farmdoc DAILY

Department of Agricultural and Consumer Economics, University of Illinois Urbana-Champaign

The Rule of Law vs. the Rule of Power: a Reflection

Jonathan Coppess

Department of Agricultural and Consumer Economics
University of Illinois

September 25, 2020

***farmdoc daily* (10): 172**

Gardner Policy Series

Recommended citation format: Coppess, J. "The Rule of Law vs. the Rule of Power: a Reflection." *farmdoc daily* (10): 172, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, September 25, 2020.

Permalink: https://farmdocdaily.illinois.edu/2020/09/the-rule-of-law-vs-the-rule-of-power-a-reflection.html

The passing of Justice Ruth Bader Ginsburg can offer an occasion for thought and reflection. A powerful advocate for equality under law, she leaves a vast, important legal legacy. (Greenhouse, September 18, 2020). An honest attempt to reason with law and power—to reckon in troubled times with personal political perspectives and the lessons of learned experience—seems, at the very least, a better tribute than the unseemly rush to replace her. For those willing to hazard such an undertaking, consider the following reflection.

Background

In a lecture from 1953, the political philosopher Hannah Arendt distilled the long history of political theory to produce a powerful commentary on the rule of law versus that of power. A government is good or bad based on "the role played by law in the exercise of power" (Arendt 2007, at 713). In the "exercise of power in the interest of the rulers," we find bad government; good government "the use of power in the interest of the ruled" (Id.) Tyranny, therefore, is a lawless government in which decisions are "bound only by its own will and desires" (Arendt 2007, at 713-14). In such fundamental underpinnings of society and government, we may hear echoes from the Founders. Alexander Hamilton wrote that "Government implies the power of making laws . . . instituted . . . [b]ecause the passions of man will not conform to the dictates of reason and justice without restraint" and that where "the whole power of the government is in the hands of the people, there is less pretense for the use of violent remedies in partial or occasional distempers of the State" (*The Federalist* No. 15 and 21 (respectively)).

Law's legitimacy springs from the process by which it is created and its general applicability. The rule of law is not arbitrary, and it applies to every citizen; no one is above the law or beyond its reach. The rule of power is its opposite. Our system of government was designed to guard against the arbitrary creation and application of rules; a "barrier against domestic faction" serving as a remedy for the "mortal diseases under which popular governments have everywhere perished" (*The Federalist* No. 9 and 10). A faction is some number of citizens united by self-interests adverse to the rights of others or the collective interests of society. Those in power should "make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society" (*The Federalist* No. 57). The rule of law can provide "one of the strongest bonds by which human policy can connect the rulers and the people together . . .

but without which every government degenerates into tyranny" (*The Federalist* No. 51). That rules are wrong if applied only when convenient, or only when they help those applying them, is a concept so basic that it is taught to and understood by children.

The Founders' "genius of republican liberty" requires that "all power should be derived from the people" (*The Federalist* No. 37) in "a government which derives all its powers directly or indirectly from the great body of the people" through elections (*The Federalist* No. 39). Supreme Court justices are not elected by the people; with lifetime appointments, they are also not accountable to the people. In theory, it was the branch "least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them" (*The Federalist* No. 78). In practice, however, it is a more open question (see e.g., Tushnet 1995; Friedman 1998). The Supreme Court renders judgment on questions of basic and fundamental rights, but it can also have the proverbial last word on policies, laws and regulation—the fundamental workings of the elected branches. From its decision there is no appeal; while it has no actual power to enforce its decisions, they can cause vast reverberations in society. Therefore, a distinctive alarm sounds when arbitrary rules are applied in matters of the Supreme Court.

Discussion

Today's roiling controversies bring to mind an old Supreme Court case; not the one discussed most frequently and fervently but, rather, a decision largely lost in American history and jurisprudence. On January 6, 1936, a conservative majority of the Supreme Court issued a consequential decision striking down the Agricultural Adjustment Act of 1933 as unconstitutional (*U.S. v. Butler*, 297 U.S. 1 (1936)). The 1933 Act—a key part of President Franklin D. Roosevelt's New Deal efforts to combat the Great Depression—represented the first attempt by the federal government to directly intervene in the agricultural economy to help farmers. Seeking to centrally manage production and provide direct assistance to the farmers who agreed to cooperate, it courted controversy on many fronts.

The specific subject of the Supreme Court's review was the authority to assess a tax on processors. Taxing processors to pay for benefits to farmers was a basic system of redistribution that drew strong ideological and partisan opposition. The *Butler* case was a legal Trojan horse for powerful political allies who viewed the case as an effective attack on Roosevelt, the Democrats, and the entire New Deal (Irons 1982; Soifer 1985). It represented the rule of power more than of law and was part of a dangerous trend for the American system of government. The decision possesses a troubling backstory that informs this conclusion. It may also offer perspectives on contemporary controversies (Metzger 2017).

Litigation ensued when the receivers of a bankrupt cotton mill in Massachusetts—backed by wealthy interests that included a large meat packer—refused to pay the processing tax because they considered it unconstitutional. The 6 to 3 majority opinion was written by Justice Owen Roberts, appointed by President Herbert Hoover in 1930. His opinion was part of a series of decisions aligned with the views of the four deeply conservative justices known as the Four Horsemen for their efforts to nullify the New Deal (Cushman 1997). The 1933 AAA was also targeted by the American Liberty League, formed in 1934 by members of the du Pont family and other wealthy conservatives to attack the New Deal from a particular Constitutional perspective (Rudolph 1950; Wolfskill 1962; Goldstein 2013). One of the key lawyers to argue the case before the Supreme Court for the mill's receivers was George Wharton Pepper. A scion of the Wharton and Pepper families in Philadelphia, he had been a Senator and a professor at Pennsylvania Law School where he was a mentor, friend and promotor of the career of Justice Roberts (Soifer 1985; Irons 1982; Leonard 1971). Adding further intrigue, the American Liberty League was rumored to have pushed the Republican Party leadership to nominate Justice Roberts to run against President Roosevelt in the 1936 election (Rodell 1955; Shughart 2004). The rule of power thrives under such conditions.

The 1933 AAA involved the clear constitutional powers of Congress to tax and spend for the general welfare in the middle of an economic depression. This provided no small set of challenges to the Court and led to a confounding distortion of both the statute and the Constitution. Justice Roberts incorrectly conflated the processing tax as "incident" to the regulation of agriculture; he coupled that with a misreading of the Tenth Amendment by proclaiming that "Congress has no power to enforce its commands on the farmer to the ends sought" and "it may not indirectly accomplish those ends by taxing and spending to purchase compliance" (*U.S. v. Butler*, 297 U.S., at 61 and 74 (respectively)). The decision conjured a limitation on the powers of Congress that does not exist in order to replace the powers granted by the Constitution (Glick 1938; Rankin 1960; Soifer 1985). But Justice Roberts tipped

his hand; his objection was to Congress "exact[ing] money from one branch of an industry and pay[ing] it to another" for fear that "every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income" (*U.S. v. Butler*, 297 U.S. at 74 and 76 (respectively)). These reveal objections about policy, not the Constitution. His decision was labeled "judicial fiat," an arbitrary order by the hands of power particularly dangerous to the system of government (*U.S. v. Butler*, 297 U.S., at 87 (Stone, J. dissenting)).

History's judgment has favored the dissent written by Justice Harlan Stone and his reasoning is worth reviewing. He reminded the Court that "while the unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint" (*Id.*, at 79). He warned against "the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action" (*U.S. v. Butler*, 297 U.S., at 87-88 (Stone, J. dissenting)). The role of the judiciary is necessarily limited to control its power; "[f]or the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government" (*Id*., at 79). Because courts "are not the only agency of government that must be assumed to have capacity to govern," he condemned Constitutional interpretations based upon "any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save" the system; a view that "is far more likely, in the long run," to lead to its destruction (*Id*., at 87-88).

The *Butler* majority's retreat to the Tenth Amendment served ideological purposes to enlist the Supreme Court in the pursuit of factional power lost to the depression; one of a series of decisions nullifying portions of the New Deal in a striking level of judicial activism on behalf of special interests (Ross 2005). In politics as in physics, however, actions produce reactions. The decision was denounced on the House and Senate floor by Members of both parties as Congress rushed to enact the Soil Conservation and Domestic Allotment Act of 1936. Voters overwhelmingly endorsed Roosevelt and Democrats in Congress in 1936. Roosevelt responded by pushing a Court-packing plan in February 1937. His effort failed in Congress but helped drive a hasty retreat from the ideological redoubt at the Supreme Court; Justice Roberts switched his position on the New Deal and Congressional powers (*West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); Irons 1982). In short order, a reconfigured Supreme Court went on to uphold New Deal legislation, including for agriculture (*Currin v. Wallace*, 306 U.S. 1 (1939); *Mulford v. Smith*, 307 U.S. 38 (1939)). It was, in fact, a subsequent challenge to the Agricultural Adjustment Act of 1938 by which the Supreme Court would deeply entrenched a vast, expansive scope for Congress and the federal government under the Constitution (see e.g., *Wickard v. Filburn*, 310 U.S. 111 (1942)).

Concluding Thoughts

An unhealthy obsession with packing the judicial branch for blatant partisan purposes merges with more troubling efforts to attack elections and voting (Corasaniti and Vogel, September 24, 2020; Epstein, Cochrane and Thrush, September 24, 2020). Together, these are clear signposts on the path to the rule of power. If the tempests of attempted tyranny hide behind distractions, can single-issue simplicity conceal actual threats from the exercise of power by those who hold it? American society is being wrung through the spindles of a pandemic that has killed over 200,000 of our fellow citizens and crashed the economy. A bulwark of equality under law is lost at a time the subject gains new attention and urgency. On the horizon march profound challenges from climate change. To what ends is power being exercised? Machiavelli warned that those "seeking to preserve power" were the more dangerous citizens "because in them the fear of loss breeds the same passions as are felt by those seeking to acquire" power but "their position enables them to operate changes with less efforts and greater efficacy" (Machiavelli 1531, Chapter V). What level of success makes an actual tyrant out of an aspirant? Political power is a curious paradox, at once capable of great and awful feats but also incredibly insecure and fragile. Sometimes overreach triggers the shattering of a seemingly iron grasp; shards can be found littered throughout history. In the final analysis, actual strength does not trade the rule of law for the rule of power, only weakness does.

References

Arendt, Hannah. "The Great Tradition: I. Law and Power." *Social Research: An International Quarterly* 74.3(2007): 713-726.

Cushman, Barry. "The Secret Lives of the Four Horsemen." *Virginia L. Rev.* 83(3) (1997): 559-645.

Friedman, Barry. "The history of the countermajoritarian difficulty, part one: The road to judicial supremacy." *NYUL Rev.* 73 (1998): 333.

Glick, Philip M. "The Soil and the Law." *Of Soils and Men, Yearbook of Agriculture*. U.S. Department of Agriculture, 1938.

Goldstein, Jared A. "The American Liberty League and the Rise of Constitutional Nationalism." Temp. L. Rev. 86 (2013): 287

Irons, Peter H. *The New Deal Lawyers*. Princeton University Press, 1982.

Leonard, Charles A. *A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937*. Kennikat Press, 1971.

Machiavelli, Niccolo, *The Discourses on the First Decade of Titus Livius*, translated Ninian Hill Thompson and produced by Ted Garvin, Jayam Subramanian and PG Distributed Proofreaders for the Project Gutenberg EBook (2004), available http://www.gutenberg.org/cache/epub/10827/pg10827.html.

Metzger, Gillian E. "1930s Redux: The Administrative State Under Siege." *Harv. L. Rev.* 1 (2017).

Rankin, J. Lee. "The Supreme Court, the Depression, and the New Deal: 1930-1941." *Neb. L. Rev*. 40 (1960): 35.

Rodell, Fred. *Nine Men: A Political History of the Supreme Court from 1790 to 1955*. Random House, 1955.

Ross, William G. "When Did the Switch in Time Actually Occur: Re-Discovering the Supreme Court's Forgotten Decisions of 1936-1937," *Arizona State Law Journal* 37(4) (2005): 1153-1220.

Rudolph, Frederick. "The American Liberty League, 1934-1940." The American Historical Review 56, no. 1 (1950): 19-33.

Shughart, William F. "Bending before the storm: The US supreme court in economic crisis, 1935–1937." The Independent Review 9, no. 1 (2004): 55-83.

Soifer, Aviam. "Truisms That Never Will Be True: The Tenth Amendment and the Spending Power." *U. Colo. L. Rev.* 57 (1985): 793.

Tushnet, Mark. "Policy distortion and democratic debilitation: Comparative illumination of the countermajoritarian difficulty." *Michigan Law Review* 94.2 (1995): 245-301.

Wolfskill, George. *The Revolt of the Conservatives: A History of the American Liberty League, 1934-1940*. Houghton Mifflin, 1962.