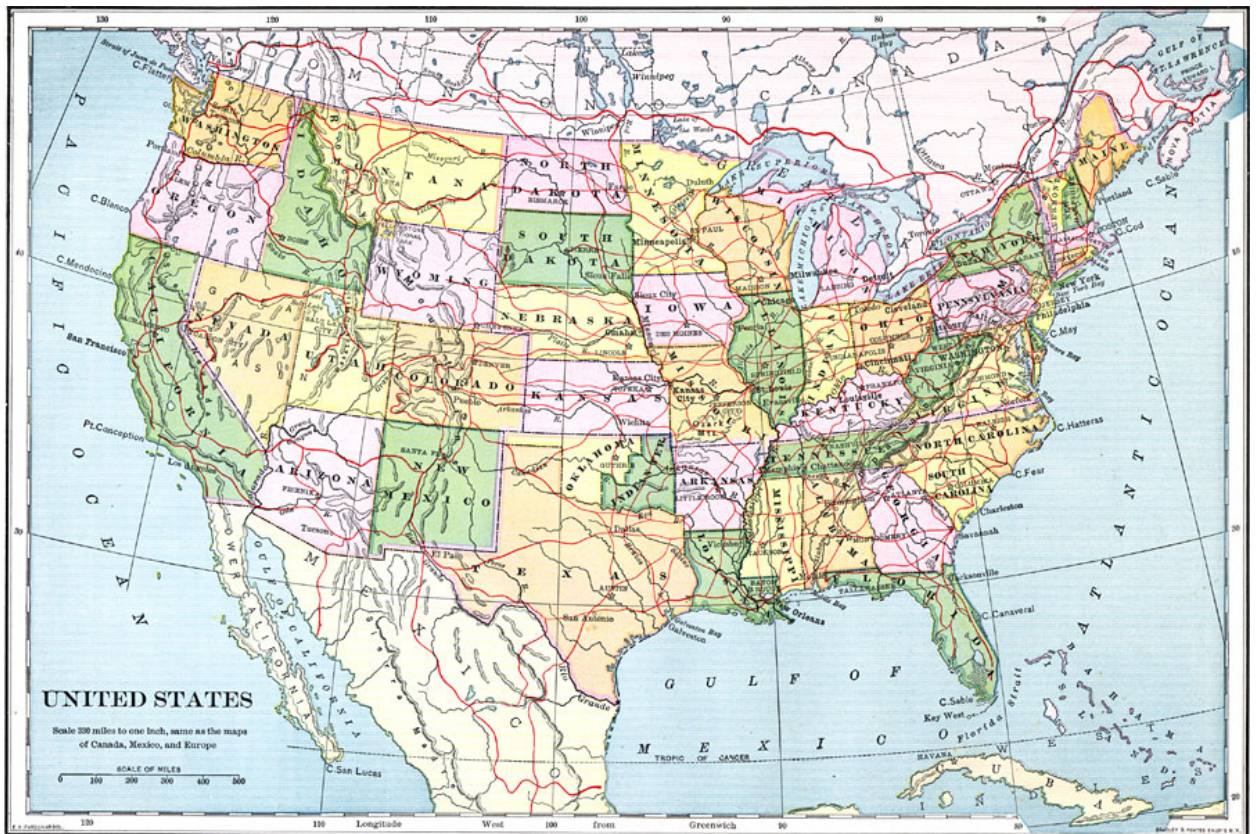


CHAPTER 6

The Progressive Era and the New Deal

Income tax: The Sixteenth Amendment – The election of Senators: The Seventeenth Amendment – The Prohibition: The Eighteenth and Twenty-first Amendment – Women’s suffrage: The Nineteenth Amendment – The Presidential and legislative terms: The Twentieth Amendment – The Supreme Court opinions during the Progressive Era and the *New Deal* – The Contractual Freedom and the Legislative Power: *Lochner v. New York* – A frustrated President: *A.L.A. Schechter Poultry Corp. v. United States* – The End of the Lockner Era: *West Coast Hotel Co. v. Parrish* – The Labor Unions Rights: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*



Florida Center for Instructional Technology (FCIT) at USF. <<http://etc.usf.edu/maps>>

The United States of America – 1898

In the United States, the period between the 1890s and the 1920s is known as the Progressive Era. Progressivism was a reforming movement that aimed to improve both society and political activity through the social and technological advances achieved by modernizers during the Second Industrial Revolution. The years following the Reconstruction Era were called, not without certain irony, the Gilded Age. During that

Age, the United States had the greatest economic development of its history; but it was at the same time a period of financial excesses, social injustices, and big political corruption.

The Progressives aspired to fix all those social evils. To that end, they created new political parties, such as the Populist Party and the Bull Moose Progressive Party of Theodore Roosevelt. In 1912, Roosevelt innovatively proposed, among other social reforms, a National Health Service, social insurance for the elderly, the unemployed, and the disabled, an eight-hour workday, and a minimum wage for women. Many of these reforms would come about during the Presidency of Franklin D. Roosevelt (distant cousin of Theodore) as part of his New Deal legislation.

On the political issues, the progressive parties proposed changes such as constitutional amendments to allow a Federal income tax, women's suffrage, and the

Theodore Roosevelt (1858-1919) was an American historian and politician, leader of the Progressive Movement Party, and the 26th President of the United States. Born in New York, into a wealthy family, he graduated from Harvard University. He dropped law studies to become a candidate to the New York General Assembly. From 1888 to 1895 Roosevelt was part of President Harrison's Administration. In 1898 he resigned his office as Assistant Secretary of the Navy to fight in the Spanish-American War. Returning from that war as a very popular figure, Roosevelt was chosen by President McKinley as his running mate in the Presidential elections of 1900. When McKinley was assassinated in 1901, Roosevelt became President. In the 1904 elections, Theodore Roosevelt won by a landslide, basing his campaign on an attack against the big monopolies. His mediation in a conflict between Russia and Japan earned him the Nobel Peace Prize. In the elections of 1908, Roosevelt decided not to run for a third term, but when the Republican Party split during the Presidential campaign of 1912, Roosevelt formed the Progressive Party and became its candidate. During the campaign he suffered an assassination attempt that forced him out of his campaign schedule and, as a result, Roosevelt lost the elections. Nevertheless, he remained in politics until his death.

direct election of Senators, all of which would be implemented in the years to follow. But they also proposed more radical political changes, such as to recall elected officials before their terms of office had ended, to have popular referendums and initiatives, and the provision for a judicial recall to override unpopular constitutional decisions of the Supreme Court. The Progressives were for banning alcohol, since its abuse was associated with all kinds of social disorders and, according to them, with political corruption since allegedly politicians met in the saloons to conspire.

Income Tax: The Sixteenth Amendment

Prior to the Civil War, the government of the United States did not collect any tax on personal income. The regulation of taxes was one of the important issues that forced the Constitutional Convention of 1787. The *Articles of Confederation* did not allow "the United States in Congress assembled" to collect any taxes directly from the taxpayers, but rather the financing of the Continental Army and other common expenses

depended on the contributions made by the states. No procedure was specified to enforce any financial obligations upon the states, should these fail to meet those obligations. So, the *Perpetual Union* was therefore condemned to perpetual insolvency.

To correct that serious *deficiency*, the federal Constitution authorized Congress to lay and collect “Capitation or other direct Taxes” (Sections 2 and 9, Article I), imposed basically over the land property and proportional to the census, as well as to levy other indirect “Duties, Imposts and Excises [...] uniform throughout the United States” (Section 8, Article I).

To pay for the Civil War effort, Congress passed the *Revenue Act of 1861*, which created a tax on personal income. This was then considered an indirect tax, and consequently it was not proportional to the census. The tax was set at a fixed 3% of any income above a certain minimum amount. It was modified the following year, making it effective until the end of the war in 1866. The Act was not constitutionally challenged before it expired.

In 1894, Congress passed the *Wilson-Gorman Tariff Act*, which imposed a federal income tax of 2% over any income above \$4,000 dollars. The law was challenged and, in 1895, the Supreme Court ruled in *Pollock v. Farmers’ Loan & Trust Co.* that such a tax was direct and, consequently, unconstitutional since it was not proportional to the census.

In 1909, President William Howard Taft asked Congress to approve a tax on the income of corporations and at the same time, to avoid a repetition of the constitutional problems in the *Wilson-Gorman Tariff Act*, to propose to the states for their ratification a constitutional amendment permitting this type of direct income taxation.

The 16th Amendment was ratified in 1913. Then, President Woodrow Wilson signed into law the pending *Revenue Act* initiated four years earlier by President Taft. The Act modified Section 9 of Article I of the Constitution, and thereby empowered

William Howard Taft (1857-1930) was an American jurist and politician, the 27th President of the United States and 10th Chief Justice of the Supreme Court. Born in Ohio, into a politically influential family, he graduated from Yale University in 1878 and from the Cincinnati Law School in 1889. Taft was appointed Solicitor General of the United States in 1890 and the next year became Judge of the Court of Appeals of the United States. In 1900, after the Spanish-American War, Taft was appointed Governor-General of the Philippines by President McKinley and, in 1904, Secretary of War by President Theodore Roosevelt. When in 1908 Roosevelt decided not to run for reelection, he gave his support to Taft who easily won the election. The factional break-up of the Republican Party in the following elections, and the re-entry of Theodore Roosevelt as a candidate, caused Taft to lose the Presidency. In 1921, William H. Taft was nominated Chief Justice of the United States, holding this office until his resignation one month before his death.

Congress “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration,” and moot *Pollock*. As of today, Congress may tax anything, anyway, and anywhere, without any restriction.

The election of Senators: The Seventeenth Amendment

Perhaps the most peculiar circumstance of this 17th Amendment is the fact that it most nearly forced a “runaway convention.” This is a national constitutional convention – similar to the Philadelphia Convention of 1787– with unforeseeable consequences, which included the possibility of the drafting a new constitution.

In the original text of the Constitution, Senators were elected by the legislatures of the several states. At the time –in 1787– this procedure was justified as a way to prevent from reaching the Senate demagogues who could use either charm or brute force to seize the popular vote. Furthermore, the Framers thought that, if the Senate was by popular election, it would be no different than the House of Representatives, and it would lose its character as the “check and balance” element in Congress.

While this method of electing Senators worked reasonably well until the mid-19th century, bipartisan tensions across the country were beginning to impact its feasibility in the longer term. Even before the Civil War, on several occasions the Senate seats of some states, such as Delaware, California and Indiana, were left empty because their legislatures were unable to reach the required majorities to elect their Senators, so radical were their divisions. In 1866 Congress passed an Act regulating the procedure the states were required to follow in electing their Senators. Nevertheless, many of the old divisions persisted and, between 1866 and 1906, several cases of



<http://lewandpatpolitics.files.wordpress.com/2010/09/us-senate.jpg>

The Senate in session

bribery were reported in the senatorial elections. Between 1891 and 1905, more than one half of the states reported recurring deadlocks in the elections, so evenly matched were the electors. Vacant seats in the Senate meant lack of representation at the Federal level.

Paradoxically, the eventual solution to the problem became the one that had been avoided when the Constitution was drafted: the direct election of the Senators by the people,

indeed in exactly the same way as the Representatives. However, unspoken interests in the Senate and in many state legislatures put a barrier in the way of implementing the proposed electoral change. Every year, from 1893 to 1902, Congress received proposals for a constitutional amendment to that end. And, year after year, the proposals were rejected by the very same Senators whose election process the amendment tried to regulate. The Senators had become a political class of their own and had taken possession of a powerful branch of government. They were refusing to accept a change that would deprive them of power and privileges.

Changes, however, were taking place in the legislatures of many states, and, by 1910, twenty-nine states of the forty-six then in the Union elected their Senators through some form of popular endorsement. It should be remembered that Article v of the Constitution offers two methods of proposing an amendment to the states: either through the approval of a text by two-thirds of each House, or through a convention requested by the legislatures of two-thirds of the states. In 1910, “two-thirds of the

states” meant “thirty-two states.” With twenty-nine states already in favor of the amendment, the Senate understood that its refusal to pass a suitable text could make the “runaway convention” a reality. Getting ahead of possible unpleasant events, in 1911 the Senate itself proposed the amendment that, after almost a year of debates in the House of Representatives, was approved by the required majorities. It was submitted to the states for their ratifications and reached the three-fourths majority for its approval in 1913.

The Amendment modified the first and second paragraphs of Section 1, Article I, of the Constitution, whereby for the future all Senators were to be “elected by the people” of each state. To ensure that Senate seats were always occupied the Amendment also provided for “temporary appointments until the people filled in the vacancies by regular elections.”

Although the ratification of the 17th Amendment immediately resulted in a change in the political composition of the Senate and several of the former problems seemed to fade, the Amendment was not free of criticism. Scholars have pointed out the loss of power to Congress of the state legislatures. Popularly elected Senators have gained the freedom to ignore the directives of their own state legislature and an opportunity arises for special interest groups disguised within the electing citizenry to exert undue influence.

The Prohibition: The Eighteenth and Twenty-first Amendment

The earliest temperance movements in the United States go back to 1789, in the State of Connecticut. The goal of temperance movements was to fight against the many evil consequences associated with alcohol consumption, namely poverty, domestic violence, and crime in general. In 1826, the American Temperance Society was organized and a few years later it numbered more than one and one half million members and had the support of many of the Protestant churches. In the years to follow, temperance movements appeared in Anglo-Saxon countries around the world. From 1830 on, temperance lobbying pressured British legislatures to pass laws limiting the consumption of alcohol across the domains of the British Empire. By the end of the 19th century, American temperance groups had many states in the United States pass local legislation with similar prohibitions.



<http://www.loc.gov/pictures/item/99405169/>
Library of Congress

New York police destroying liquor (1921?)

In response to many years of groups such as the Woman’s Christian Temperance Union lobbying Congressmen, both Houses proposed, in December of 1917, an amendment prohibiting “the manufacture, sale, or transportation of intoxicating

liquors within, the importation thereof into, or the exportation thereof from the United States.” Thus the amendment did not expressly prohibit the consumption of “intoxicating liquors,” although it made it quite difficult. The 18th Amendment was ratified in January of 1919, taking effect one year later, as prescribed in the Amendment text itself.

Its enforcement was troubled from the very beginning. The Amendment gave “Congress and the several States [...] concurrent power to enforce [it] by appropriate legislation.” In 1919, before the Amendment took effect, Congress passed the *National Prohibition Act*, defining “intoxicating liquor” in detail and the penalties for violating the Prohibition. But when the Act was submitted to President Woodrow Wilson for his

Woodrow Wilson (1856-1924) was an American scholar and politician and the 28th President of the United States. He was born in Virginia, the son of a Presbyterian minister and supporter of the Confederacy. Due to dyslexia, he did not learn to read until well past the age of ten. In 1879 Wilson graduated from Princeton, and then he went to study law in the University of Virginia, being admitted to the Bar in 1882. Not finding enough work as an attorney, Wilson enrolled in Johns Hopkins University to get a PhD in History and Political Sciences, and after his graduation he taught in several major universities: Cornell, Wesleyan, New York Law School, Princeton, to name but a few. From 1902 to 1910, he was President of Princeton University. In 1911 he was elected Governor of New Jersey and in 1912, as the Democratic candidate, was elected President of the United States. During his first term, Wilson endorsed such progressive legislation as the *Federal Reserve Act*, the *Federal Trade Commission Act*, the *Clayton Antitrust Act*, and the *Federal Farm Loan Act*, and he signed the *Revenue Act* that made of income tax the main means to raise federal and state revenues. In his reelection campaign, Wilson promised to keep America out of World War I, but once he was returned to office, and having learned from the intelligence services that Germany was encouraging Mexico to attack the United States, he asked Congress to declare war on Germany. Woodrow Wilson’s active participation in the peace treaties signed after the war resulted in the formation of the League of Nations, a precursor of the United Nations. For his peace efforts, Wilson was awarded the 1919 Nobel Peace Prize. In October of that year Wilson suffered a stroke that incapacitated him. Without a procedure to discharge the President of his duties in case of incapacity, Woodrow Wilson remained formally in office until the end of his term, in March of 1921. During the intervening fifteen months, the agenda of the Presidency was, to a large extent, in the hands of his wife. A year later, the 25th Amendment remedied this kind of situation. Well remembered for his accomplishments, Woodrow Wilson is popularly considered one of the best presidents of the United States.

signature, Wilson vetoed it (although the House of Representatives overruled the veto the very same day and the Senate did the same the following day).

A novelty of this Amendment was the time limit –seven years– set for its ratification by the three-fourths of the states. The constitutional validity of this clause was contested, but in 1921 the Supreme Court affirmed it in *Dillon v. Gloss*, Deputy Collector. (Since then, most of the amendments proposed to the several states for their ratification included similar time-limited provisions.)

Despite the fanfares trumpeted by the temperance movements, the populism of many Congressmen, and the good intentions of the progressive groups, the conviction

for sobriety was not, by far, universal in the United States, as the Presidential veto had already shown. Against the Amendment, and with manifest disregard for the tough penalties imposed by the implementing legislation, a large number of people chose to disobey the laws of prohibition, and so caused a huge increase in the clandestine manufacture and sale of liquor. As in many other countries, the illegal distilling of alcoholic beverages was an immemorial practice in the United States, although until then it had been done to evade the hefty taxes imposed on the sale of alcohol, and not to fight the constitutional prohibition on its “manufacture, sale, or transportation.”

The 18th Amendment is one more example of how the road to hell is paved with good intentions. The benefits expected when the Amendment was approved, such as the protection of families against all evils and degradations caused by the consumption of liquor, or the decrease in diseases, poverty, child abuse, domestic violence, street brawls, etc., were not achieved. Instead, and as a direct result of the Prohibition, the end results were disastrous, magnifying some of the old problems, especially corruption and bribery, and causing new ones, such as organized crime.

By driving the use of alcohol underground, the illegal sale of liquor became big business monopolized by mafias. These criminal organizations bribed government officials to look the other way and not to interfere with their illegal businesses. The law was abused in all sorts of ways. For example, doctors could sign off whisky as a prescription drug, and thus pharmacies were able to sell alcohol by the millions of

Warren G. Harding (1856-1923) was an American publisher and politician, and 29th President of the United States. Born in Ohio, at only 17 years of age he graduated from Ohio Central College. His father owned a local newspaper, working for which Harding learned the trade of journalism and, at the age of 30, he bought his own newspaper. In 1899, Harding was elected Senator for Ohio's Assembly, and in 1903, as a good party player, he was nominated for the position of Ohio's Lieutenant Governor. In 1915, he was elected U.S. Senator for Ohio, and in 1920 he won the Presidential election. Harding was noted for rewarding his cronies and more generous contributors with influential offices. This behavior eventually led to numerous scandals being brought to public attention, some of them ending in court, with sentences for defrauding the government. During his term, he signed the peace treaty with Germany and Austria that ended World War I, but kept the United States out of the League of Nations that had been sponsored by his predecessor, President Woodrow Wilson. Harding died suddenly in 1923. Because of the many corruption issues during his term, Harding is considered one of the worst presidents of the United States.

gallons. Federal agents of the Prohibition Unit acted with disregard for any constitutional guarantee, searching and seizing without judicial writs. Between 1920 and 1927, these agents shot down more than 200 suspected smugglers. At the same time, Federal judges routinely dismissed formal complaints of abuse by federal agents who were exceeding their authority. Moreover, the law was not always being enforced equally across the society.

In fact, Prohibition was enforced with less severity than the ensuing legend has suggested. Wine used in religious services (such as the Catholic communion or Jewish ceremony) was excluded, and the same relaxation applied to alcoholic liquor prescribed by a medical doctor as mentioned. Farmers were allowed to manufacture for family consumption a certain volume of wine or cider each year. President Warren Harding,

for instance, had a well-supplied wine cellar in the White House, most certainly for *raison d'état!* To escape the new law, all kinds of deceptions were attempted. Time magazine published in its issue of August 17th, 1931, an article about a grape juice concentrate, called “wine bricks,” from the *Vino Sano* (!) company. The concentrate carried a warning on the packaging “against dissolving the brick in a gallon of water, adding sugar, shaking daily and decanting after three weeks. Unless the buyer eschewed these processes, 13^o wine would be produced.”

After twelve years of Prohibition, in 1932 more that 75% of voters, and 46 of the 48 states in the Union, were in favor of repealing the 18th Amendment. The Democratic candidate for the Presidential elections that year was Franklin D. Roosevelt, who had promised in his campaign program to work with Congress to repeal the Amendment and all federal laws on Prohibition. Congress approved a text for the 21st Amendment but it did not send it to the state legislatures, addressing it instead to their governors.

As previously mentioned, Article V of the Constitution shows two possible paths for the ratification of amendments. It can be done by the legislatures of the states or by

“ratification conventions” called in all of them. It is always Congress’s choice what form to use in each amendment. In all the twenty preceding amendments, Congress had decided to send the text to the state legislatures for its ratification. But in 1933 all the indications were that those legislatures were not representative of the popular will. Rather the pressures of interest groups associated with temperance movements were expected to prevail. The Woman’s Christian



<http://www.jazzfm.com/wp-content/uploads/2011/08/Prohibition-Ends.jpeg>

December 5, 1933, 7pm

Temperance Union was again to be feared because, though a small minority, it was a very vociferous one. To circumvent these un-desirable pressures, Congress decided to use the second path and to submit the proposed amendment text to conventions to be organized in each state. At the same time, President Franklin D. Roosevelt requested that Congress modify the National Prohibition Act to allow the sale of beer. The Amendment was ratified ten months later, on December 5th, at 5:30 pm. President Roosevelt signed its Proclamation at 7 pm and bars opened at the very same time, thereby ending the period of Prohibition.

Women’s suffrage: The Nineteenth Amendment

Lydia Chapin Taft, widow of Josiah Taft (an ancestor of President William Howard Taft), who had been the largest landowner in the city of Uxbridge, Massachusetts, has the distinction of being the first woman to vote in what is now the United States. At the time, the value of the vote was a function of the land owned by the individual. On two occasions, in 1756 and 1765, the town council of Uxbridge considered essential for the

largest property in the municipality to support its position on some very important issues. Since all the male children from the marriage were underage, the town council expressly authorized Josiah Taft's widow to vote by proxy.

From 1790 to 1807, the State of New Jersey granted all women residents in the state the right to vote. The next cases of women's suffrage in the United States took place in the Western federal territories, shortly after the Civil War had ended. First in

Jeannette Pickering Rankin (1880-1973) was an American social worker and activist, and the first woman elected as a Representative to the Congress of the United States. Born in Montana, she studied in the University of Montana. After becoming a member of the National American Woman Suffrage Association, she was instrumental in getting women's suffrage approved in the State of North Dakota in 1913 and, in the following year, in her own state, Montana. In 1916 she was elected a U.S. Representative for Montana, winning the seat again in 1940. As a pacifist, Rankin voted against United States involvement in both World Wars. She was one of the founders of the American Civil Liberties Union (ACLU) and of the Women's International League for Peace and Freedom (WILPF).

1869, in the Territory of Wyoming, and a year later in the Territory of Utah (both under the direct control of the Federal Government), women were franchised on equal terms with men, since in those same terms they shared the pains and difficulties of the Western migration. In 1887, the Congress of the United States removed such right from the women of the Territory of Utah (who were mainly Mormons) in punishment for voting in favor of polygamy; but when in 1896 Utah became a state, the women got their suffrage right restored.

In 1868, the New England Woman Suffrage Association –a group described by Henry James in his book *The Bostonians*– had been organized in Massachusetts, and in the following year, after a conflict among its members, the group split and the National Woman Suffrage Association was created.

In the elections that followed the ratification of the Fifteenth Amendment in 1870, many women took up their opportunity at the polling stations to exercise their votes. The Amendment text protected “the right of citizens of the United States to vote,” and it placed no restriction on the sex of the voters. However, the election boards decided not to allow the women to vote. In 1875, the Supreme Court held, in *Minor v. Happersett*, that the Constitution did not grant women the right to vote because this was not one of the constitutionally protected privileges of the 14th Amendment. “It is clear, therefore, we think,” said the Court, “that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted” (88 U.S. 162, 171). The Court was “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one”



http://en.wikipedia.org/wiki/File:Pre-election_suffrage_parade_NYC.jpg
Library of Congress, Bain Collection

Suffrage Parade, New York City, 1915

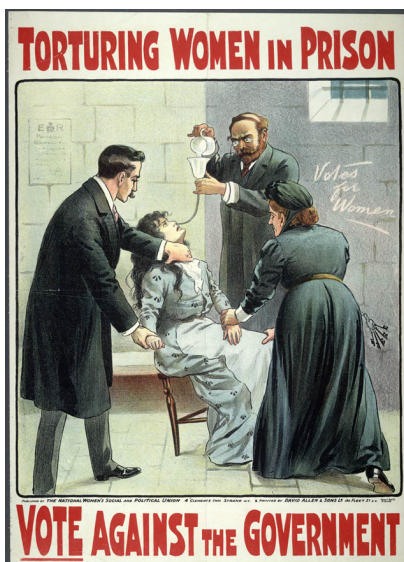
(88 U.S. 162, 178), so no violation of the Constitution had occurred when the women were prevented from voting.

The female franchise was achieved piecemeal. In 1878, U.S. Senator for

Henry James (1843-1916) was a British writer born in the United States (New York) to a wealthy family. In his adolescent years, James traveled extensively through Europe, returning to the United States at the age of 19 to register in Harvard Law School; but he dropped law studies to become a writer. In 1871 James published his first novel, *Watch and Ward*, and in 1876 he moved permanently to England where he wrote the bulk of his works. Henry James was part of the literary realism movement of the last decades of the 19th century. In many of his novels, James describes the relationships between American expatriates and Europeans. Among his most prominent works are *The Portrait of a Lady* (1881), *The Bostonians* (1886), *What Maisie Knew* (1897), and *The Ambassadors* (1903). Disappointed by what he considered to be the desertion of Great Britain by the United States at the outbreak of World War I, Henry James renounced his American citizenship and became a British subject. Henry James was awarded the British Order of Merit shortly before his death.

California Aaron Augustus Sargent submitted to Congress the first amendment proposal to grant women the right to vote; but his proposal failed. In 1896, women got their right to vote in the States of Idaho and Utah; in 1911 in California; in 1912 in Oregon, Arizona and Kansas; and in 1914 in Nevada and Montana. It is worth noticing that all these are Western states. In 1913, the Congressional Union for Woman Suffrage was organized on a national scale, and in 1917 it became the National Woman's Party,

with one main objective: to obtain approval and ratification of a constitutional amendment that, similarly to the Reconstruction Amendments for African-Americans, would guarantee women every right and privilege, and particularly the right to suffrage, in equal terms with men.



<http://en.wikipedia.org/wiki/File:Suffragette-force-fed.jpg>

In 1916, the State of Montana elected Jeannette Rankin as U.S. Representative, making her the first woman to have a seat in the Congress of the United States. In the same year, President Woodrow Wilson made women's suffrage part of his electoral campaign. Since they could not influence the election directly, members of the National Woman's Party began demonstrating permanently in front of the White House, picketing for women's rights. After 1917, when the United States entered the –until then– European conflict, the women also picketed against sending their young men to the

war. At one point police arrested the demonstrators for breaking the code of public order, and a number of them were sentenced to jail. Once in jail, the women started a hunger strike, following the example of the suffragettes in Great Britain in similar circumstances. As had happened in Great Britain too, prison officials force-fed the striking women, and President Wilson and the whole American Administration were

characterized in the international press as in violation of human rights.

In January 1918, right at the start of his presidential campaign for reelection, the President announced publicly his support for a constitutional amendment to grant the suffrage to women. This was a public reaction to the scandal created by the detention and mistreatment of the suffragettes. The same day, Jeannette Rankin proposed an amendment in the House of Representatives that was immediately approved. But the Senate postponed their vote until October, and then it failed to achieve the necessary two-thirds majority needed for approval. The response of the National Woman's Party was to campaign against the reelection of any of the Senators who had voted against the amendment. The next year, a new text was proposed in Congress, this time identical to the one that Senator Sargent had proposed in 1878. The Senate approved the wording of the text, and the Amendment was ratified by the states in 1920.

The Presidential and legislative terms: The Twentieth Amendment

When the text of this Amendment was prepared in 1932, the Senate Committee wrote in the recommendation of its approval that “when our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. [...] Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days’ travel of the remotest portions of the country. [...] Another effect of the amendment would be to abolish the so-called short session of Congress. [...] Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. [...] Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the reason that it requires practically all of the time to dispose of the regular appropriation bills. [...] The result is a congested condition that brings about either no legislation or ill-considered legislation. [...] The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided ‘that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.’ It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should

commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions.” [S. Rep. No. 26, 72^d Cong., 1st Sess., 2, 4, 5, 6 (1932).] All these reasons justified the change to the legislative sessions and the Presidential terms from March to January, since the two months from the elections to the date of inauguration gave sufficient time for the transfer of powers.

This Amendment has the popular name of the “Lame Duck Amendment.” When a Congress convenes after new Representatives and Senators have already been elected but have not taken possession of their seats, the old Congresspersons find themselves in the awkward position of having to take decisions without the authority of the duly elected representatives of the people. This situation earned the popular name of “lame duck session.” All kinds of problems resulted from that lack of popular legitimacy. Such was the case of the Congress that appointed the “midnight judges” of President John Adams in 1801. Before this Amendment, all final sessions of every Congress were “lame duck,” thus the name of the Amendment. The same “lame duck” concept applies to a President or any elected official after his successor has been elected.

But even after the Amendment, “lame duck” sessions persisted because Congress cannot always adjourn from the election date –namely the first Tuesday after the first Monday in November– until the inauguration date. Moreover, it could be forced to reconvene by the President in circumstances he deemed demanded it. Since 1940, Congress has had sixteen such “lame duck sessions.”

The 20th Amendment modified temporarily Section 2 of Article I and Section 1 of Article II, reducing by 43 days the four-year term of the President and Vice-President elected in 1932, and by 60 days the terms of Senators and Representatives chosen in the elections of that same year. The Amendment modified both the references to “the fourth day of March” in the 12th Amendment and “the first Monday in December” in Section 4 of Article I.

The Supreme Court opinions during the Progressive Era and the *New Deal*

In the earliest years of the 20th century, state legislatures, the Congress of the United States and the Presidency were influenced by the progressive concepts and social tendencies of the times. Perversely, the Supreme Court of the United States remained the bastion of conservatism, writing opinions such as *Slaughter-House Cases* or *Plessy v. Ferguson*. Constructing a new meaning to the Fourteenth Amendment, which had been drafted to protect the rights of the emancipated slaves, the Supreme Court applied, in its resolutions, the so-called Substantive Due Process doctrine, aiming to annul and void state and federal laws that had been enacted to limit the abuses of powerful employers and producers over much weaker employees and consumers. The argument used time and again by the Supreme Court was that the Constitution granted full protection to the individual right to contract freely and to the sanctity of private property. State or federal laws, said the Supreme Court, could not impair these two fundamental rights. This position of the Court was one of the reasons that labor and social legislation failed to progress for quite some time in the United States.

That conservative position of the majority of Justices reached a crisis-point when the Supreme Court systematically declared unconstitutional those laws of



Unemployed_men_queued_outside_a_depression_soup_kitchen_opened_in_Chicago_by_Al_Capone_02-1931_-_NARA_-_541927.jpg
National Archives

Soup kitchen, Chicago, 1931

President Roosevelt's *New Deal* that were essential to rescue the nation from the acute economic crisis created after the Wall Street Crash of 1929.

The Constitution attributes to the President the appointment of the Justices and to the Senate their confirmation. But once confirmed, they hold "their Offices during good Behaviour" and cannot be removed by the President, and Congress can do it only through the impeachment process. But during the 1930's, tensions between the Court and the President had reached such a point that Roosevelt threatened to modify the size of the Court, adding more positions of Associate Justices –that, obviously, he would appoint among the supporters of his social and economic policies– to reach the required majority to get his policies

Franklin D. Roosevelt (1882-1945) was an American politician and the 30th President of the United States. He was born in New York to a very wealthy family, and was a distant cousin of President Theodore Roosevelt. He graduated from Harvard University in 1904 and then went to study law at Columbia Law School, being admitted to the Bar in 1907 and working for an important law firm. In 1910, Roosevelt was elected Senator for the New York Assembly. President Woodrow Wilson appointed him Assistant Secretary of the Navy in 1913. Unfortunately, he contracted polio at the age of 39, and though he recovered, he was paralyzed from the waist down. In 1929 Roosevelt was elected governor of the State of New York. In 1932, in the middle of the worst economic crisis, he won the Presidential election. In the first 100 days of his term Roosevelt established a program for the economic recovery of the country, known as the *New Deal*. The Supreme Court of the United States declared unconstitutional a significant part of the *New Deal* legislation, blocking temporarily the efforts of his Administration to improve the economic and social conditions of the country. Despite this legal setback, the economy improved significantly from 1933 onward, and in the elections of 1936 Roosevelt was reelected by a landslide, carrying 46 of the then 48 states of the Union. Notwithstanding a new economic recession in 1937, by 1940 World War II had broken out and Roosevelt was successfully elected for a third term. In December of 1941 the Japanese attacked the United States, which had been neutral till this point. Much of the President's energies were engaged in the war. By the time of the 1944 elections, Roosevelt's health had deteriorated significantly, but even so he was elected once more. Roosevelt died of a massive stroke in April of 1945, one month after his fourth inauguration. Franklin D. Roosevelt is considered to be one of the best presidents of the United States and the person most admired and appreciated by his fellow citizens.

approved. This incident is known as the *Court-packing Plan*. It is uncertain whether the Court realized President Roosevelt was talking seriously about the Plan, or whether

Justices genuinely changed their minds over what was or was not constitutional. The fact is that, all of a sudden, the Supreme Court's criteria changed from an obstinately conservative position, to a radically liberal one. From that point on, the Court went to recognize during the mid part of the 20th century a large number of individual rights.

The Contractual Freedom and the Legislative Power: *Lochner v. New York*

The *Lochner v. New York* opinion, of 1905, ushered in a conservative period of the Supreme Court that would last until 1937 and that has been called the *Lochner* era. Actually, as we have seen in previous chapters, the conservative attitude of the Court can be traced to the *Dred Scott* opinion and even further back. But it is in the *Lochner* opinion where we can see the Court clearly elaborating the substantive due procedure doctrine. This doctrine established that the Constitution recognized that every citizen had certain inalienable rights – “life, liberty, [and] property” – that, according to the Fifth and Fourteenth Amendments, neither the states nor the federal government can limit “without due process of law.” Included in those “liberties” were the “liberty of contract” and freedom of action on private property. Given its “power of police,” a state could regulate those rights, but not in an absolute way. Otherwise those Amendments would be emptied of any significant value.

In 1895, the State of New York passed the *Bakeshop Act*, limiting the hours a baker could work to 10 in a day and 60 in a week, and fining employers who exceeded these norms. In 1901, Joseph *Lochner* was sentenced to pay \$50 for repeatedly violating the *Act* by requiring his employees to work longer hours. Defeated in all lower courts, Mr. *Lochner* appealed to the Supreme Court of the United States, alleging that the *Bakeshop Act* was in violation of the Fourteenth Amendment because it deprived him of his right to run his business as he pleased and of his freedom to contract how and with whom he chose.

The Supreme Court ruled that the “general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution”. The Court went on to say that, although that “general right” was not absolute, since it was limited by “certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers” (198 U.S. 45, 53), these “police powers” of the state were also limited. Otherwise, the Court said, the Fourteenth Amendment would be meaningless and the state could regulate anything without any limit. The province of the Supreme Court, it said, was to decide if the state law was “a fair, reasonable and appropriate exercise of the police power of the State, or it [was] an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family” (198 U.S. 45, 56).

It could not be alleged that the state had a right or obligation to protect any citizen against his or her ignorance, since the citizens in general, and the bakers employed by Mr. *Lochner* in this particular case, “are in no sense wards of the State” (198 U.S. 45, 57). The Court said that bakers “are able to assert their rights and care for

themselves without the protecting arm of the State, interfering with their independence of judgment and of action” (198 U.S. 45, 57).

The Court thought “that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee” (198 U.S. 45, 59). Consequently, the State of New York exceeded its powers when it passed the Bakeshop Act, since the regulation was not related to any health issue, and to regulate the hours that bakers could or could not work interfered with the right of the bakeshop owners to contract with their employees. Thus, the Supreme Court of the United States reversed the judgments of the states courts and remanded the case to the initial County Court “for further proceedings not inconsistent with this opinion” (198 U.S. 45, 65).

Four of the nine Justices dissented, arguing that the police power of the state extends “to prescribe regulations to promote the health, peace, morals, education, and good order of the people” (198 U.S. 45, 65). Citing an extensive number of precedents, the dissenting Justices pointed out that “the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only ‘when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law’” (198 U.S. 45, 68). Furthermore, said the dissenting Justices, “when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional” (198 U.S. 45, 68). And then, “[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere” (198 U.S. 45, 68). In his particular dissent, Justice Oliver Wendell Holmes, Jr., accused the majority vote of trying to impose their personal beliefs and prejudices on the whole country and he maintained that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*” (198 U.S. 45, 75).

The specific detail of the “10-hour working day” in the *Lochner* opinion was repealed by *Bunting v. Oregon*, 243 U.S. 426 (1917); but the Supreme Court held the *Lochner* precedent, and the substantive due process doctrine, until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), systematically turning down most of the state and federal legislation that had begun to limit the economic rights of employers.

A frustrated President: *A.L.A. Schechter Poultry Corp. v. United States*

The Great Depression that followed the financial Crash of 1929 was an economic crisis that nearly paralyzed the commercial and social structures of the United States. The

plunge of the stock market resulted in a massive fall in consumer spending and, misfortunes never travelling alone, a severe drought caused great damage to

Oliver Wendell Holmes (1841-1935) was an American jurist and Associate Justice of the Supreme Court of the United States. He was born in Massachusetts to a prominent family and graduated from Harvard University in 1861. That same year Holmes enlisted in the Massachusetts militia to fight in the Civil War, where he was twice wounded. Once the war was over, Holmes returned to Harvard to study law. Having been admitted to the Bar in 1866, he practiced law with a small firm in Boston. In 1881 he published his book *The Common Law* and the following year was appointed Associate Justice of the Supreme Judicial Court of Massachusetts, eventually becoming its Chief Justice. In 1902, Oliver W. Holmes was appointed to the Supreme Court by President Theodore Roosevelt during recess, and was unanimously confirmed by the Senate later on. Holmes served as a Justice of the Court until he was 90 years of age. After Chief Justice John Marshall, whose wisdom guided the infancy of the United States, Oliver Wendell Holmes is the American jurist most frequently cited in and outside the United States. Among his contributions are the developments of legal realism or what is termed the “clear and present danger” doctrine by which the First Amendment he said the right to freedom of speech did not protect against “falsely shouting fire in a theatre and causing a panic” [in *Schenck v. United States*, 249 U.S. 47 (1919)]. With the time, Holmes was to be greatly influential in the critical legal studies movement and in the economic analysis of law.

agricultural production. By comparison with the economic performance in 1929, industrial production in 1932 had dropped 46%, commodity prices 32%, and foreign trade 70%. Consequently, unemployment had risen, with six times the number of people out of work in 1929, the hardships affecting up to 25% of the labor force.

Unable to formulate a program to solve the economic crisis or, at least to ameliorate it, President Hoover, who in the Presidential campaign of 1928 had promised “a chicken in every pot and a car in every garage,” failed in his bid for reelection in 1932. Within his first 100 days in office, his successor in the Presidency, Franklin D. Roosevelt, sent Congress a large number of bills, proposing public programs aimed at restoring the economy, which the Democrats-majority Congress consistently enacted. Among those public programs, known collectively as the New Deal, was the *National Industrial Recovery Act* (NIRA or NRA), whose general goals were “[t]o encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.” By means of those laws, Congress intended “to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of Industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.” As part of the NIRA execution process, the government issued a number of codes and regulations, one aimed specifically at the poultry industry.

Schechter Poultry Corporation was a slaughterer and wholesaler of poultry. The Schechter brothers purchased live chickens, slaughtered them following Orthodox Jewish rituals, and sold them mainly to butchers and retail stores, though they also sold to private individuals in the Orthodox Jewish community of New York. The federal government charged Schechter Poultry with, among other things, “the sale to a butcher of an unfit chicken,” sales to people without a commercial license, avoiding inspections and falsifying the accounting records, and conspiracy.



<http://lcweb2.loc.gov/service/pnp/fsa/8a20000/8a20800/8a20804r.jpg>
Library of Congress

After being convicted in the lower courts, Schechter Poultry appealed to the Supreme Court of the United States. The Court unanimously reversed and held unconstitutional both the poultry code and the National Industrial Recovery Act enabling it. The Court ruled, in the first place, that the President had no power to issue those codes, since Article I of the Constitution granted all legislative powers to Congress and the legislature could not bestow on others what was its own exclusive power. Secondly, the NIR Act allowed the President to issue “codes of fair competition.” But, said the Court, “fair competition” was a term vague enough to allow the President to regulate anything, even to create new laws without requiring the approval of Congress. Moreover the Court was of the view that the federal indictment in this case was against the Commerce Clause of the Constitution, which, though it allowed the federal government to regulate interstate commerce, would not apply to the commercial activities of Schechter Poultry because these were limited to the State of New York. Additionally, the Court did not find a clear connection between the regulation of minimum wages and the operation of interstate commerce.

In spite of President Roosevelt labeling the *NIRA Act* as “the most important and far-reaching ever enacted by the American Congress,” the Supreme Court of the United States held unanimously that the law exceeded constitutional limits because it illegally granted to the executive branch a power that was legislative in nature. The Court pointed out too that Congress was making an improper use of the Commerce Clause.

Once the NIRA had been declared unconstitutional, most of the New Deal programs depending of that Act came to a halt. One after another, all the cases of this nature reaching the Supreme Court were turned down and the federal laws declared unconstitutional. The continuous nullification of his programs frustrated President Roosevelt to the point of preparing a bill, entitled *Judicial Procedures Reform Bill* of 1937, which would change the number of justices in the Supreme Court, and described previously as the *Court-packing Plan*.

The End of the Lochner Era: *West Coast Hotel Co. v. Parrish*

The Supreme Court was originally constituted with six Justices, a Chief Justice and five Associate Justices. As the federal judiciary grew and new circuit courts were added, the number of Supreme Court Justices increased too. One of the functions of the Justices while the Supreme Court was not in session was to preside as circuit justices. As new states joined the Union, new circuit courts were created and, consequently, the number

of Justices to preside over them also had to be increased. At its maximum, there were ten Justices in the Court, eventually being reduced to the present nine, which has been considered to be the most effective number.

Buried in the Judicial Procedures Reform Bill of 1937, was a clause that authorized the President to appoint a new Justice, up to a maximum of six, for every Justice older than 70 years of age. The justification given in the bill was the need to reduce the workload of older Justices. In truth, the clause would allow President Roosevelt to “pack” the Court with new Justices more favorable to his policies and supportive of his projects. At the time that the bill was going to be introduced in Congress, the Supreme Court had to decide on the *West Coast Hotel Co. v. Parrish* case.

Elsie Parrish was a chambermaid working for the West Coast Hotel Company. Parrish sued West Coast for receiving a lower salary than the minimum wage for a 48-hour week, determined by the Industrial Welfare Committee and the Supervisor of Women in Industry of the State of Washington. Using the current Supreme Court precedents, the lower state court ruled for the employer. But the supreme court of the State of Washington reversed and found in favor of the employee. Then, the employer appealed to the Supreme Court of the United States.

Given the *Lochner* precedent, everything pointed toward a Court decision against the minimum wages and the limited working week. Surprisingly, the Court ruled 5 to 4 that the Constitution allowed state legislation to limit contractual freedom and the liberty of contract. Therefore, the state had the power to regulate working hours where such restrictions protected the community or the health and safety of vulnerable groups, such as women.



http://commons.wikimedia.org/wiki/File:Wenatchee,_WA_-_Cascadian_Apartments_01.jpg
 Joe Mabel

Cascadian Hotel Wenatchee, Washington

The Labor Unions Rights: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*

Fifteen days after its ruling on *West Coast Hotel Co. v. Parrish*, and the same day that the *Judicial Procedures Reform Bill* was submitted to Congress, the Supreme Court decided in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, along with four more cases related to labor relations, in favor of the federal legislation comprised in the *National Labor Relations Act*.

The nullification of the *NIR Act* in the *Schechter* case by the Supreme Court had caused a retreat from President Roosevelt’s *New Deal* policies. The response of the executive had been to push for a new law, the *National Labor Relations Act*, prohibiting labor practices considered unfair. (It should be noted that this law, with appropriated updates, is the law of the land to this day.) Among the practices considered unfair were: restraining or coercing employees from joining labor

organizations, discriminating against employees for supporting a labor organization, and refusing to bargain collectively with the representative of the employees.

Jones & Laughlin Steel, one of the largest American steel producers in the 1930s, was charged by the *National Labor Relations Board* (NLRB) of discriminating against workers who wanted to join a labor union and firing ten employees at one of its plants in Pennsylvania after it had become unionized. The NLRB ruled against the company and ordered that workers be rehired and given back pay. But Jones & Laughlin refused to comply with the NLRB ruling and alleged that the *National Labor Relations Act* was unconstitutional on the basis that it attempted to regulate manufacturing, which was an intrastate activity and, consequently, beyond the scope of the Commerce Clause. Citing the existing Supreme Court precedent in *A.L.A. Schechter*

Poultry Corp. v. United States, the lower courts ruled in favor of Jones & Laughlin. The NLRB appealed then the case to the Supreme Court of the United States.

The Supreme Court posed three questions: 1. Does Congress have the powers to regulate manufacturing activity when this activity is significantly internal commerce within the state? 2. Is Congress within its powers to use the Commercial Clause to regulate labor relations? 3. What kind of activities may Congress



<http://www.loc.gov/pictures/resource/fsa.8d04899/>
 Rothstein, Arthur, 1942

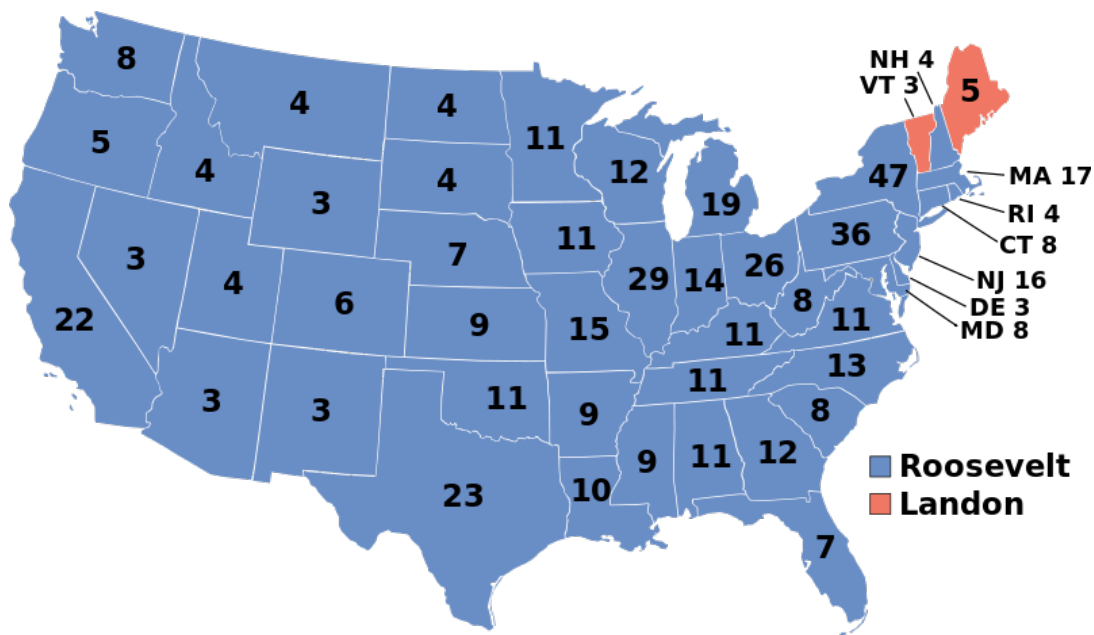
Workers in one of the *New Deal* programs

regulate under the Commerce Clause? To the first two questions the Court answered categorically in the affirmative. To the third question the Court answered that “[a]lthough activities may be internal to the state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control” (301 U.S. 1. 37). To determine its jurisdiction Congress no longer had to differentiate between the “direct” and “indirect” effects of state commerce, but rather had to determine whether the regulated activity could have a “significant effect” on interstate commerce.

The Court recognized “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection” (301 U.S. 1. 33) as fundamental rights. Thus, any violation of such fundamental rights was a proper subject for regulation by a competent legislative authority. And that “competent legislative authority,” i.e., the Congress of the United States, was not confined to regulate only in the case of “direct” obstacles to the intercourse of interstate commerce, but rather could extend to any other obstacles that could have any “significant effect” over that intercourse.

Nevertheless, the United States had a “dual system of government” and the power of the Commerce Clause “may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” The question was one of “degree”. The Court ruled that “Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.” (301 U.S. 1. 37.) In the case of *Jones & Laughlin Steel Corporation*, a halt in production caused by a labor conflict certainly had an immediate, direct and paralyzing effect on the industry and interstate commerce. By a vote of 5 to 4, the conclusion of the Supreme Court was “that the order of the [National Labor Relations] Board was within its competency and that the Act [was] valid as here applied” (301 U.S. 1. 49). The judgment of the lower court was reversed.

It cannot be said with certainty if the Justices sincerely changed their previous position regarding Roosevelt legislation, or if the threat of the *Court-Packing Plan* helped them change their mind. The fact is that, as already mentioned, the Supreme Court decided the same day four other cases – *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937); and *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142 (1937)– all of which were about labor relations and are known as the *Labor Board* cases. In all of them the Court followed the pattern that had been established few days earlier, in the case of *West Coast Hotel Co. v. Parrish*, in which the Court ruled for the federal government, thereby giving the green light to President Roosevelt’s *New Deal* programs. That pattern would continue all the way through the 1970’s.



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 AndyHogan14

1936 Electoral Map