The Great Depression, the New Deal, and the American Legal Order

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Shortly before the 1932 election, which brought Franklin D. Roosevelt to the presidency and the New Deal to America, Supreme Court Justice Harlan F. Stone returned home after a dinner party at the White House, where he and other members of Herbert Hoover's "medicine ball" cabinet had dined with the beleaguered incumbent. Stone's law clerk, Herbert Wechsler, found the Justice in a very reflective mood that evening and inquired what he was thinking about. "Well," said the former dean of the Columbia Law School, "what I'm thinking about mainly is that I guess we won't be dining very much at the White House any more." Wechsler asked if the Justice viewed that prospect with regret. "Yes, I do. But not with surprise. If I told the President once I told him many times, he was in danger of forgetting that it was the common people of this country who elected him." Hoover's aristocratic opponent, who helped to extend the benefits of the American legal order to the common men and women of the country, seldom made the same mistake.

Nearly thirty years ago, the dean of legal historians, J. Willard Hurst, wrote that the main thrust of American law in the nineteenth century had been to "protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression." If that is so, then the main thrust of American legal development in the twentieth century has been to adapt those basic concepts to an interdependent, urban, industrial society. The era of the Great Depression and the New Deal marked an important milestone in the quest for a new relation between law and human happiness which would, in Hurst's apt phrase, "give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances."  

Prior to FDR and the New Deal, the American legal order afforded abundant liberty for the wheat farmers of Kansas to sell their crops below the cost of production. There was ample freedom for entrepreneurs who wished to form larger and larger units of production, but very little for the

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3. Id.
individual industrial worker who desired collective bargaining; sufficient liberty for the floor traders on the stock exchange who manipulated the value of securities, but far less for the ordinary investor who sought reliable information about a corporation's balance sheet. The practical range of choices open to the white, Anglo-Saxon, Protestant graduates of the nation's best law schools was infinitely greater than the opportunity available to Jews or Roman Catholics from the same institutions. Even the stock market crash of 1929 did not affect everyone equally. The wealthy seldom felt the pinch of the limiting force of circumstances. The same could not be said for the nation's elderly, its unemployed, or its many children who labored in the mines and mills of Alabama and North Carolina. As many legal historians have pointed out, the American system often encouraged rapid economic growth at the expense of social justice and economic equality.

Until the pioneering work of Hurst and his disciples, especially Lawrence M. Friedman and Harry N. Scheiber, historians described the nineteenth century American legal order as devoted to laissez faire economics and the defense of vested property rights. But as these scholars and others demonstrated, nineteenth century American law accorded much greater protection to entrepreneurial property interests than to rentier ones. In addition, the states and their legal institutions played a fundamental role in promoting economic growth during the nineteenth century and in allocating the costs and benefits of the social disruptions produced by the railroad, the factory, and the commercial integration of the national economy.

The degree of legal intervention and coercion varied, of course, ranging from the harsh slave codes of the Old South and the law of eminent domain to the bankruptcy statutes and the rules of contract law. Historians have, for the most part, rejected the traditional view of the state as a slumbering power that permitted market forces to go unchecked. Most legal historians now perceive that even the primitive governmental machinery of the nineteenth century could be an important instrument of economic development and planning. The most serious debate in nineteenth century legal history today does not rage over the extent of state intervention, but over the question of which socioeconomic groups benefited from the rules of both public and private law.

6. In some articles, notably M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 31-252 (1977), and to a lesser extent, Scheiber, supra note 5, and L. Friedman, supra note 4, scholars argue that the legal rules favored the commercial classes and large-scale developers at the expense of farmers, artisans, and the working class. This view has been challenged in, inter alia, Simpson, The
Historians’ reconceptualization of the nineteenth century American legal order has led to a reconsideration of law and the state in modern America. The origins of administrative law, redistributive social programs, and a concern for economic planning lie not in the progressive era of Theodore Roosevelt and Woodrow Wilson, as once thought, but in the final decades of the nineteenth century. The old liberal synthesis, which posited a continuing legal struggle between big business on the one hand and selfless, idealistic reformers on the other, began to lose credibility in light of modern research. Many historians now argue persuasively that corporate leaders and their legal advisers played important roles in the drafting and implementation of many reforms and that businessmen and middle-class progressives shared a common ideology rooted in their concern for economic efficiency and social order.

Historians have also challenged the cherished belief that American political life is characterized by sharp, cyclical swings between periods of liberal reform and conservative reaction. This paradigm lost validity as a way of characterizing the early days of this century, once scholars began to reexamine the 1920’s, to rehabilitate such figures as Herbert Hoover, and to rediscover the many similarities between that era and its progressive past and New Deal future. Few historians today would, like their predecessors in the 1950’s, gloss over the ideological and class conflict present in American society. Nevertheless, there is also less of a tendency to regard the New Deal as “a third American revolution,” which departed fundamentally from the public policies of earlier eras.


The New Deal was a product of both radical and conservative ideas and was attacked vigorously from the Right and Left. Two decades ago, many New Left scholars portrayed the New Deal as a conservative effort to prevent change, failing to appreciate the many institutional barriers to reform which Roosevelt’s administration faced, exaggerating the American people’s desire for more drastic innovations, and to some degree undervaluing the changes that did occur. The New Deal was conservative to the extent that many of its key leaders, including FDR, began their careers in an earlier era and drew inspiration from the public policies of Theodore Roosevelt and Woodrow Wilson. It was radical, however, in that it brought to fruition many programs that had been only dreams in the progressive era and in so doing frequently incurred the enmity of the rich and the powerful. Felix Frankfurter and other New Dealers may have wished to save American capitalism from the follies of the Left but the decade’s genuine conservatives regarded them as cunning agents in an insidious plot to sovietize the American system. Some historians have also ignored legal ideas and institutions that worked to neutralize the New Deal’s effectiveness. By emphasizing the many legal changes initiated by the New Deal, scholars have also tended to slight important developments on the state level and to ignore the entire field of private law, where conservatives, not New Dealers, often held the upper hand.

The New Deal initiated or accelerated five important changes in the American legal order. The first, arising from the administration’s confrontation with the Supreme Court, was a “constitutional revolution” in 1937, which permanently and dramatically changed the role of the judiciary. Instead of invoking the due process and commerce clauses to veto progressive laws, which it frequently did between 1880 and 1937, the Court retreated to the more secure redoubt of statutory construction, abandoning the attempt to veto national economic policy. The justices continued, however, to engage in an active retail trade in this area of the law, despite their growing preoccupation with civil liberties and their frequent invocation of judicial restraint.

The second change was the elevation of the presidency, already revital-
ized by Theodore Roosevelt, Woodrow Wilson, and Herbert Hoover, to
the pinnacle of power within the political system. FDR was not able to
create an "imperial presidency" through the New Deal. His efforts re-
ceived several notable setbacks at the hands of Congress and the Supreme
Court. Further, many of his largest accretions of executive power were
the result of World War II, not the New Deal. Nevertheless, his mastery
of the radio, his superb political skills, and the Executive Reorganization
Act of 193913 enormously enhanced the prestige of the presidency. With
Roosevelt's tenure the White House became the focus of popular dissatis-
faction with the nation's economy, foreign policy, and moral tone.

The third change, manifested in the extraordinary growth of federal
grant-in-aid programs, the Social Security Act of 1935,14 and in the ef-
forts of the Department of Justice to protect civil rights under the old
Reconstruction-era statutes,15 was the significant modification of Ameri-
can federalism. For the first time, the national government became the
chief custodian of both economic security and social justice for all citi-
zens. While the New Deal never centralized power in Washington to the
extent that its critics feared or many of its supporters desired, by 1940 the
federal government stood at the fiscal and administrative center of a com-
plex web of intergovernmental relationships that bore little resemblance
to the neat models of "dual federalism" outlined in turn-of-the-century
textbooks on American government.

A fourth change ratified the triumph of state capitalism under the man-
agement of a bureaucratic elite drawn from the legal profession, the aca-
demic world, and big business. This change was distinguished by the re-
vitalization of established independent regulatory agencies such as the
Interstate Commerce Commission and the birth of new ones including the
Securities and Exchange Commission and the Federal Communications
Commission.

The final change arose from the New Deal's impact upon the legal pro-
fession. This occurred in two ways. First, by recruiting many young law-
ners for government service, the administration broke the occupational
monopoly held by large, private law firms and opened up new avenues for
the pursuit of power and status within the profession. Second, by expand-
ing the domain of administrative law, the New Deal challenged the domi-
nant orthodoxies of legal education and professional practice, which had

scattered sections of 42 U.S.C. (1976)).
15. See, e.g., Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified in part at 42 U.S.C.

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long emphasized the superiority of judicial institutions and the common law over legislatures, independent regulatory agencies, and statutes.

FDR AND THE SUPREME COURT

As a consequence of the "constitutional revolution," the 1930's closed one chapter in America's legal history and opened a new one. The New Deal years marked the end of the era of substantive economic due process and dual federalism. At the same time, they marked the beginning of an era of judicial concern for raising the standards of criminal justice and protecting the civil liberties and civil rights of those whom Justice Harlan Stone referred to as "discrete and insular minorities." The New Deal era was also distinguished by the Roosevelt administration's conflict with the Supreme Court, which climaxed a struggle over the constitutional system.

The conflict between the President and the Court had its roots in the end of the nineteenth century, when the justices first asserted broad authority to shape the country's economic arrangements. They did so by balancing the power of government to regulate property and contract relationships in the public interest against the right of individuals to remain free from state intervention. Beginning in the 1870's, some justices adopted an expansive reading of the fourteenth amendment's due process clause and a narrow construction of Congress' constitutional interstate commerce and taxation powers. Influenced by Jacksonian ideas of entrepreneurial individualism, equality, and state sovereignty, they restricted the scope of both state and federal intrusion into the sphere of private economic decision making. They also denied the states the authority to regulate most private business firms, except those "afflicted with a public interest" such as railroads and other public utilities. And even with respect to these corporate interests, the Court became the final arbiter of valuation issues and rate-making. It frustrated adoption of a federal in-

16. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Many scholars regard this case as the rhetorical turning point of modern constitutional development. In Carolene Products, the Court sustained the federal Filled Milk Act, ch. 262, Pub. L. No. 513, 42 Stat. 1486 (1923) (codified at 21 U.S.C. §§ 61–64 (1976)), against claims that Congress had exceeded its authority to regulate interstate commerce and had deprived manufacturers of valuable property rights without due process of law. Where statutes concerned "ordinary commercial transactions." Stone wrote for the majority, the Court would insist only that the legislatures acted upon some rational basis, 304 U.S. at 152. Where the law touched political rights or others protected by the first nine amendments, however, the Court might insist upon weightier justification. Id. at n.4.


come tax until passage of a constitutional amendment in 1913,19 vetoed state and federal laws that attempted to prescribe minimum standards for employment,20 and hampered the initial attempts by the federal government to break up manufacturing monopolies.21

Other justices, heirs to the radical Republican tradition of moral reform and positive government, remained far more sympathetic to state efforts at economic manipulation and redistribution. Their reading of the Constitution helped to sustain state regulation of working conditions for certain workers, especially women,22 permitted national regulation of local economic activities that affected interstate commerce,23 allowed Congress to prohibit the use of such commerce for many deleterious purposes,24 and sanctioned taxation for regulatory as well as revenue purposes.25

In short, the Court had developed two parallel and contradictory lines of jurisprudence. These two lines both reflected and managed the tensions between a vanishing social order of localism, individualism, and voluntarism on the one hand and on the other a new regime of national economic integration, collectivized work, and systematic planning produced by massive demographic changes and the rise of big business. As the nation entered the worst economic depression in its history, the justices had not resolved this fundamental doctrinal conflict. Still, they possessed enormous flexibility on most issues that might come before them for resolution. By invoking prior decisions that limited governmental control over the economy, they could resist many efforts at further social reform. But they could also accommodate change by looking to those precedents that had sustained government intervention in the past. Thus, the "constitutional revolution" of the decade arose less from the articulation of new doctrines than from the eventual triumph of older ones.

The doctrinal tensions on the Court were reflected in its membership. Four devout conservatives, James McReynolds, George Sutherland, Willis Van Devanter, and Pierce Butler, distrusted most manifestations of governmental regulation and preached a robust version of judicial activism to prevent it. Three liberals, Louis Brandeis, Harlan Stone, and Benjamin Cardozo, advocated judicial restraint in order to foster governmen-

tal regulation of the economy. Nevertheless, only one, Cardozo, truly sympathized with the New Deal. Two "swing" justices, Charles Evans Hughes and Owen Roberts, appeared to vacillate between fear that the government would be too weak to prevent a general economic collapse and fear that it would become too strong to resist managing private property completely.

The marked divergence in the Court's membership was a fairly recent phenomenon. FDR's immediate predecessor, Herbert Hoover, appointed Hughes,26 Cardozo—the outstanding state jurist of his time—and Roberts—a middle-of-the-road Republican from Pennsylvania, who had won the enthusiastic endorsement of many reformers for his role in the prosecution of the Teapot Dome scoundrels. "I do not believe there are any skeletons in his mental closet," remarked Felix Frankfurter at the time of Roberts' appointment. "Facts will find a ready access to his mind."27 Thanks to Herbert Hoover, therefore, the New Deal programs were presented to the most progressive Court in several generations.

Hughes' Court initially fulfilled many of these liberal expectations with a series of decisions in 1934–35 that endorsed a generous conception of governmental power. The new Chief Justice himself wrote the Court's opinion in Home Building & Loan v. Blaisdell,28 where five of the justices upheld a state mortgage moratorium against objections that it violated private rights of contract. In Nebbia v. New York,29 Roberts swept away over a half century of precedent that limited the states' power to fix prices. The same quintet of Hughes, Roberts, Cardozo, Stone, and Brandeis upheld the New Deal's monetary policies in a series of rulings30 that provoked Justice McReynolds to lament: "This is Nero at his worst. The Constitution is gone."31

26. Although twenty-six senators voted against Hughes' confirmation because of his past Wall Street connections, Hughes had given liberals good cause to think that he would be far more tolerant of governmental experimentation than his predecessor, William Howard Taft. As an associate justice between 1910 and 1916, he had authored both the Minnesota Rates Case, supra note 23, and Shreveport, supra note 23, and dissented in Coppage v. Kansas, 236 U.S. 1 (1915), where the majority invalidated a Kansas law prohibiting "yellow-dog" labor contracts on the grounds that the regulation deprived employers of liberty of contract. As New York's progressive governor, he had once observed that "we are under a Constitution, but the Constitution is what the judges say it is." See S. Hendel, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951): THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES (D. Danelski & J. Tulchin eds. 1973).
31. The McReynolds quote, carried by the newspapers, but expunged from the official record, is
None of these early disputes, however, concerned the scope of congressional, presidential, or federal administrative authority, with the exception of the Gold Clause Cases. When such issues emerged clearly in 1935–36, the Court’s honeymoon with the New Deal ended abruptly. On “Black Monday,” May 27, 1935, the justices toppled two important New Deal laws, the controversial National Industrial Recovery Act, and the Frazier-Lemke Farm Relief Act. They also curtailed FDR’s power to remove members of the independent regulatory commissions without specific approval from Congress.

A year later, in addition to vetoing the administration’s basic agricultural program, and the Guffey Bituminous Coal Act, the justices administered a stern rebuke to the new Securities and Exchange Commission, and encouraged disgruntled shareholders to sue corporate officers who did not resist the New Deal’s public power efforts. In a closing salvo, five of the justices again struck down state minimum wage laws.

In the face of FDR’s landslide reelection victory and the introduction of his plan to reorganize the federal judiciary, the Court reversed its doctrinal gears once again. The old pre-1935 majority led by Hughes and Roberts, who had condoned many of the judicial mutilations in 1935–36, upheld a new minimum wage law, and endorsed the New Deal’s landmark labor reform in the Jones & Laughlin case. Chief Justice Hughes wrote both opinions, the first laying to rest the hoary doctrine of “liberty of contract,” and the second giving Congress broad authority to regulate labor-management conflicts that disrupted interstate commerce.

What caused the Court’s switch? Although many scholars have tackled this startling shift in judicial attitudes, there is still no consensus as to why the Court, especially Hughes and Roberts, engaged in such intellectual somersaults.

Hughes blamed the New Deal’s lawyers for the constitutional imbroglio, because, he complained, they drafted sloppy laws that deserved

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judicial burial. Thus, the Court’s reversal might be explained by the fact that statutes were more carefully drafted as the emergency of the Hundred Days passed and as the administration recruited more experienced legislative draftsmen. This thesis has some merit with respect to the National Industrial Recovery Act, which the Court severely criticized in the “hot-oil” case44 and the Schechter case,45 but none at all when one reflects upon the care with which very good lawyers wrote the Agricultural Adjustment Act46 and the Guffey Coal Act,47 both of which were struck down by the Court.48

Another explanation for the Court’s apparent reversal is that there was no reversal—that before and after 1937 the justices engaged in scrupulous line-drawing between acceptable and unacceptable regulatory schemes. One student of the Court has emphasized the consistency in Hughes’ approach to due process and commerce clause issues from 1910 to 1937, which by implication rejects the idea that he changed his mind at all.49 But this explanation glosses over much of the Chief Justice’s language in Schechter and Carter Coal, dismisses the contrary estimate of several contemporaries,50 and overlooks Hughes’ anti-New Deal posture in cases such as Butler and Jones. Felix Frankfurter once attempted to rescue Justice Roberts from charges of expediency,51 but his effort was unpersuasive.52 When one carefully examines the pattern of judicial vetoes in 1935–36, it appears that the anti-New Deal coalition (which sometimes included Brandeis as well as Hughes and Roberts) feared most of all the enhancement of executive power, enlarged federal control over the economy, and the discretionary authority of federal regulatory agencies.53

See supra note 33.


See supra text accompanying notes 36–37.


Justice Brandeis told Tommy Corcoran after the Schechter decision.

This is the end of this business of centralization, and I want you to go back and tell the President that we’re not going to let this government centralize everything. It’s come to an end.
form measures that did not sweep as broadly with respect to these three areas faced far less judicial hostility, even from the Court’s hide-bound conservatives. Shortly before overturning the Agricultural Adjustment Act, for example, the justices sustained the Hawes-Cooper Act, which declared that all convict-made goods shipped in interstate commerce were to become subject to the laws of the state of their destination. And prior to the Parrish decision, they also upheld an amendment to Hawes-Cooper, which made it a federal crime to transport convict-made goods into any state forbidding their possession or sale.

These affirmative uses of federal law to support state policies went back to the Webb-Kenyon Act of 1913, where Congress banned the transportation of liquor in interstate commerce if it was intended for use in any way violating the laws of the state into which it was shipped. Theoretically, the principles of Webb-Kenyon and Hawes-Cooper had very broad application. States with the most advanced labor and social welfare policies, for example, could with federal assistance compel their backward sisters to adopt more progressive laws or risk losing their principal markets. As a constitutional strategy, Webb-Kenyon and Hawes-Cooper represented a viable if circuitous route to reform. Unfortunately, the New Deal failed to exploit its full potential, even after Frankfurter urged the approach upon Roosevelt when the Court struck down the NIRA. FDR and many of his other advisers, however, favored more direct methods of federal control, which triggered greater anxiety among the Justices and contributed to the impasse of 1935–36.

In the final analysis, both the impasse and its solution were more political than doctrinal. Hughes and Roberts, both moderate Republicans, looked upon many of the New Deal’s reforms and some state level programs as radical, especially with respect to the redistribution of social and economic power.

Other old progressives, including Newton D. Baker and Al Smith, fought the New Deal for these same reasons after 1935. By joining with

As for your young men, you call them together and tell them to get out of Washington—tell them to go home, back to the states. That is where they must do their work.


54. See supra note 36.
57. See supra note 41.
the conservative justices in 1935–36, Hughes and Roberts hoped to portray FDR and his advisers as dangerous subversives who were tampering with constitutional verities. "The words of the Justices carried political as well as legal significance," noted Attorney General Robert Jackson. "It was unfortunate, if the majority felt compelled to strike blow after blow at the President's policy, that this compulsion was concurrent with . . . the [presidential] campaign."61 Faced with a choice between an administration that had arrested the economic decline and a group of Justices who argued that this administration often behaved unconstitutionally, the voters placed their immediate self-interest above abstract lawyers' arguments. Roosevelt's landslide left Hughes and Roberts with no alternative but capitulation.

In bowing to the election returns, however, Hughes became the leader of the Court's progressive wing once again. He also salvaged the basic power of judicial review and placed himself and the Court in an impregnable position with respect to the President's misconceived Court-packing plan. It was a stunning triumph for the Chief Justice, who, unlike Justice Roberts, accomplished this feat without serious damage to his intellectual integrity. Hughes, the Justice who wrote *Miller v. Wilson*62 in 1915, did not find it too difficult to sustain minimum wage legislation two decades later. And the ideas expressed in *Jones & Laughlin*63 had already been given initial shape in the *Minnesota Rates Cases*64 and the *Shreveport* case.65 For a Chief Justice as brilliant and as crafty as Hughes, leading the constitutional revolution in 1937 was as simple as resisting it had been the year before.

The struggle between Roosevelt and the Court has tended to obscure other aspects of the justices' work during the decade, work that had profound and lasting significance. Hughes and his brethren afforded important new protection in the areas of civil liberties and civil rights. In cases such as *Stromberg v. California*66 and *DeJonge v. Oregon*,67 the Court significantly enlarged the scope of first amendment rights guarded against state interference, at a time when such decisions did not command broad public support.68 The Justices drove another nail into the coffin of

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62. 236 U.S. 373 (1915).
63. See supra note 42.
64. See supra note 23.
65. 234 U.S. 342 (1914); see supra note 23.
66. 283 U.S. 359 (1931).
"separate but equal,"69 and provided black citizens with a modicum of defense against Southern lynch law disguised as due process.70 The Hughes Court also broadened the reach of federal habeas corpus actions to attack constitutionally defective state trials,71 and greatly expanded the in forma pauperis docket, which permitted indigent defendants to challenge their convictions.72 While certain aspects of economic liberty went into constitutional eclipse during the decade, the Court extended new liberty to many forgotten Americans. This "constitutional revolution," which laid the foundation for the jurisprudence of the Warren Court two decades later, was as important as the more celebrated revolution of 1937.

THE CHANGING PRESIDENCY

A second significant change brought on by the New Deal can be seen in its impact on the presidency. Roosevelt’s critics, especially the Liberty Leaguers and later the isolationists, who loathed his economic reforms and distrusted his diplomacy, accused him of erecting a presidential dictatorship. Congress was likewise blamed for abdicating its authority to the executive branch and to the growing federal bureaucracy, which, critics complained, subjected local government and private economic interests to the whims and caprice of radicals in Washington. Like all generalizations, these contained some measure of truth, but also considerable hyperbole.

These claims persisted because it was virtually impossible for most Americans who experienced the Great Depression and the New Deal to distinguish the presidency from the man. "Most of us in the Army have a hard time remembering any President but Franklin D. Roosevelt," remarked one G.I. at the time of FDR’s death in 1945. "He was the Commander-in-Chief, not only of the armed forces, but of our generation."73 Roosevelt’s aggrandizement of power rested as much upon his own buoyant personality as upon statutes and executive orders. Few political leaders in our history could match his oratorical gifts, his guile in dispensing patronage, and his deft manipulation of subordinates, opponents, the press, and Congress. But he was not invincible. We often forget that, despite his extraordinary charisma, Roosevelt experienced a number of

73. B. ASBELL, WHEN F.D.R. DIED (1967).
profound setbacks between 1933 and 1939 that clearly limited his power even during the unparalleled economic crisis of the Depression. The coming of World War II shifted the balance back in favor of presidential power, but even during the war FDR usually functioned within the boundaries set by Congress and public opinion.

The period of unquestioned presidential preeminence in the shaping of domestic policy was remarkably fertile, but also remarkably short-lived. Throughout the so-called Hundred Days, which lasted from March 4 until early June of 1933, Congress quickly endorsed dozens of proposals that flowed from the White House, including a new banking law, and the first federal securities statute, as well as laws setting up the National Recovery Administration and one expanding the lending capacity of the Reconstruction Finance Corporation. Acting under the dubious authority of the Trading with the Enemy Act from World War I, Roosevelt banned gold exports and all foreign exchange transactions until Congress approved the administration’s monetary schemes and devalued the dollar by almost twenty-five percent. By equating the economic debacle with war, FDR asked for and received from Congress the resources appropriate for a military commander battling a foreign invader.

The off-year elections in 1934 gave Roosevelt even larger majorities in Congress. This mandate, combined with the defection of many conservatives and the growing challenge presented by Senator Huey Long and others, encouraged a second burst of reforms in 1935. Again responding to initiatives from the White House, Congress adopted the Social Security Act, the National Labor Relations Act, a $4.8 billion relief and public

80. Leuchtenburg, supra note 9.
works measure,\textsuperscript{83} and a significant revision of the federal tax code that closed many loopholes opened during the 1920's and levied new surcharges on the very rich.\textsuperscript{84} Despite the Supreme Court's invalidation of key administration measures, executive power stood at its peacetime zenith after FDR's triumph at the polls.

When Roosevelt attempted to exploit his personal political capital in 1937, however, Congress reasserted legislative independence and administered its first decisive rebuff to executive power\textsuperscript{85} by rejecting the administration's ill-advised attempt at Court-packing. The proposed Judicial Reform Act of 1937 would have added additional justices to the Court for each one who failed to retire within six months of reaching age seventy. "Boys," snapped one congressman, "here's where I cash in my chips."\textsuperscript{86} The President's best legal minds, including Felix Frankfurter, Ben Cohen, and Tommy Corcoran, were not consulted until after the measure had been sent to Congress. "They're just doing it all wrong," lamented Cohen.\textsuperscript{87} "The way Roosevelt set it up at first was dishonest because he didn't state his real reason," recalled Joseph Rauh, Jr. "The real reason was to change most of the Supreme Court's decisions, and this crap about . . . 'we just want to have a few more judges because these judges are overworked' was rubbish."\textsuperscript{88}

The protracted legislative battle over the Court-packing bill blunted the momentum for additional reforms, divided the New Deal coalition, squandered the political advantage Roosevelt had gained in the 1936 elections, and gave fresh ammunition to those who accused him of dictatorship, tyranny, and fascism. When the dust settled, FDR had suffered a humiliating political defeat at the hands of Chief Justice Hughes and the administration's Congressional opponents.\textsuperscript{89} Roosevelt lost more in the wake of this setback than a few judicial appointments. He lost as well the initiative on domestic policy to the Congress. Having punctured the myth of FDR's political infallibility, members of the House and Senate became more critical of new proposals from the White House and carefully scrup-

\textsuperscript{85} Until 1937, Roosevelt and Congress had usually worked in harmony, with the exception of monetary policy, where FDR had been forced to accept the inflationary nostrums of the silver bloc (Silver Purchase Act, ch. 674, Pub. L. No. 438, 48 Stat 1178 (1934)) (repealed), and payment of the veterans' bonus, where Congress had overridden his veto (Adjusted Compensation Payment Act, Pub. L. No. 425, 49 Stat. 1099 (1936)).
\textsuperscript{86} Quoted in J. ALSOP & T. CATLEDGE, THE 168 DAYS 67 (1938).
\textsuperscript{87} K. LOUCHHEIM, supra note 1, at 113.
\textsuperscript{88} Id.
\textsuperscript{89} Leuchtenburg, The Origins of Franklin D. Roosevelt's "Court-Packing" Plan, Sup. Ct. REV. 347, 352-99 (1966); J. ALSOP & T. CATLEDGE, supra note 86, at 87.
tinized existing New Deal programs that had stirred controversy, especially the National Labor Relations Act.

The economic recession of 1937–38 and Roosevelt’s attempt to restructure the executive branch dealt other blows to presidential prestige and leadership. After taking credit for the economic upturn before the election, the President had to absorb the blame for the “Roosevelt recession,” which had been triggered in part by his own desire to trim federal expenditures and balance the budget. Congress also scuttled his bold plans to reorganize the executive branch, which rested upon the recommendations of a blue-ribbon committee on administrative management headed by the renowned Louis Brownlow. The original bill called for the enlargement of the White House staff, creation of the Executive Office of the President to include the Bureau of the Budget, and a far-reaching consolidation of existing bureaus, agencies, and commissions into twelve super departments, all under the President’s control. Even independent regulatory commissions such as the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission would have been regrouped under the authority of these executive departments.90

Congressional critics denounced the reorganization plan as another presidential power grab. Working in tandem with frightened bureaucrats who hoped to protect their own fiefdoms from the White House, they easily defeated the proposal’s most important features. Roosevelt received his Bureau of the Budget and a larger staff, but Congress retained the upper hand on executive reorganization by means of the controversial legislative veto. Although the final statute permitted the President to regroup certain agencies and functions as he saw fit, the legislative veto provided that his orders might be nullified within sixty days by a concurrent resolution of the Congress.91

Roosevelt’s political fortunes reached another nadir in the 1938 elections, when several conservative Democrats won reelection despite FDR’s effort to “purge” them during bitter primary campaigns. Defeated on judicial reform and executive reorganization, Roosevelt now confronted a well-organized and aggressive conservative coalition in Congress, which resisted most presidential initiatives on domestic policy and harried many New Dealers with accusations of subversion and un-Ameri-


91. R. Polenberg, supra note 90, at 79–188; J. Harrin, Congressional Control of Administration (1964); Millet & Rogen, The Legislative Veto and the Reorganization Act of 1939, 1 Pub Ad Rev 176–89 (1941).
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can activities. The New Deal had been derailed and presidential power checked at home by the time German troops marched into Austria and Czechoslovakia. Only in the sphere of foreign policy, a traditional prerogative of the executive, did presidential power remain on the offensive after 1938. Once “Dr. Win-the-War” replaced “Dr. New Deal,” Congress augmented presidential authority to an extent unparalleled during World War I and the early days of the New Deal, but even as they sanctioned the growth of an “imperial” presidency abroad, opponents in the Congress dismantled the more controversial and most vulnerable New Deal programs such as the Farm Security Administration and the National Youth Administration.

THE NEW FEDERALISM

The third important change brought about by the New Deal was a significant modification in American federalism. New Deal reforms that threatened powerful, entrenched economic interests or that attempted to redistribute social benefits often provoked fervent pleas on behalf of “states’ rights” and angry denunciations of “federal tyranny,” but the changing patterns of intergovernmental relationships became far more complex during the Depression than these shibboleths suggested. Sharp confrontations between federal and state interests, of course, took place. Arizona, angered by the diversion of water from her lands to those of other states, threatened to use military force to block construction of Par-

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93. Faced with substantial isolationist sentiment in Congress and among the public at large between 1936 and 1939, Roosevelt attempted to check the Axis powers by means of executive agreements and executive orders that rested exclusively upon his claims to inherent presidential authority to conduct foreign relations and command the nation’s land and naval forces. Ironically, the same Supreme Court that attempted to limit presidential authority over the domestic economy provided much of the doctrinal support for these initiatives abroad in the case of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), written by none other than Justice George Sutherland.

Once the United States became an active belligerent, Congress rapidly expanded presidential control over both military policy and the domestic economy in a series of far-reaching statutes, the most important of which were the renewal of Lend-Lease, ch. 199, Pub. L. No. 9, 57 Stat. 20 (1943) (codified at 22 U.S.C. §§ 412, 415; terminated 1946), the Second War Powers Act, ch. 199, Pub. L. No. 507, 56 Stat. 176 (1942) (codified at 15 U.S.C. § 609q; repealed 1947), the Emergency Price Control Act of 1942, ch. 25, Pub. L. No. 420, 56 Stat. 23 (1942) (codified in scattered sections of 30 U.S.C.; expired), and the War Labor Disputes Act, ch. 144, Pub. L. No. 89, 57 Stat. 163 (1943) (codified in scattered sections of 30 U.S.C.; repealed 1946). By means of these laws, the President was given the discretion, among other things, to allocate $50 billion of war supplies to America’s allies, to reorganize all executive departments and agencies, to fix rents and prices throughout the country, and to seize industrial plants closed by strikes. Congress retained a legislative veto in these areas, but seldom exercised it. As the Second World War drew to a close, executive discretion over the nation’s life and property far transcended the experience of the NRA years.

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Harry Hopkins, Federal Emergency Relief Administrator, terminated cooperative federal-state efforts and asserted complete federal control over state programs in cases of obvious corruption or where the states failed to make adequate financial contributions to work relief projects. Harold Ickes, Secretary of the Interior and head of the Public Works Administration, waged a titanic struggle with New York Park Commissioner Robert Moses over the administration and allocation of funds to build the Triborough Bridge.

But the usual, day-to-day interactions between federal and state officials were not plagued by such conflict or controversy. National Forest Service rangers enforced state fish and game laws in most western states; federal and state personnel jointly inspected eggs, butter, fruit, vegetables, and tobacco, with the inspection fees collected by the states, who paid the salaries of the federal agents. In 1934, the Bureau of Biological Survey in the Department of Agriculture eradicated over seven million disease-carrying rodents in three southern states with an $8.7 million grant from the Civil Works Administration. Simultaneously, PWA and WPA funds helped to construct sanitary privies, septic tanks, and sewage disposal plants in many states in an effort to combat typhoid, malaria, and hookworm. No constitutional objections hampered these activities, although it is difficult to imagine a more palpable federal intrusion into the domain of local health activities.

Federal responsibility for local economic performance and social services did not commence suddenly with FDR’s election, but the New Deal did more than continue the efforts of past administrations. FDR’s administration greatly expanded the breadth of such activities. Its most flexible and potent instrument became the grant-in-aid, which made federal money available to the states (sometimes on a matching funds basis) for specific activities to be administered by state officials working under national guidelines. The origins of this particular mode of federal-state cooperation went back to the famous Morrill Act of 1862, which conveyed to the states federal lands upon the condition that they be utilized for the construction and support of colleges and universities. In the

Weeks Act of 1911, 100 Congress extended this concept to include cash grants to the states for fighting forest fires in the watershed of navigable streams. Similar grant-in-aid programs flourished during the Wilson administration for vocational education, 101 highways, 102 and agricultural extension work, 103 but the budget-conscious Republican administrations of Harding and Coolidge put a cap on new programs during the 1920’s. 104

In their own use of the grant-in-aid technique, the New Dealers drew upon the experience of the Wilson years and the tentative efforts of the Hoover administration. The Emergency Relief and Construction Act of 1932, 105 which Hoover reluctantly approved, made over $600 million in federal loans available to the states for work relief projects. Although the guidelines for receiving federal loans and spending them discouraged many states from applying, this program became the largest single undertaking through the grant system prior to the New Deal. The new administration substituted grants for loans in both the relief and work-relief programs. By 1940, in addition to these vast relief activities and the continuation of old programs from the Wilson era, the New Deal had undertaken landmark grant-in-aid efforts for unemployment compensation, old-age assistance, child welfare services, and maternity care. The Wagner-Peyser Act of 1933 106 made $3 million available to the states each year for the operation of public employment offices. Social Security, the largest New Deal grant-in-aid program, assisted the blind, the disabled, and dependent children through combined federal-state efforts. 107

The growth of federal grant-in-aid programs represented the clearest expression of the New Deal’s commitment to “give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances.” 108 It rested upon the realization that many social and economic problems required national attention and that

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104. The exception was the Sheppard-Towner Act, Pub. L. No. 97, 42 Stat. 224 (1921) (codified at 42 U.S.C. §§ 161–175), which provided federal funds for state programs designed to improve maternal and child health. Congress allowed the law to expire in 1929.
108. W. HURST, supra note 2.
only the federal government commanded the fiscal resources to deal with them adequately. At the same time, grant-in-aid programs avoided the expansion of an even larger federal bureaucracy and left many critical administrative decisions in the hands of state and local officials.

Through the grant-in-aid programs and other means, state and local elites often played a major role in the implementation of New Deal measures. This, in turn, created complex patterns of political decision-making that refuted simplistic ideas about rampant centralization in the federal bureaucracy. For example, although the federal government paid for the popular Civilian Conservation Corps, state welfare administrators selected the 500,000 men who received jobs, and set the agenda for CCC projects.\footnote{J. Clark, supra note 97, at 92–93.} Similarly, the heart of the New Deal's farm program, the domestic allotment system, vested important decisions in the hands of county committees composed of farmers and extension-service personnel chosen by local notables.\footnote{R. Kirkendall, Social Scientists and Farm Policies in the Age of Roosevelt (1966) V. Perkins, Crisis in Agriculture: The Agricultural Adjustment Administration and the New Deal, 1933 (1969).} The Taylor Grazing Act\footnote{Taylor Grazing Act, Pub. L. No. 482, 48 Stat. 1269 (1934) (codified in scattered sections of 43 U.S.C. (1976)).} gave similar power to livestock ranchers, whose rulings determined the extent of grazing rights on the vast public lands of the Western states. The New Deal may have spawned a new bureaucratic elite in Washington, but it usually left intact and sometimes strengthened the local power structure by refi-nancing it or buttressing its activities with federal law.

New Deal reformers who challenged the prerogatives of local elites usually provoked instant political protest and retaliation. Roosevelt hastily dismantled the innovative Civil Works Administration in 1934, because it drew intense opposition from governors, county supervisors, and mayors. These local officials objected to the complete federalization of its extensive work-relief efforts. Later, the WPA program gave a larger voice in decision-making to these officials, who systematically used the WPA machinery to punish their political enemies and to discriminate against racial minorities.\footnote{Fishel, The Negro in the New Deal Era, 48 Wis. Mag. Hist 111–23 (1964).} When idealistic lawyers in the AAA, led by Alger Hiss, Jerome Frank, and Lee Pressman, attempted to protect sharecroppers and tenants from eviction in the South under the cover of the administration's farm program, they stirred up a grass-roots revolt among the prosperous commercial farmers and landowners. Roosevelt and his Secretary of Agriculture, Henry Wallace, sided with the local power
structure. Likewise, much of the opposition to the New Deal after 1935 among Southern Democrats flowed from two sources: first, the fear that the National Labor Relations Board would speed the unionization of industrial workers in the region; and second, anger at the Department of Justice for resurrecting the Reconstruction-era civil rights statutes in an attempt to protect Negroes from local violence.

CIVIL RIGHTS UNDER THE NEW DEAL

The reforms of the New Deal did little to dislodge Southern racial attitudes because of Roosevelt’s own indifference, the strength of the party’s southern wing in the Congress, and the absence of a viable tradition of civil rights enforcement in the Department of Justice. FDR refused to endorse a federal anti-lynching law, although his wife, Eleanor, and many administration leaders vocally supported it. Not until the end of the decade did Attorney General Frank Murphy, the former governor of Michigan, launch a civil rights division in his department. This change brought the executive branch into the civil rights field for the first time since the 1870’s. In addition to initiating the landmark prosecution against electoral fraud in Louisiana, Murphy’s small but dedicated staff began indictments against a Georgia policeman charged with torturing a black man to obtain a confession, and against a group of Alabama vigilantes, who had infringed the right of free speech and press of a local newspaper editor. Given its meagre funding, inadequate personnel, and lack of clear legal precedents, the department began to prosecute the most flagrant examples of Southern racism, but failed to modify the day-to-day patterns of violence, intimidation, and discrimination.

Despite the New Deal’s failure to eradicate the most glaring examples of local injustice and racial oppression in the South, the decade of the Great Depression witnessed a revitalization of American federalism, which strengthened the institutions of both national and local government. It was not a federalism without tension, especially when reformers in Washington challenged entrenched local customs and power relation-
ships, but tension had been a basic theme of federal-state relations since the era of George Washington. By 1940, the federal government enjoyed undoubted fiscal and legal supremacy over the states, but the routine interpretation and application of national laws often remained in the hands of more parochial officials, who often tailored them to local habits and conditions. Many important areas of public law—especially labor relations and corporate finance—became largely a prerogative of the national government as a result of New Deal legislation, but others remained within the exclusive jurisdiction of the states, including insurance regulation, zoning and property law, marriage and divorce, and business incorporation. At the same time that it affirmed the broad authority of the national government over important economic policy questions in cases such as Jones & Laughlin and Stewart Machine Co. v. Davis, the Supreme Court overturned a century of precedent in *Erie v. Tompkins* to give greater recognition to state law in disputes arising in the federal courts through diversity jurisdiction.

Brandeis’ opinion in *Erie* struck a blow for local autonomy and variation in the vast domain of private law, but the states, ironically, were moving in the opposite direction under the influence of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. By the end of the depression decade, the states had adopted over 400 uniform statutes, covering areas of commercial law, property, and civil procedure.

The American Law Institute had been founded in 1923 by elite lawyers and jurists who feared for the consistency of the common law in a nation of 48 states and who also hoped to curb the radical innovations in doctrine advanced by several state courts. Through the publications of its various Restatements, (the first of which, on the law of contracts, appeared in 1932) the Institute became a potent force for uniform application and

116. See supra note 42.
118. 304 U.S. 64 (1938).
119. *Erie* overruled the venerable case of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which permitted federal judges to apply federal rather than state common law to matters not covered by state statutes. Justices Brandeis and Frankfurter and others believed that *Swift* placed unnecessary power in the federal courts and benefited only the giant corporations who exploited diversity jurisdiction to escape local regulations. They had often urged Congress to modify the rule, but without success. When Congress failed to act, Brandeis used the occasion of the *Erie* case finally to bury the rule of *Swift v. Tyson*, although neither party to the litigation had asked the Court to do so.
interpretation of the common law. Its publications eventually covered trusts, property, agency, and torts. In 1939, the Pennsylvania Supreme Court noted that it could find only a single instance in the recent past when it had not followed the applicable rule of law as set down in the *Restatement of Contracts*. Obviously, not all of the uniformity brought to the American legal order during the 1930's arose from the machinations of subversive New Dealers in Washington. In the case of the American Law Institute, legal conservatives carried out a successful counter-revolution against those deviant jurists who threatened the symmetry of the common law rules through idiosyncratic rulings often rooted in local traditions and customs.

**THE MATURING OF STATE CAPITALISM**

The maturing of state capitalism was another important change arising from the legal reforms of the New Deal. Roosevelt and his advisers did not hesitate to employ the law in an effort to provide a more secure environment for laborers, farmers, the elderly, and the unemployed. Nevertheless, they offered many benefits to the nation’s capitalists as well. While business opposition to FDR was frequently intense, it was narrowly based in such labor-intensive industries as textiles, automobiles, and steel, which had the most to lose from collective bargaining. The administration’s tax reform measures likewise generated bitter opposition from wealthy families such as the DuPonds, the Pews, and the Mellons. At the same time, the New Deal found many business allies among companies in the growing service industries of banking, insurance, and stock brokerage, where government regulation promised more stable profits and a reduction in cutthroat competition. And because of its aggressive policies to expand American exports and investment opportunities abroad, the administration drew support from emerging high-technology firms such as IBM and from the international oil companies, which were anxious to break the British monopoly in the Middle East.

Sophisticated businessmen such as Gerard Swope, Averell Harriman, Walter Teagle, and Sidney Wineberg discovered that they could live quite comfortably in a world of government regulation. The “socialist” Tennessee Valley Authority lowered the profits of a few over-extended utility

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123. B. Graves, *supra* note 120, at 860.
124. The restructured Reconstruction Finance Corporation, for example, provided a needed infusion of capital into the banking system by purchasing the preferred stock of many institutions on the edge of collapse. See A. Schlesinger, Jr., *supra* note 113, at 431–33.
companies, but its campaign to bring cheap electric power to the rural South translated into larger consumer markets for the manufacturers of generators, refrigerators, fans, and other appliances.\textsuperscript{126} The SEC, in addition to restoring public confidence in the stock exchanges and the securities industry generally, encouraged self-regulation among over-the-counter dealers, gave large brokerage houses such as Merrill Lynch greater influence in the governance of the exchanges, and allowed accountants to play a decisive role in the regulatory process with respect to financial reporting and disclosure requirements.\textsuperscript{127} The Interstate Commerce Commission aided the motor-trucking firms in their efforts to reduce competition, just as the new Civil Aeronautics Authority protected the major airlines from the rigors of the market place.\textsuperscript{128} Despite its brief flirtation with an aggressive antitrust policy in 1938–39, the New Deal’s basic impact upon the nation’s industrial structure was in the direction of further cartelization and closer business-government cooperation, a process intensified by the demands of economic mobilization during the Second World War.

THE GALVANIZATION OF THE LEGAL PROFESSION

The New Deal had an equally profound impact upon the structure and values of the American legal profession. Businessmen flocked to Washington during the war, but the lawyers preceded them. The New Deal, as Jerold Auerbach observed, was above all “a lawyer’s deal,”\textsuperscript{129} whose achievements rested ultimately upon the skills of this profession in negotiation, legislative drafting, administration, and litigation. Unable to win the support of traditional leaders, whose careers and income remained closely tied to hostile business and financial groups, the New Deal fashioned a new, counter-elite of lawyers to draft, implement and defend its laws.

Many of the so-called “New Deal lawyers,” including Jerome Frank, Robert Jackson, Ben Cohen, and Francis Biddle, abandoned prosperous, established practices to begin government service. They did so for a variety of reasons, ranging from a desire to reform existing social institutions to simple boredom. Private practice no longer satisfied him, Biddle re-


marked, because "there was little dedication to ends beyond monetary rewards for the narrower needs of self." 130 A larger contingent of lawyers was composed of younger men, many of them fresh from the country's premier law schools, who came to Washington in search of steady employment and often with a desire to make the world over. They were, in the memorable phrase of George Peek, who distrusted them, "boys with their hair ablaze." 131 Felix Frankfurter, who recruited many of them, believed they were "the best men of the graduating classes of the leading law schools," who were "freed from complicated ramifications of private life . . . diverted by a minimum of vanities and jealousies . . . more resilient, more cooperative in taking orders . . . on the whole much better than . . . the generation that preceded [them]." 132

In truth, Frankfurter's young lawyers did not seem to be noticeably more cooperative, more resilient, less vain, or less petty than the lawyers who came before them. But whether they were more mature, established attorneys or recent products of Harvard, Yale, and Columbia, the New Deal lawyers did share one trait—they were usually outsiders. They did not quite fit the traditional mold of the legal establishment, either because of their ideas, their social background, or their ethnocultural heritage. This was true of Robert Jackson, who had never graduated from law school and who idealized the solo practitioners of nineteenth century legend; of Jerome Frank, the intellectual founder of legal realism; and of William O. Douglas, the iconoclast from Yakima, Washington, who herded sheep and ate in hobo jungles before attending law school, joining a Wall Street firm, and teaching at Yale. It was certainly true of the numerous young Jewish lawyers such as Nathan Margold, Abe Fortas, and Nathan Witt, who found the traditional avenues of success through private practice and academia closed off because of the depressed economy and anti-Semitism.

The New Deal drew its dynamism from such individuals, because the New Deal was a coalition of minorities—social, ethnic, regional, and intellectual—which Roosevelt forged into a new governing majority. The administration gave influence, status, and recognition for the first time to those who had been excluded from full participation in the nation's power structure before the Great Depression—Irish Catholics, Jews, Eastern Europeans, white Southerners, women, and Negroes. Roosevelt appointed the first woman cabinet member, Frances Perkins, and the first Roman Catholic Solicitor General, Charles Fahy. The New Deal became the political home for those already made such as Joseph P. Kennedy, the Bos-

130. Id. at 174.
131. See the splendid account in P. IRONS, THE NEW DEAL LAWYERS (1982).
132. F. FRANKFURTER, LAW AND POLITICS, 238–49 (1956).
ton millionaire, and Marriner Eccles, the upstart Mormon banker from Utah, as well as for those on the way up, such as the Reuther brothers, Sidney Hillman, and Lyndon B. Johnson.

As both Auerbach and Peter Irons have noted, the zeal of these New Deal lawyers for fundamental social change was usually tempered by political realities and by their own professional training, which valued compromise and technical prowess much more than revolution or “correct” ideology. Legal technique often triumphed over legal reform. Not a few New Deal lawyers, who earned their reputations fighting economic royalists during the 1930’s, became ensconced in their own wealthy law firms by the 1950’s, where they served many of their former antagonists. Upon reflection, these defections seem prefigured by the New Deal lawyers’ personal and professional personalities. The typical New Deal lawyer was the hard-boiled, cynical, wise-cracking Tommy Corcoran or Thurman Arnold, not the gentle, idealistic Ben Cohen.

That the New Deal lawyers did not in the end transform their profession’s ethics or dominant passions is hardly surprising when one considers that neither they nor the administration they served wished to break decisively with the American past. Theirs was a mandate only to improve a legal order that had long placed private interests above public ones and that had been preoccupied for a century with economic growth at the expense of economic justice. The New Deal at least began to redress that ancient imbalance in our legal culture. “The thing I remember most about those times,” noted Charles Horsky, who served in the office of the solicitor general, “is the esprit de corps, the sense that we were doing something worthwhile . . . . We felt we were going to change the United States and make it a better place. And we did, damn it, we did.”

Because of the reforms sponsored by the New Deal between 1933 and 1939, the American legal order was more just, equitable, and efficient at the end of the decade than at its beginning. As a result of the “constitutional revolution” in 1937, the personal liberty protected by the nation’s fundamental law amounted to more than the empty freedom to work for subsistence wages under a “yellow-dog” contract with little prospect of economic security during retirement. As a consequence of the growth of presidential power, the one public official elected by all of the people was finally given the mandate and the institutional tools to make decisions on behalf of the broadest possible conception of the public interest. The sterile “dual federalism” of the past, which often left both national and local government impotent in the face of serious economic and social

133. See supra note 129.
134. See supra note 131.
135. K. LOUCHHEIM, supra note 1, at 88.
The 1930’s and the American Legal Order

problems, gave way to a more energetic, cooperative federalism, which utilized the vast fiscal resources of Washington, yet preserved local diversity and initiative with respect to implementing policy. The new legal framework of state capitalism offered businessmen greater stability and predictability in the marketplace in exchange for giving labor, consumers, investors, and the general public a greater voice in corporate affairs. And the legal profession, long dominated by the intellectual traditions of the common law and the social values associated with commercial-corporate practice, experienced a fresh infusion of ideas and personnel generated by the growth of administrative law, the overhauling of law school curricula by the legal realists, and the creation of new professional opportunities for racial and ethnic minority groups.

By any reckoning, these were impressive and healthy developments that reflected well upon the extraordinary capacity of the American legal system and its political institutions to initiate and accommodate far-reaching changes with a modicum of violence and bloodshed. But the New Deal’s legal balance sheet contained its share of debits as well as credits. The nation’s more benevolent legal order was also far more complicated and remote from popular influence than ever before. Enormous power and discretion had now been vested in a handful of institutions—the White House, executive departments, selected Congressional committees, federal courts, and the permanent bureaucracy—where small cadres of legal mandarins attempted to insure economic prosperity and security for a society of 130 million people. The average citizen retained his absolute right every two, four, or six years to “kick the rascals out,” but increasingly, many of the critical decisions about his economic welfare—everything from interest rates to the price of steel—were made by appointed, highly-specialized technicians. Without a lobbyist, without a lawyer, without some rudimentary knowledge of the substance and procedures of administrative law, the average citizen had little capacity to shape the decisions of government that affected his daily life. A compassionate government was also at times a large, impenetrable, and impersonal government, a disease that plagued not only Washington, but the state capitals and city halls of America as well. The result by the end of the decade was an unmistakable trend of voter apathy, indifference, and cynicism that reached epidemic proportions by the 1980’s.

Without a substantial increase in presidential power, it is doubtful that the country could have surmounted the decade’s economic trauma or later withstood the challenges posed by the aggressive nationalism of Nazi Germany and Imperial Japan. An “imperial presidency,” one which sometimes tested the limits of constitutional authority, was a blessing during the 1930’s in a country weakened by depression, doubt, and
military vulnerability. Roosevelt’s successors, however, often used his precedents for less benign purposes. In a nation that enjoyed virtual economic hegemony throughout the world and that possessed a monopoly of nuclear weapons, an “imperial presidency” could become both a threat to domestic civil liberties and a menace to the human race. By generally accepting the racial status quo in America, Roosevelt and the New Dealers secured the cooperation of the white South in their efforts to promote domestic reforms and prepare the country for war. Economic recovery and, later, rearmentment, took priority over fighting segregation and disenfranchisement in Alabama and Mississippi. But in making this choice, FDR and the New Dealers not only failed to address the nation’s most serious moral question, they also guaranteed that when the issue was faced, it would be in the context of a much longer legacy of frustration, bitterness, and fear.

With the exception of the abolition of slavery during the Civil War, the New Deal remains the closest we have come in this country to a fundamental restructuring of our economic and legal system, where the rules of public and private law and the apparatus of the state have been devoted usually to economic expansion, profit-maximization, and the defense of property rights at the expense of other human rights. At the conclusion of the New Deal, the rules of law no longer favored capital as blatantly as in the past. The state served more than the interests of big business. But instead of popular government, we had government by bureaucratic elites; instead of genuine social democracy, we had state capitalism and the smallest welfare state among the industrial nations of the West. The social philosopher may wish for more profound changes. The historian, however, realizes that such may not have been possible given the habits and traditions of the American people, their particular mood during the 1930’s, and the limitations of those they chose to lead the nation.