; May 12, 1933).[3]

Justice Roberts wrote the majority opinions in two of those cases – *Butler* and *Alton Railroad*. In *Alton*, Justice Roberts exposed the fallacy that Congress could enact mandatory pensions for railway workers under the commerce clause when he wrote:

> The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type is in any just sense a regulation of interstate transportation. ***If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation.*** The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. ***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***

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1. See *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935).
2. See *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).
3. See *U.S. v. Butler*, 297 U.S. 1 (1936).

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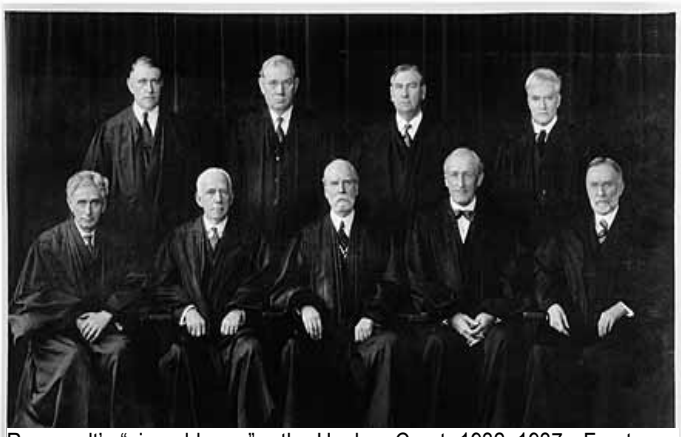
be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. ***These matters obviously lie outside the orbit of congressional power***. *Alton*, p. 368.[4]



Roosevelt's "nine old men" – the Hughes Court, 1932–1937. Front row: Justices Brandeis and Van Devanter, Chief Justice Hughes, and Justices McReynolds and Sutherland. Back row: Justices Roberts, Butler, Stone, and Cardozo. The anti-New Deal conservatives – Butler, Sutherland, Van Devanter and McReynolds – were known as the "Four Horsemen," and the pro-New Deal liberal bloc – Stone, Cardozo and Brandeis – were known as the "Three Musketeers."

And even though he helped lay the foundation in *Butler* for subsequent decisions to build on Hamilton's expansive view of the taxing power,[5] he ultimately sided with the four conservative justices to also invalidate the Agricultural Adjustment Act, albeit on the grounds that it violated reserved state powers:

> We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. ***The act invades the reserved rights of the states.*** It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. ***The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.***
>
> … ***It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.*** *Butler*, p. 68.

Chief Justice Charles Evans Hughes recognized the disastrous potential of the majority's *Alton* decision in undermining Congressional power grabbing, when he remarked in his dissent that: "the majority finally raise[d] a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce. … That is a conclusion of such serious and far-reaching importance that it overshadows all other questions raised by the act."[6]

Yet, despite thinking the *Alton* decision went too far, Hughes' majority opinion in the *Schechter Poultry* case is a classic statement of limited powers:

> ***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.*** Such assertions of extraconstitutional 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.'[7]

The "nine old men"

With three important components of the New Deal already declared invalid, Roosevelt figured his New Socialist Deal would fare better in the Supreme Court if he could pack the court with enough liberal judges to out-number the prevailing conservative bloc. So he proposed his Judicial Procedures Reform Bill in February 1937. According to Roosevelt, it was necessary because:

> In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. . . A lower mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.[8]

In other words, those old men sitting as justices were just too set in their views of limited government to understand Roosevelt's need to exercise undelegated power. And if they wouldn't get out of the way of progress, then they would be made irrelevant.

Despite Roosevelt's attempt to convince the public in one of his fireside chats that he was just trying to help the courts by reducing the burden of their workloads, it was widely recognized for the political maneuvering that it really was. In the end, his court-packing gambit was re-

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4. Unless otherwise noted, all emphases throughout have been added, and internal citations may be omitted.
5. For the extended quote from *Butler* on this subject, see page 3 of the December 2012 Liberty Tree.
6. *Alton*, pg. 375.
7. *Schechter Poultry*, p. 528.
8. See www.ssa.gov/history/court.html.

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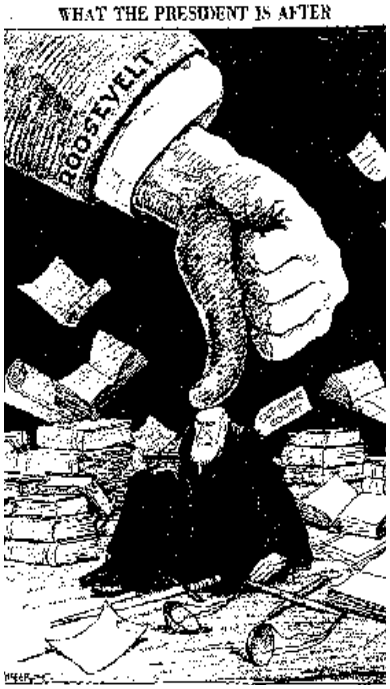
jected, but the proposal itself may have ultimately convinced the recalcitrant Supremes to toe FDR's line.

The "switch in time that saved nine"

As mentioned above, Roosevelt's scheme would have allowed him to seat six new Supreme Court justices, for a total of fifteen. Since three of the then-sitting justices – Cardozo, Stone and Brandeis, known as the "Three Musketeers" – were already willing to uphold Roosevelt's New Socialist Deal, the addition of six more liberals to the court would make for a majority that could carry FDR's agenda forward. However, weeks after the announcement of Roosevelt's plan, the Supremes appeared ready to start upholding the New Deal. In March 1937, Justice Roberts voted to uphold a minimum wage law in Washington state[9] that was very similar to one from New York that he found unconstitutional in June 1936.[10] Two weeks later, Roberts again sided with the liberals to uphold the National Labor Relations Act (49 Stat. 449; July 5, 1935)[11], and then in May 1937, he voted to uphold Alabama's law imposing an unemployment tax in compliance with the Social Security Act (49 Stat. 620; August 14, 1935).[12] This case was the first of a triple-header of Social Security cases heard in April and May 1937 and decided on May 24, 1937.



As this cartoon shows, not everyone was convinced of Roosevelt's professed altruistic purpose for packing the court.

This change in allegiance of Justice Roberts from the conservative to the liberal position on New Deal cases, seeing as how it precluded the need for court-packing, became known as the "switch in time that saved nine." However, when Roberts retired, he was asked by Justice Felix Frankfurter to explain his motivation in the *Parrish* minimum wage case, and his memorandum in response reveals that his decision in that case actually preceded the announcement of Roosevelt's plan by about seven weeks. That decision was withheld however, because the court was divided 4-4, and Justice Harlan Stone was ill. So, they waited until Stone returned to the bench in early February 1937, at which time he naturally voted with the other liberals to uphold the law. But, because of that delay, the decision on the case wasn't announced until March, a couple of weeks after FDR's announcement.

> So the law becomes slack and justice never prevails. The wicked surround the righteous – therefore judgment comes forth perverted.
>
> *Habakkuk 1:4* (*NRS*V)

Justice never prevails

His memorandum also explains that the difference between the case involving the New York law and the one involving the Washington law was that the latter case specifically challenged the validity of the precedent[13] relied upon to invalidate the New York law. Because of that explicit request to reconsider the *Adkins* case, Roberts, who disagreed with that earlier decision, voted to overturn it, thus paving the way for upholding the Washington minimum wage law in *Parrish*. And although he thought *Adkins* had been wrongly decided, he explained his vote in *Morehead* this way: "I stated to him [Justice Butler] that I would concur in any opinion which was **based on the fact that the State had not asked us to re-examine or overrule *Adkins*** and that, as we found no material difference in the facts of the two cases, **we should therefore follow the *Adkins* case**."[14]

Notice that the actual validity of the laws was not always the deciding factor in Justice Roberts' decisions. Otherwise, he would have found the laws in both cases to be valid. However, because one didn't specifically request the bad precedent to be overturned, he invalidated that law, thereby perverting justice in that case.[15] The same can be said of the other cases in which Roberts flipped sides: if he ultimately declared laws valid which were not distinguishably different from laws he previously declared invalid, then justice must have been perverted in one or the other of the two situations.

The other "switch"

Notwithstanding Roberts' flip-flop on the New Deal, there was another event which helped make Roosevelt's scheme unnecessary. Just a week before the decisions up-

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9. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
10. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).
11. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).
12. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).
13. The case that was considered to be binding on the *Morehead* decision was *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which was a challenge to another minimum wage law, this one in Washington, D.C.
14. Robert's Memorandum (November 9, 1945); see www.newdeal.feri.org/court/roberts.htm.
15. Maybe the lesson here is that it's better to argue to have bad precedents overturned than trying to distinguish them from our present case.

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holding the Social Security Act were announced, Justice Van Devanter submitted his resignation, thereby giving FDR a chance to appoint another liberal judge to the bench. By 1941, all "The Four Horsemen" had either died or retired, as well as Hughes and two of "The Three Musketeers."[16] This gave Roosevelt the opportunity to constitute nearly the whole Supreme Court – altogether he appointed eight Associate Justices and promoted Stone to Chief Justice. Two of those appointees – Hugo Black and William O. Douglas remained on the bench into the 1970's, thus extending FDR's influence over our nation beyond his unprecedented three terms in office and his New Deal.

Judicial independence

This court-packing episode in our history gives us a clear picture of the political nature of the judiciary, especially the Supreme Court – the court of last resort. It shows that the idea of judicial integrity is really more of a mirage than anything of substance. Judges are picked on the basis of what they are expected to reject or uphold. While on the bench, the rules by which they operate,[17] including the practice of being bound by past precedents and the refusal to reconsider them except when avoidance is impossible, limit their sphere of action to execute real justice. And as happened in the situation discussed here, external influences also affect judicial integrity. If Roosevelt's plan would have succeeded, only the willfully blind could have failed to see that perversion of justice would be the inevitable result. And whether the attempt actually influenced Roberts to change his opinions on the cases subsequently heard by the court, or influenced Van Devanter to take his retirement earlier than he would have done otherwise, the fact that the public believed it to be so, still undermines the perception of fairness and integrity in the judicial system. And when you get right down to it, that's really all there is – a perception.

Since the government prosecutes all crimes as well as gets to be the judge in all of its own causes, there is precious little reason to have any confidence that the outcome will be any type of justice. Certainly *their* interests will always be well represented in those outcomes. But our interests, not so much. And so the façade of fairness and integrity is all there is to keep the public accepting the decisions of the black-robed liberty thieves as legitimate. Therefore, it behooves the government to preserve the public's confidence, by maintaining that deceptive façade as much as possible. However, in the long run, many of the things they do to try to preserve it – such as their rules of *stare decisis* and of avoiding constitutional issues – tend instead to destroy the confidence they rely upon. Just like with any other type of lie, that's one of the pitfalls of deception.

16. An early New Deal law that cut retired Supreme Court justices' pensions by about 50 percent probably contributed to the reluctance of Sutherland and Van Devanter to retire. Conversely, the restoration of full pensions in 1937 may have contributed to so many justices retiring within such a short time span.
17. See my series titled "Steering Clear of the Constitution" in the Nov. 2008, Jan. 2009 and Mar. 2009 issues of *Liberty Tree*.