A Theory of Social Formalism: The Four Horsemen and the New Deal

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The hard-line conservatives on the New Deal Supreme Court systematically rejected President Roosevelt's liberal legislation. It is thus a commonly held notion that these justices, known as the Four Horsemen, were unsympathetic to the Americans suffering as a result of the Great Depression. Scholars attribute their decisions to legal formalism—application of the law without consideration for social reality. The authors here, using court cases as well as previous scholarship, argue that these justices were social formalists, whose conservative decisions were not based on an inherent aversion to liberal ideas, but rather the laissez-faire *ideas of the 1920s, and the constitutionally questionable nature of the New Deal legislation.*

During the 1930s, America faced the greatest economic crisis in its history. Finding no relief from state or private sources, the American people turned to the federal government. President Franklin Delano Roosevelt (FDR) was elected, promising swift and effective aid to the American people. Despite immense popular and congressional support, several of FDR's programs were struck down by the United States Supreme Court. This precipitated a major constitutional crisis in 1937, as the President attempted to pack the Court with justices that he believed would be more sympathetic to the New Deal. Roosevelt himself was mystified as to why his programs, created to deal with the rampant unemployment and plummeting economy, were being rejected by a court "apparently oblivious to the world outside its doors."[1] Viewed as particularly hostile to the New Deal were the so-called "Four Horsemen"—Willis Van Devanter, James McReynolds, Pierce Butler, and George Sutherland. These four justices for their dismissal of the New Deal programs have been marked as classical formalists—interpreting the law with abstract, unchanging principles, ignorant of the reality of society. Historians have seen this 1930s' court as one of the great battles between the conservative, reactionary formalism of the

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Horsemen, and the progressive, liberal ideas of Justices Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone; the remaining two justices, Owen Roberts and Charles Evans Hughes adopted somewhat of a middle ground.[2] We shall argue, however, that this viewpoint is far too simplistic. Despite outward conservatism and seeming indifference toward society, the Four Horsemen were not classicist in nature—rather, they subscribed to a kind of social formalism. Although many of their decisions contained conservative attitudes, they were, in fact, a reflection of a conservative society. The justices were aware of the large-scale suffering brought upon by the Great Depression, but the poor quality of the New Deal legislation, in their minds, rendered it unacceptable.

Legal classicists—also known as formalists—dominated American jurisprudence for decades. The inequalities created by the Industrial Revolution, however, led to progressive movements both socially and legally. Advocates of sociological jurisprudence challenged formalistic philosophy. Instrumentalists such as Louis Brandeis, Oliver Wendell Holmes, Jr. and Roscoe Pound saw the law as a living force that must be adapted to existing social situations. This philosophy based legal decisions on social realities—instrumentalists protested the classical legal thought pattern of complete disregard for anything outside of antiquated legal documents. Pound writes in "The Need for Sociological Jurisprudence" that,

> He [the ideal jurist] should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know that state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.[3]

Formalism was seen as impractical. Deriving laws from law alone had no real world application. Holmes wrote that "we cannot explain legal history in terms of legal processes alone. Legal history does not unfold as if it were created by a logician. The life of the law has not been logic in this sense."[4] Instrumentalists were aware of society and believed that it was important to take society's problems and sentiments into account. Despite their stance against most of the New Deal's measures to combat the Great Depression, the Four Horsemen actually incorporated many ideas from sociological jurisprudence into their conservative decisions.

A great deal of evidence supports the social formalistic explanation for the Four Horsemen's behavior. Although conservative in their opinions on many issues, the argument can be made that these justices understood the problems of society, and were inclined to support popular reforms. Justice Sutherland supported the Employers' Liability Act; Pure Food and Drugs Act; the Hepburn Rate Bill; the Children's Bureau; the Seaman's Act of 1915; the Postal Savings Banks; the free coinage of silver; Workers Compensation for Interstate Carriers; Women's Suffrage; Populist presidential candidate William Jennings Bryan. These acts, initiatives, and Mr. Bryan represented popular reforms and a liberal expansion of government that would set a precedent for the later New Deal. Justice Sutherland denied the practical validity of legal classical logic, proclaiming that instead it must be understood that people are "fed and clothed and comforted by the practical rule of thumb."[5] His fellow riders supported similarly progressive sentiments. Pierce Butler supported the Sherman Antitrust Act, James McReynolds was known as a trustbuster before his appointment, and Van Devanter was sympathetic to the plight of the Native American.[6] One historian remarked that the Four Horsemen "upheld more Interstate Commerce Commission orders than you can shake a stick at."[7] Although they interpreted the Constitution along strict lines, each expressed socially conscious, progressive sentiments.

Despite their conservative reputation later during the New Deal, the two Horsemen on the Court during World War I—McReynolds and Van Devanter—were remarkably supportive of Wilson's efforts to expand the federal role. During the Great War the national government began controlling state and local governments in unprecedented ways.[8] It was this rapid assumption of power—for many Americans a matter of wartime necessity—that became the model for FDR's New Deal.[9] It is surprising to learn, then, that the Supreme Court upheld almost all of the federal actions under Wilson. The President assumed full control of the nation's railways, telephones and telegraphs, and the Court upheld his actions in *Northern Pacific Railway Co. v. North Dakota* (1919).[10] The only federal statute struck down by the Court during the war, the Lever Act, was on technical rather than philosophical grounds.[11] The Horsemen's actions during World War I demonstrated that they were aware of the changing needs of America. Following the end of the war, America entered into an era characterized by conservatism, isolationism, and free enterprise capitalism. Urofsky and Finkleman write, "The majority of Americans in the 1920s wanted to be left alone to enjoy the nation's rampant prosperity; they wanted law and courts that would not disturb the status quo. The broadly conservative policies of all three branches of the national government perfectly suited the mood of the times."[12] "The business of America is business!" proclaimed President Calvin Coolidge.[13] Tired of war, the nation adopted an isolationist foreign policy, turning its attention towards the booming domestic economy. Both presidents of this era,

Calvin Coolidge and Warren G. Harding, adopted a *laissez-faire* stance toward business, taking a cue from the old adage, "if it ain't broke, don't fix it." The Supreme Court, sensing the conservative mood of the times, reacted by upholding conservative rulings. As a result, the Supreme Court handed down many decisions that continued the *laissez-faire* tradition. Striking down a District of Columbia minimum wage law for working women in *Adkins v. Children's Hospital* (1923), Sutherland's majority opinion effectively ruled that private business with no public interests is not subject to governmental regulation.[14] In *Federal Trade Commission v. Gratz* (1920), Justice McReynolds denied that the regulatory agency had legitimate ability to determine "unfair methods of competition," preventing the Federal Trade Commission from fulfilling its intended purpose.[15]

When public opinion called for liberal legislation, the Court answered accordingly. The Court unanimously upheld a mandatory program in *Dayton-Goose Creek R. Co. v. U.S.* (1924) to make profitable railroad companies support smaller, less profitable ones, on the World War I basis that the railways were a national system.[16] McReynolds supported the federal government's treaty obligations overruling state law in *Missouri v. Holland* (1920).[17] Sutherland wrote the majority opinion in *Euclid v. Amber Realty* (1926), arguing that government zoning regulations were necessary to promote rapid post-war growth and expansion.[18] Demonstrating a realistic understanding of the mechanics of modern commerce, the Supreme Court upheld the Packers and Stockyards Act of 1921.[19] Ruling that the government did indeed have legitimate power to regulate meat stockyards, the Court upheld the Act in *Stafford v. Wallace* (1922), and again unanimously eight years later.[20]

The political and economic systems of the 1920s, including the Supreme Court, were ill-equipped to handle the national crisis that loomed ahead. On Tuesday, October 29, 1929, the stock market suffered the greatest single crash in its history. This inaugurated a period of national economic disaster. In the three year period from 1929 to 1932, the stock market average fell from 452 to a mere 52.[21] Steel plants were operating at 12 percent of their capacity.[22] The national income fell from $88 billion in 1929 to $40 billion in 1933.[23] The unemployment rate soared from 3.1 percent in 1929 to 25 percent in 1933.[24] In the face of this disaster, America looked to the national government for solutions. Holding President Herbert Hoover responsible for their misfortunes, they placed their trust in Franklin D. Roosevelt, who promised "a new deal for the American people."[25] He pledged "direct, vigorous action" in the form of legislation designed to expand federal powers to unprecedented levels in an effort to help "citizens who find themselves the victims of such adverse circumstances as make them unable to obtain even the necessities for mere existence."[26] Roosevelt, determined in his quest, found an unexpected roadblock at the Supreme Court.

On May 27, 1935, which came to be known among supporters of the New Deal as "Black Monday," the Court surprised Roosevelt with three decisions—all of them unanimous, and all of them decidedly against the president's wishes. The Supreme Court, in one day, invalidated the National Industrial Recovery Act (*Schecter v. United States*, 1935), the Frazier-Lemke Mortgage Act (*Louisville Joint Stock Land Bank v. Radford*, 1935), and eliminated the power of the president to remove members of independent regulatory commissions (*Humphrey's Executor v. United States*, 1935).[27] Roosevelt, when informed of these decisions, reportedly responded, "[W]here was Ben Cardozo?" Unable to understand what he clearly saw as betrayal by his liberal counterparts, he questioned, "And what about old Isaiah [Louis Brandeis]?"[28]

Despite the apparent judicial hostility to Roosevelt's progressive legislation, evidence indicates that the Four Horsemen, and the New Deal Court in general, were not reactionary and backward-thinking villains. They struck down New Deal legislation, not because it was too liberal, but because it was, in essence, bad legislation. It was hastily compiled and poorly written. Urofsky and Finkleman refer to its "sloppy legislative draftsmanship," and that,

> The enormous mass of legislation churned out in the first hundred days rested on constitutional bases as questionable as some of the economic theories that animated those statutes. Moreover, they had been drafted for the most part by enthusiastic but inexperienced young lawyers under impossible time constraints – Roosevelt had given the committee that drew up the National Industrial Recovery Act just one week to overhaul the nation's business structure, for example.[29]

In addition to its poor quality, the proposed legislation was also not necessarily progressive. Barry Cushman writes, "Moreover, there is reason to doubt the conservatism of certain decisions striking down New Deal measures, precisely because there is reason to doubt the liberality of the New Deal programs they invalidated." He continues,

> [B]y 1934, less than a year into its short life, the National Industrial Recovery Act (NIRA) was under heavy attack. Consumer prices got higher while workers' wages stayed low; employers ignored wage, hour, and collective bargaining provisions with impunity; blacks were routinely forced to accept lower wages than whites; and code authorities were dominated by representatives of larger enterprises, who promulgated

> regulations restricting production and reducing competition, both to the detriment of smaller businesses. When the Supreme Court invalidated the NIRA in May of 1935, unemployment was higher than it had been a year earlier, the program had few friends, and prospects for congressional extension of its two-year charter were gloomy.[30]

The case was the same with the Agricultural Adjustment Act (AAA). Cushman explains, "There was no shortage of contemporary liberals who thought that the AAA was a sellout to the commercial farm lobby and a policy disaster."[31] The Act, though supposedly progressive, hurt consumers at the expense of large-scale farmers. Cushman continues,

> Similarly, the principal beneficiaries of the AAA were large commercial farmers. Consumers, forced irrespective of income to bear the brunt of higher food prices were horrified by its policy of enforced scarcity. The food processing taxes used to fund the program were likewise passed on in a regressive fashion to consumers in the form of higher prices.[32]

The legislation overall was so questionable that even the liberal justices, Brandeis, Cardozo and Stone, could not stand by Roosevelt. Not merely an issue of progressiveness, Roosevelt's legislation was also a matter of constitutionality and quality. Although the country needed drastic measures to combat the Great Depression, the measures still had to comply with traditional limits, and the Supreme Court justices—even the liberal ones—were there to enforce this tradition.

It would be incorrect to say, then, that the Four Horsemen were merely conservative formalists, stuck in their own legal world, and oblivious to existing society. The Horsemen did not always vote conservatively—in fact, each of the justices has a fairly impressive liberal record. Additionally, the riders were not formalistic; they dismissed precedent when they felt it necessary. Although the justices looked to society in making their decision, they also examined the legislation being passed. The New Deal, although designed to alleviate the Great Depression, overstepped its constitutional limitations. Perhaps, too, the justices underestimated the scope of the Great Depression. They may have felt that a temporary economic downswing did not necessitate a change in the *laissez-faire* style they had adapted from the needs of the 1920s. We believe it was for these reasons that the Four Horsemen—McReynolds, Van Devanter, Butler and Sutherland—arrived at their decisions, including those that opposed the New Deal. Fully aware of the outside world, the Horsemen were not sheltered, adamantly conservative legal aristocrats with little or no concern

for the average American. Rather, these four justices were social formalists who struggled to reconcile the interests of the American people with the limits of the Constitution.

Endnotes

1. Melvin I. Urofsky and Paul Finkleman, *A March Of Liberty: A Constitutional History of the United States*, 2nd ed. (Oxford University Press, 2002), II: 663.

2. Ibid, 664-665.

3. Roscoe Pound, "The Need for Sociological Jurisprudence," 1907 (21 February 2003). http://www.law.ucla.edu/students/academicinfo/coursepages/s2001/337/roscoepound.html.

4. Morton White, *Social Thought in America : The Revolt Against Formalism* (New York: Oxford University Press, 1976), 16.

5. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 36.

6. Barry Cushman, "The Secret Lives of the Four Horsemen," *Virginia Law Review* 83 (1997): 560.

7. Ibid, 567.

8. Urofsky and Finkleman, 599.

9. Ibid, 600.

10. *Northern Pacific Railroad Co. v. North Dakota*, 250 U.S. 135 (1919).

11. *US v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921).

12. Urofsky and Finkleman, 624.

13. Ibid, 625.

14. Cushman, *Rethinking the New Deal Court*, 66-67.

15. *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920).

16. Urofsky and Finkleman, 630.

17. Ibid, 631.

18. Ibid, 641.

19. Ibid, 631-632.

20. Ibid, 632.

21. Ibid, 663.

22. Ibid, 663.

23. James L. Roark et al., The *American Promise: A History of the United States,* Compact Ed. (New York: Bedford/St. Martin's. 2000), 635.

24. Ibid, 635.

25. Ibid, 643.

26. Ibid, 645, 647.

27. William E. Leuchtenburg, *The Supreme Court Reborn: Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995) 89.

28. Ibid, 89.

29. Urofsky and Finkleman, 675-676.

30. Cushman, *Rethinking the New Deal Court*, 34.

31. Ibid, 35.

32. Ibid, 34.

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