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**A Legal Revolution: The New Deal on Constitutionalism**

Andy Xu

It seems, in recent years, that few are satisfied with the congressional legislative process. And this discontent is not ungrounded: among the failures of the political administration is chaos in the allocation of political agency, and a deep-running factionalism as a result. This paper will attempt to partially explain this agency confusion by tracing it back to the New Deal, arguing that the New Deal challenged constitutional commitments to checks and balances within the federal government as well as the federalist principles describing the scope of federal agency itself, leaving a legacy of misappropriated and misallocated political agency.

**Constitutionalism: Pre-New Deal Background**

The New Deal intentionally made sweeping reinterpretations of the preceding constitutional spirit of checks and balances within the government. However, to meaningfully understand theses changes and re-interpretations, we must first acknowledge the historical backdrop against which they were made.

Up to the New Deal, the guiding philosophy of national politics was essentially dominated by the Madisonian ideal. Madison believed the greatest threat to liberal democracy was self-interested factions hoarding power. However, from his recognition that humans cannot get past their self interest, he favored a form of compartmentalized representation over direct participation from the citizenry. Only when representatives are free from the pressure of influential groups can they focus on the deliberation of politics. From this understanding of politics and government, which many Founding Fathers shared or adhered to in some form, was born the mechanics for the distribution of national power into the familiar three branches of the federal government. This arrangement served many purposes: it was an economically efficient division of labor, it provided an effective safeguard against tyranny, it spread out the responsibility for legislation not necessarily popular withal segments of the constituency, and it gave just enough power to each branch that cooperation was allowed for but independent action was still potent and relevant. However, the most important function of the division of powers was to check unenlightened or self-interested representatives. Above all, it diffused governmental power, reducing the possibility that any branch can abuse an excessive amount of power. The system of checks and balances allowed each branch, armed with its own ambitions, to attempt to restrain the others. (Sunstein, 12)

Also important was the Madisonian belief that large republics were unable to conduct effective public discourse towards the goal of optimizing policy, preferring instead the more localized small republic, where he believed a much higher level of local involvement would allow for a less factional form of politics. Specifically, Madisonian constitutionalism was inherently suspicious of big central governments, believing them to be not only encumbering to the political process but an infringement on individual liberties by virtue of their existence.

Importantly, the system of checks and balances ensured that the terms of regulation often would be set by the common law courts, which had a vital place in the system. The importance of this cannot be overstated. Courts creating and implementing the common law could play a major role in social ordering, promoting private markets and resisting the various dangers associated with a government that combined the power to make, interpret, and execute the law. A politically insulated judiciary was permitted to assume this function because the common law was supposed to embody a system of natural or pre-political rights; in acting according to the dictates of "reason," courts were not subject to the risks posed by a combination of powers in the legislative or executive branch of the national government. (Sunstein, 16)

The New Deal reformers, in their hasty zeal for a remedy for the depressing state of the country at the time, had neglected the wisdom of the checks and balances so carefully engineered into the federal government. To them, the most important function it served, to have the branches contain each other, can only lead to governmental inaction, which in their opinion was the last thing America needed. (Ackerman, 302) They sought to change the system, perhaps with noble intentions in mind, in order to achieve the reforms they deemed necessary to rescue the country. Ironically, and perhaps fittingly, their shortfalls recall the very purposes that the checks and balances they so casually discarded serve.

**A New System of Legal Rights and Its Ramifications**

The system of checks and balances, as well as the reliance on common law systems for effective execution of legislations, came under attack on a number of grounds. Preeminently, the Progressives felt judicial lawmaking was anti-democratic, both on a constitutional and common law level. (Sunstein, 18) An additional concern was the efficacy of the common law itself. The Depression and the failures of the free-rein market economy made it harder to argue that governmental intervention beyond common law rules was antithetical to economic productivity. The collapse of market system, which was very much supported by and to an extent symbiotic with the common law system, during the Depression made the utopian premises of laissez-faire thought seem downright fanciful. Indeed, economic recovery seemed to call for greater coordination and planning. A final concern was the perceived need for redistribution of wealth and entitlements, which could definitely not be brought about through the common law, who had a long-standing and revered commitment to the protection of civil liberties, chief among which were property rights. Most fundamentally, many New Deal reformers regarded the common law itself as a regulatory scheme, not as pre-political, and asserted that the common law had proved wholly inadequate in this regulatory role. (Sherrill, 14) The very name “New Deal” should be invocative, calling for a re-design of the allocation of resources in the economy, and to justify their vast overhaul of American economic life, they had devised a new system of legal rights which was truly born for the sake of their reformative agenda.

For New Deal advocates, traditional civil liberties handed down in common law jurisprudence no longer captured the category of fundamental interests; their focus was badly misaligned. Rights to governmental assistance in the employment market, for example, were insufficiently protected by the common law, as were the interests of the poor, consumers of dangerous food and drugs, the elderly, and victims of unfair trade practices. At the same time, the common law system gave undue protection to rights of private property. (Sunstein, 21) In some settings the common law itself seemed a product of factional power in its protection of some interests and its unwillingness to recognize others. As the reader might be able to infer, this called for a dramatic re-evaluation of the baselines of governmental action and the legitimacy thereof would be measured.

New Deal reformers believed that these revised conceptions of substantive rights required significant institutional reform. The separation of powers and checks and balances appeared to prevent government from taking necessary steps to intervene in the economy. A system of more unified powers was necessary in order to allow for dramatic and frequent governmental action. Naturally, they turned to vest that power in the Executive, which was traditionally the most unified branch in the federal administration. That power came largely at the cost of common law courts. (Hudson, 12) Another hallmark of New Deal reform is their reliance on insulated, neutral expertise in the form of agencies to implement their agendas on the ground. Both of these changes were deviating from the Madisonian system of checks and balances in significant ways. The former was obviously breaking the power dynamic between the Executive and the other branches of the federal government. The latter, though it employed insulated methods to carry out its goals, casted states in a highly unfavorable light. States appeared weak and ineffectual, unable to deal with serious social problems. The idea that states were to be a check on federal power seemed redundant, as New Deal reformers adamantly believed their time to be one of national unity. (Cushman, 61)

New Deal reformers proposed, in place of the Madisonian checks and balances, they would adopt a form of “autonomous administration”, allowing the unhindered executive branch, with its hands untied, to take prompt and necessary action in this time of crisis. Their hostility towards the judiciary was only fueled by the inevitable fact the judiciary exists in large part to restrain perceived oversteps in power from the other branches of government, which could not have been convenient for any agenda pushing for “prompt action” and a more expansive executive power. The image of the executive as the most effective and impartial means by which the will of the people are expressed was further enhanced by the New Deal’s appeals to scientific bureaucracy, and the entire impression that expertise and neutrality emanating from all the independent agencies they established. All of that helped tip the scales in favor of the Executive further.

**Cracks in the New Deal Utopia**

The courts did not sit on their hands while the entire judiciary was essentially under siege. They invalidated statues creating agencies on constitutional grounds. A prime example is *Schechter Poultry Corp. v. United States*, in which the Supreme Court invalidated the National Industrial Recovery Act as an unconstitutional delegation of lawmaking power to private groups. (Sunstein, 32) It reflected concerns at the time about the accountability of these agencies to the electorate as well as their responsiveness and even whether they work towards what’s best for the country. However, due to overwhelming popular support for regulatory administration, the constitutional case failed to bear fruit.

The problem of self-interested representation is, however, a recurrent source of concern about autonomous administration. The fear is that administrators will attempt to promote their own interests at the expense of the interests of the public. Some observers have argued that administrators seek above all to enlarge their own powers, often producing excessive or misdirected regulation. Because agencies are not subject to the discipline of the market or the electoral process, this concern looms especially large. The absence of the system of checks and balances can only aggravate the problem. The administrative process also suffers from problems of inefficiency, a concern addressed by the original constitutional effort to create a unitary executive. Frequently, the bureaucracy is unable to act expeditiously. Many agencies have overlapping or inconsistent missions. Without unitary control, it is difficult to coordinate agency decisions or to redirect national policy.

The New Deal was not even close to ending in disgrace. It tends to be remembered instead as this valiant effort to salvage a last glimmer of hope from the bleak times of the Depression. And while I agree that some of its innovative legislation left a positive legacy for history, the fallout from its jurisprudentially reckless constitutional re-alignments will impact judicial history for decades to come.

**Conclusion**

The distribution of national powers was designed to ensure a sensible division of labor, to promote deliberation in government, and to provide a series of checks against factional power and self-interested representation. The original constitutional framework was also associated with the system of common law ordering, because the scheme of checks and balances made national action more difficult, thus allowing states and the common law courts to set the basic terms of

regulation. In its substantive dimension, New Deal constitutionalism self-consciously rejected the common law. It held that a new conception of legal rights was necessary to protect workers, the poor, the elderly, consumers, and others disadvantaged by the marketplace. Above all, New Deal constitutionalism held that baselines derived from the common law no longer provided neutral or natural standpoints from which to make legal decisions. The institutional position of the New Deal followed naturally from this critique. In the view of the 1930's reformers, the original distribution

of national powers obstructed necessary governmental action. The New Deal alternative was both to increase the power of the presidency and to create the modern administrative agency, comprised

of technically sophisticated officials promoting the public interest. The New Deal aimed to reinvigorate government and break free of the shackles of the judiciary, which necessitates a deviation from the substantive and the institutional legacy of the original constitutional interpretation.

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