

**THE SECOND BILL OF RIGHTS: FDR's Unfinished Revolution—And Why We Need It More Than Ever**, Cass Sunstein, 2006

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p. 54

### WAS THE NEW DEAL UNCONSTITUTIONAL?

I have mentioned the idea of freedom of contract and the Court's insistence, before the New Deal, that this idea imposed sharp limits on regulatory legislation. The 1930s saw an intense struggle between the Supreme Court and the Roosevelt administration. Before Roosevelt assumed office, the Court had erected a series of barriers to the kinds of initiatives Roosevelt hoped to undertake. First, the Court ruled that the power of Congress under the commerce clause of the Constitution was sharply limited, in a way that would make it difficult for the national government to do much of what Roosevelt sought to do: forbid child labor, impose maximum hour and minimum wage laws, and take steps to govern labor-management relations. Second, the Court had suggested that Congress could not "delegate" its power to the president and federal agencies, thus indicating that much of New Deal legislation would be in grave constitutional difficulty if it authorized the president and regulatory institutions to exercise discretion to solve the problems at hand. Third, the Court held (e.g., in the *Adkins* decisions mentioned in Chapter 2) that the Constitution protected "liberty of contract" and thus would not allow government, whether state or federal, to regulate the relationship between employers and employees.

Taken as a whole, these rulings put the New Deal on shaky constitutional ground, as the Court repeatedly ruled in the early years of Roosevelt's administration. When the New Deal suffered a set of large defeats in the Court, Roosevelt concocted his infamous "court-packing" plan, which would allow him to add an additional member to the Court for each justice who had reached the age of seventy, thus gaining a sympathetic majority.

It was only in 1937, in *West Coast Hotel*, that the Court capitulated to Roosevelt amid the threat of a genuine constitutional crisis. We have seen that *West Coast Hotel* rejected the Court's previous protection of freedom of contract. Since that decision, the Court has *never* struck down federal action on the ground that it interferes with that freedom. Two other developments were crucial. The first involved the increased power of the president. After signaling that it might discipline "delegations" of congressional authority from Congress to the president, the Court promptly retreated. It concluded that as long as Congress set out an "intelligible principle," it could give the president and his agencies a great deal of discretion to set regulations as they saw fit. In modern government, both the president and federal agencies are often permitted to choose policy under vague laws, saying, for example, that regulation of telecommunications should be in "the public interest" and that controls on occupational hazards should be imposed "to the extent feasible." Since the New Deal, the Supreme Court has permitted Congress to grant quite open-ended power to the executive branch.

The final development expanded the powers of Congress itself. In short order, the Court ruled that the national government had broad authority to regulate the economy under the commerce clause. Accepting Roosevelt's own arguments, the Court emphasized that because of

interdependencies in the national economy, problems in one state are highly likely to affect interstate commerce. For example, a strike in one state would likely affect others, and hence the national government could reasonably decide that national protection of labor–management relations was necessary to protect interstate commerce. Going even further, the Court ruled that companies whose economic activities are apparently limited to one state might be taken to have interstate effects, if only because they tend to purchase products from elsewhere. As a result, the Court refused to strike down *any* exercise of congressional power as beyond the commerce clause for nearly sixty years. Not until 1995 did the Court invalidate congressional action under the commerce clause, when it invalidated a congressional effort to ban the possession of firearms near schools.

How should we assess these changes in constitutional understanding? Did Roosevelt actually violate or amend the Constitution? When the Court capitulated to Roosevelt, did it allow a kind of unwritten constitutional amendment, akin to the written ones that followed the Civil War? This is the view of some of Roosevelt’s greatest admirers—and critics. Yale law professor Bruce Ackerman, for example, argues that the United States has had three “constitutional moments”: the founding, the Civil War, and the New Deal. In Ackerman’s view, each of these moments stimulated a large-scale rethinking of the nation’s commitments in a way that fundamentally altered the basic design and goal of the Constitution. The New Deal was unique among the three periods in that it did not involve any textual change in the Constitution. But Ackerman believes that by 1937, the meaning of the Constitution had changed greatly from its meaning in 1932. He argues that the change came from a massive popular movement that did the same work as a literal constitutional change. Because the New Deal was ratified by the public, no less than the Civil War had been, Ackerman believes that it was entirely legitimate.

Other people agree with Ackerman’s assessment of what happened but do not share his approval. In their view, the New Deal was an illegitimate departure from the constitutional framework, giving the national government unprecedented powers, allowing Congress to delegate those powers, and intruding on constitutionally protected liberty. This view is widely held today and helps explain some of the work of the Supreme Court under Chief Justice William Rehnquist, which has, in some respects, attempted to reinvigorate the pre–New Deal Constitution. In its most extreme form, this view suggests that there is a “Constitution in Exile”—a real document that the Court abandoned when it capitulated to Roosevelt. Douglas H. Ginsburg, an especially able, fair-minded, and distinguished appellate judge, writes that “respect for the text of the Constitution was the norm ... through the first third of the twentieth century,” but that the “great Depression and the determination of the Roosevelt Administration placed the Supreme Court’s commitment to the Constitution as written under severe strain in the 1930s, and it was then that the wheels began to come off.” Judge Ginsburg challenges a number of decisions in which the Court allowed the Roosevelt administration to do what it wanted; he singles out the Court’s decision to uphold the National Labor Relations Act as a legitimate exercise of congressional power.

Many critics believe it is both possible and important to restore the true Constitution. Less radically, numerous current American judges appear to believe that the courts should make incremental move