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Sick Chickens in the Second Circuit Threaten FDR's New Deal

By C. Evan Stewart

Charles Evans Hughes, well before he became a Supreme Court Justice, once famously remarked: "We are under a Constitution, but the Constitution is what the judges say it is" [see *The Yale Book of Quotes* (ed. F. Shapiro) p. 374 (speech in Elmira, New York, May 3, 1907)].

That truism was never shown to be more true than when Hughes served as Chief Justice in the mid 1930s and the Court's repudiation of the Roosevelt Administration's New Deal legislation resulted in an unprecedented Constitutional crisis. One of the key litigated disputes that brought on that crisis arose in the Second Circuit.

The New Deal Thwarted

After Franklin D. Roosevelt had been inaugurated as president on March 4, 1933, his Administration quickly put together a laundry list of legislative programs to deal with the Great Depression. With broad public support (and wide majorities in Congress), virtually all of those programs were enacted into law.

Whether the programs did in fact "defeat" the Depression remains an issue of debate among historians to this day. What is not subject to debate is that much of the early New Deal legislation ran into tough sledding when it was challenged in the courts.

In fact, in 1935-36, the Supreme Court gutted the centerpieces

of FDR's legislative agenda, striking down the National Industrial Recovery Act ("NRA"), the Agricultural Adjustment Act, the Railroad Retirement Act, as well as New York State's minimum wage law for women. Before getting to the Constitutional crisis those decisions caused, the case arising in the Second Circuit deserves a look.

The "Sick Chicken" Case

In the 1930's, New York City was the largest live-poultry market in the United States; 96 percent of the poultry arrived from other states, was sold to slaughterhouse operators, who then killed the poultry and re-sold it to retail poultry deal-

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ers and retail butchers. Four brothers, Martin, Alex, Joseph, and Aaron Schechter, ran two successful slaughterhouse markets in Brooklyn; and they operated their business in strict accordance with Jewish dietary law (*shochitim*).

For reasons that are not completely clear, NRA officials decided to make the Schechters a test case for the NRA's "Live Poultry Code" (the Code regulated prices, wages, hours worked, how and how many chickens could be purchased, etc.).

In the summer of 1934, NRA inspectors descended en masse upon the Schechters' slaughterhouses. The fruits of those investigatory efforts were presented to a federal grand jury, which handed down a sixty count indictment. Among the charges (which carried criminal penalties) were: (i) violations of NRA standards regarding work hours and pay; (ii) threats of violence against NRA officials; (iii) violating the "straight killing" rule (this meant customers could not select or purchase individual poultry); and (iv) selling "unfit" (aka "sick") chickens. (At trial, this boiled down to just one "egg bound" chicken—an internal condition the Schechters could not have detected prior to sale.)

Prosecuted by Walter Lyman Rice (a young Harvard Law graduate who was appointed as a special federal prosecutor), the trial

was before Judge Marcus Campbell (a Harding appointee) in the Eastern District. The Schecter brothers were defended by Joseph Heller (a Brooklyn Law graduate). One of the reasons that the Schecters chose to fight the charges was the “sick chicken” allegation, which they took to mean that their kosher slaughterhouses stood accused of being not kosher.

The trial was a mis-match of culture, education, experience, resources, and common sense. There was testimony that one NRA inspector did not know the difference between a chicken and a rooster; other NRA inspectors were said to have insulted and scared away a number of the Schecters’ customers. Rice and Martin Schecter fenced as to whether “keen” competition amongst business competitors was a good or bad thing.

The jury (with a little prod from Judge Campbell) returned convictions. The brothers were not only given very substantial monetary sanctions, but (more importantly) they were all sentenced to prison.

The Schecters appealed to the Second Circuit, unsuccessfully. They then turned to the Supreme Court. The Court agreed to hear the case, and oral argument took place on May 2-3, 1935. Donald Richberg, the NRA’s general counsel (a progressive Chicago lawyer recruited to the New Deal), and Stanley Reed, the solicitor general (and later a Supreme Court justice), argued on behalf of the United States. Joseph Heller and Frederick Wood (of Cravath, DeGersdorff, Swaine and Wood) argued on behalf of the Schecters.

The government’s basic argument was that the NRA was necessary to “protect against the evils of this unparalleled depression”; protecting

liberty in the abstract constituted nothing more than “the liberty to starve.”

Heller, on the other hand, focused on the fact that the Schecters’ business really was almost exclusively intrastate. He also emphasized that the Live Poultry Code was not only at odds with Jewish law and custom, but that it had the further effect of hurting small businesses generally and ran counter to all-American norms like consumer free-choice. Mr. Wood’s portion of the argument was on a more grandiose scale, comparing the New Deal’s regulatory reach to that which Hitler or Mussolini would find comfortable.

Just weeks later (on May 27th), Chief Justice Hughes delivered the unanimous Court’s ruling in open session (*A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). He first explicitly rejected the Administration’s overarching contention that the “grave national crisis” justified the NRA: “Extraordinary conditions do not create or enlarge constitutional power.” He then moved on to eviscerate the NRA on two basic grounds: (1) the industrial “codes of fair competition” enshrined by the legislation impermissibly delegated Congressional authority to the president, giving him “virtually unfettered” power to regulate business; and (2) the scope and breadth of the legislation ran afoul of Congress’s power to regulate interstate commerce (Congress could only regulate where the effect upon interstate commerce was direct; “indirect” effects—e.g., here, an “unfit” chicken sold in Brooklyn—were not subject to Congressional power).

This decision sounded the death knell for the NRA, and perhaps the entire New Deal as well. Indeed, that same day, Justice Louis

Brandeis told two powerful New Deal lawyers to tell FDR that “[t]his is the end of the business of centralization,” and suggested that the “young men” of the New Deal go back to their respective states and “do their work” there.

FDR was furious at this shot across the bow, and his first public comment was to characterize the justices as living in “the horse and buggy age.” The Schecter brothers, for their part, hoisted Heller on their shoulders in his Chambers Street office and repeatedly chanted “nine to nothing!”

FDR’s Court-Packing Plan

Emboldened by his record re-election victory in 1936 over Kansas Governor Alf Landon (he carried all but Vermont and Maine), FDR decided to strike back at the Court. Shortly after his inauguration in January 1937, the president publicly announced that he would be sending over to Congress a bill to increase the size of the Court to as many as fifteen justices—for each justice who stayed past 70 years of age, a new justice could be appointed. The public rationale for FDR’s action was that the Court was chock-a-block busy—in fact, stressed to the point of over-load.

No one was fooled by that, however, and the public reaction to FDR’s Court-packing plan was sharply negative (and included a number of Democrats). But FDR kept on the attack, telling the nation that the justices were unable to deal with “our modern economic conditions,” and that the Court required “new blood”; the country, he further asserted, needed to “save the Constitution from the Court and the Court from itself.”

Members of the Court did not sit still for these ad hominem. Chief Justice Hughes, for example,

wrote a letter to the Senate Judiciary Committee, in which he challenged every assumption underlying the president's plan. The Hughes letter had a significant impact on public opinion and the legislation's fate seemed uncertain.

A Switch in Time Saves Nine

In the midst of all this political brou-ha-ha, the Court on March 29th handed down a decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Explicitly reversing its decision of just a year earlier on New York's minimum wage law (*Morehead v. New York ex re. Tipaldo*, 298 U.S. 587 (1936)), as well as its decision on that same subject matter a decade earlier (*Adkins v. Children's Hospital*, 261 U.S. 525 (1923)), the Court (by a 5-4 margin) upheld Washington State's minimum wage law.

Chief Justice Hughes, writing for the majority, now took "judicial notice of the unparalleled demands for relief" caused by the Depression. The Court's prior precedent, which had been based upon the concept of freedom of contract, was simply held to be inapt in light of the majority's "fresh consideration" of the subject.

The four dissenting justices (known in history as the Four Horsemen) were furious, and not only to be on the losing side of the argument ("the meaning of the Constitution does not change with the ebb and flow of economic events."). Their fury was particularly directed at Justice Owen Roberts, who had suddenly switched sides. In a scathing attack on Justice Roberts, Justice George Sutherland (the author of *Adkins*) wrote:

[I]t is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing

views of his associates; but in the end, the question he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him*, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his judicial and moral independence.

Ouch! Two weeks later, the "new" majority on the Court made it clear that *Parrish* was not a fluke and that they were now playing on the same team with the president. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), Chief Justice Hughes, writing for the five justice majority, upheld the National Labor Relations Act. The stature, which mimicked the NRA's industrial codes, was determined not to be an impermissible delegation of power to the Executive Branch, nor was it violative of the Interstate Commerce Clause.

In response to the argument that the law's scope was too broad, Hughes (again noting the "plainest facts of our national life") brushed that off (as well as his opinion in *Schechter Poultry*), saying that the legislation was in fact "limited"—merely to all things "affecting commerce." The Four Horsemen's dissent, written by Justice James

McReynolds, had an exasperated/defeated tone to it, essentially asking into empty space: "Whatever happened to the *Schechter Poultry* 'direct/indirect' commerce test?!"

Postscript

- As a precedent, *Schechter Poultry* did not last very long. But Mrs. Joseph Schechter did compose and publish a poem for posterity, entitled "Now That It's Over":

No More excuses
To hide our disgrace
With pride and satisfaction
I'm showing my face.
For a long long time
To be kept in suspense
Sarcastic remarks made
At our expense.
I'm through with that experience
I hope for all my life,
And proud again to be,
Joseph Schechter's wife.

- FDR ultimately lost his Court-packing plan (the *Jackson* [Mississippi] *Daily News's* obituary: "dead as a salt mackerel shining beneath the pale moonlight."). But he not only got a majority of the Court to come into line, he soon thereafter got a chance to appoint new justices and began to replace the Four Horsemen.
- Justice Roberts never publicly conceded that he had switched his views based upon political expediency. And in a note to Felix Frankfurter he insisted that "no action taken by the President ... had any causal relation to my action in the *Parrish* case."
- An excellent overview of the historiography of the "switch in time saves nine" controversy can be found in Volume 110 (Number 4) of *The American Historical Review* (October 2005). Also highly recommended is Amity Shlaes's *The Forgotten Man: A New History of the Great Depression* (Harper Collins 2007). ♦