EVALUATING THE NEW DEAL

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We often mistakenly treat the New Deal as a momentous monolith, a constitutional moment[1] that suddenly placed law and government on an entirely new path. As soon as we examine the record, however, we must acknowledge that this notion oversimplifies the matter. For example, there were federal regulatory programs cartelizing sectors of the economy, such as transportation and communications, long before the New Deal.[2] Moreover, there were many dissonant elements within the New Deal itself.

Accordingly, we need to disaggregate the elements of the New Deal in order to approach the question posed in the title, which, as Judge Bowman[3] and Professor Epstein[4] have indicated, is ambiguous. Has the New Deal been undone already? Should it be undone? Can it be undone, and if so, how? I do not think we can answer these questions in gross; rather, we should look at the separate components of the New Deal and keep a "score-card" on each.

In doing so, I am not going to focus on the constitutional law issues. However optimistic constitutional deregulators are about *United States v. Lopez*,[5] *New York v. United States*,[6] or challenges to the constitutionality of regulation under the Endangered Species Act as applied to species located solely in

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1. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997) ("A *constitutional moment* occurs when a rising political movement succeeds in placing a new problematic at the center of American political life.").

2. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 441 (1987) (noting the existence of rate-setting and regulatory agencies before the New Deal).

3. *See* Pasco M. Bowman II, *Undoing the New Deal*, 22 HARV. J.L. & PUB. POL'Y 207 (1998).

4. *See* Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209 (1998).

5. 514 U.S. 549 (1995).

6. 505 U.S. 144 (1992).

one state,[7] the likelihood of the courts drastically altering the regulatory landscape is slim. There is a possibility that the courts might strike down the last one or two percent of the federal regulatory welfare state; however, the remaining ninety-eight percent of the regulatory state will remain unscathed.

This essay approaches the issues at the sub-constitutional level–or the constitutional level with a small "c". Therefore, it looks at the structure of governance in relation to the economy and society as established by federal legislation, administrative practice, and the non-constitutional jurisprudence of the federal courts. What follows is a "score-card" for analyzing these New Deal issues.

First, the New Deal firmly established the proposition that the federal government ought to take responsibility for the overall productivity and health of the economy at the macro-economic level. Perhaps the New Deal did not do a very good job at accomplishing that goal, but it has certainly stuck, and a very broad consensus on that general proposition remains.[8] Just how macro-economic stability and progress is to be achieved has been the subject of long-standing debate. Nevertheless, there seems to be a consensus today on the basic elements of policy, thanks largely to what happened under the Reagan administration and thereafter.[9] Currently, we have achieved an arguably workable approach to attaining the goal of macro-economic productivity, although the globalization of the economy presents new challenges.

Second, the New Deal established the proposition that the federal government has a basic responsibility for protecting individuals and families against the economic risks of an industrial market economy through various means of social insurance and assistance. This proposition, too, enjoys a fairly broad consensus, although there is considerable debate over the means by which to accomplish the over-arching goal.[10] For

7. Endangered Species Act of 1973, 16 U.S.C. § 1531 (1994); National Ass'n of Home Builders v. Babbit, 130 F.3d 1041 (D.C. Cir. 1997) (upholding constitutionality of Act), *cert. denied*, 118 S.Ct. 2340 (1998).

8. *See, e.g.*, Sunstein, *supra* note 2.

9. The basic tenents of our macroeconomic policy are to maintain relatively low rates of taxation on labor and capital, to refrain from tax increases, to allow for balanced governmental budgets, and to pursue a consistent fiscal and monetary policy.

10. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the*

instance, there has recently been a healthy appreciation of the dangers of regulatory over-centralization in welfare and social assistance programs. We are now implementing new strategies of devolution and flexibility for the states in welfare programs.[11] Similarly, we are considering the introduction of a very substantial degree of privatization in our national social insurance schemes.[12] Despite these means-oriented innovations, there remains a strong consensus on overall federal responsibility for economic security.

Third, the New Deal experimented with an economy-wide approach to central planning and economic regulation through the National Recovery Administration (NRA),[13] to which Richard Epstein has already referred.[14] In *Schechter v. United States*,[15] the NRA was exposed as the worst sort of factional rent-seeking and was appropriately struck down by the Supreme Court. While the decision was controversial, the result was not, because the NRA had already discredited itself. We have the New Deal to thank for initiating a policy of comprehensive central planning in peacetime and failing miserably. That experience provided us with political inoculation against the sort of economy-wide central planning and associated nationalization efforts that plagued many western European nations before and after World War II, and which continue to plague some today. The early failure of this experiment enabled us to escape the persistent economic, political, and administrative maladies that similar ventures have caused elsewhere.

Fourth, the New Deal greatly intensified and extended national regulation of particular industries and sectors of economic activity–a strategy that had been introduced earlier in the Progressive era–cartelizing, for example, communications, energy, transportation, and agriculture. Richard Epstein's remarks are, I believe, primarily directed at

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New Deal Labor Legislation, 92 YALE L.J. 1357 (1983).

11. *See, e.g.*, Robert Pear, *Number on Welfare Rolls Dips Below 10 Million*, N.Y. TIMES, Jan. 21, 1998, at A13.

12. *See, e.g.*, John Cogan, *Social Security and Abracadabras*, N.Y. TIMES, Feb. 18, 1998, at A21.

13. Created by the National Industrial Recovery Act, 15 U.S.C. 701 (1933) (held unconstitutional by A. L. A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935)).

14. *See* Epstein, *supra* note 4, at 212.

15. 295 U.S. 495 (1935).

those sectors.[16] That regulatory effort was a failure then, and it is a failure now.

The good news is that, at the non-constitutional level, we have made amazing progress in the past twenty years in dismantling and cutting back on many elements of that cartelization model, especially in transportation, energy, and communications.[17] There is still much to be done. The continuing and counterproductive cartelization of agriculture is a glaring example. Residues of unjustified rent-seeking restrictions and cartelization can be found in aspects of regulations of financial resources, telecommunications, marine transportation, and even environmental regulation. The combination of economic insight and political leadership, however, has triggered an impetus to move forward. Even as we struggle to take the rest of the world with us, our job at home is not yet finished.

Beyond the New Deal, beginning in the late 1960s, we have seen the growth of social regulation cutting across the various components of the economy. Among the most visible and important of these initiatives are environmental, health, and safety regulations.[18] These regulatory programs often address genuine instances of market failure. Many of the environmental, health, and safety problems resulting from market failures are sufficiently serious to require governmental measures at the federal level. I, for one, do not believe that devolving these regulatory programs entirely to the states is an appropriate or wise solution. These are national objectives and, as such, can be accomplished with national programs. The difficulty, I argue, lies with the means utilized to meet these objectives. We have relied too much on centrally-planned command-and-control regulation to accomplish these national objectives. We are schizophrenic as a society. We applaud economic deregulation in many sectors, but when it comes to "social regulation," we forget about the inherent limitations of central planning and its serious dysfunctions, both economic

16. *See,* Epstein, *supra* note 4, at 210-11.

17. *See, e.g.,* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§ 151-613).

18. *See, e.g.,* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1534; Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651-678; Safe Drinking Water Act 42 U.S.C. §§ 300f-300j-26. Environmental Quality Improvements Act of 1970, 42 U.S.C. § 4371 (1994).

and political. The solution is to change the structures, the tools, and the instruments for achieving these social regulatory objectives, relying on market mimicking measures as much as possible; for example, utilizing tradable emission quotas, risk bubbles, information systems, and market-oriented systems. Where we must have some command regulation, the system should encompass as much flexibility and devolution as possible.

A fifth element of the New Deal is Congress's practice of delegating authority to administrative bureaucracies that combine legislative, adjudicative, and enforcement functions. The Supreme Court will not significantly curtail, much less undo, this practice at any foreseeable time. Nevertheless, society has attempted to address the problem of administrative discretion and combination of powers by developing an elaborate system of sub-constitutional administrative law, including procedural requirements and judicial review.[19] Of particular importance is the powerful rule-making process that has produced enormously detailed regulations and a bloated *Federal Register.*

At the same time, because of political changes in Congress and elsewhere, we have in many areas moved from a system of broad delegation to highly detailed statutes. When I was in the Bush administration, I remember attending the President's signing of the 1990 Clean Air Act Amendments.[20] The amendments were a stack of paper about two feet tall. Those were just the amendments to a long, already quite detailed statute. We have come a long way from the generalities typical of much New Deal legislation. I do not believe, however, that we have promoted accountability or that we have better government as a result.

In the process of legalizing the administrative process, we have also produced enormous stasis in the system. It is very difficult to adopt new regulations. That may be a good thing, but it is also very difficult to improve existing regulations or to get rid of them. It took the Environmental Protection Agency ten years to come out with so-called integrated pollution

19. *See* S. BREYER, R. STEWART, C. SUNSTEIN, AND W. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY (4th ed. 1998).

20. Clean Air Act, 42 U.S.C. § 7401 (1998), *amended by* Pub. L. No. 101-549, 104 Stat. 2399 (1990).

control regulations for the pulp and paper industry.[21] It is likely that these regulations are not going to be changed significantly for at least another 15 years, even if they turn out to be fundamentally flawed. The result of detailed statutes and limited innovation in regulation is built-in obsolescence in our system of central planning through litigation.

Detailed statutes, elaborate rule-making procedures, and judicial review are understandable responses to administrative power, but they treat the symptom rather than the disease. The fundamental problem is that we have regulations where markets do not fail, or at least do not seriously fail, and that our regulations rely on central planning rather than on the allocation of incentives through market-mimicking structures. In the case of environmental regulation, for example, we should be relying, as already noted, much more heavily on tradable pollution rights, taxes on pollution, facility-wide risk bubbles, and environmental covenants between firms and governments.

Perhaps the most basic problem that we face at the present time is not too much sectoral regulation or even dysfunctional central planning and social regulation, but the fact that government is too big in general and tries to do too much. We have a special-benefits state. I knew this in the abstract as an academic. When I went to Washington, the reality of this governmental role was all too vividly apparent. I quickly learned that most government agencies and Congress operate as a vast labyrinthine machine to distribute special benefits to various constituency groups. I found myself and others in the Justice Department characteristically allied with Boyden Gray and others at the White House and certain people in the Treasury. We were the ones who said "no," although we could not do it very often. I could only do it when something was clearly unlawful. The sprawl of the special-benefits state has hobbled even the White House and the Treasury.

Is this the fault of the New Deal? I'm not sure. Certainly, the New Deal led people to look to Washington for solutions and for protection, but its objectives were limited and the New Deal administration was, on the whole, pretty frugal. The vast growth of the special-benefits state began slowly in the 1950s,

21. *See* 40 C.F.R. § 1.39 (1998).

accelerated dramatically in the 1960s and 1970s, slowed in the 1980s, and has resumed in the 1990s.

Convincing the American public and its leaders that this growing special-benefits state is a bad bargain should be of vital concern. We have successfully persuaded people that sectoral cartelization of the economy through centralized economic regulation is a bad bargain, economically and politically. Now we must unflinchingly reveal the dark side of the special-benefits state. We have seen enormous progress in the last fifteen years, and we should not lose hope. As Judge Bowman said, the courts in a constitutional democracy have a constitutional role to maintain the integrity of basic structures and protect individual freedoms.[22] In the end, however, the government that people get is largely the government they want. We have to persuade the American public to "just say no."

22. *See* Bowman, *supra* note 3, at 207.