

Individualism, Indecision and Indifference - The Supreme Court and the Popular Will, 1870-1949

Edwin Rothman

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Edwin Rothman, *Individualism, Indecision and Indifference - The Supreme Court and the Popular Will, 1870-1949*, 35 Marq. L. Rev. 219 (1952).

Available at: <http://scholarship.law.marquette.edu/mulr/vol35/iss3/1>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

INDIVIDUALISM, INDECISION AND INDIFFERENCE

THE SUPREME COURT AND THE POPULAR WILL, 1870—1949

EDWIN ROTHMAN*

Since 1937 the United States Supreme Court has virtually abdicated its power of invalidating Congressional legislation. Although the Court's decisions of the past twelve years have been marked by acrimonious disagreements, such disagreements have not concerned, as they did prior to 1937, the question: Has Congress the *power* to do this? Instead, the Justices have wrangled over the question: What was the *intent* of Congress? The Court, in other words, has since 1937 been acting not as the stern censor of Congressional intentions, but as the solicitous interpreter of such intentions.

What is the significance of this judicial revolution? In past years some observers charged that the Court, by invalidating regulative and ameliorative measures, was thereby frustrating the execution of the "popular will." For example, in 1912 G. E. Roe wrote: "The courts are frankly the champions of the old order as against the new. . . . Their decisions . . . are protecting special privilege, and represent ideas of government and of law which are in conflict with the convictions of a majority of the people."¹ And in 1918 A. M. Kales declared: "The Supreme Court is the American substitute for the British House of Lords. It constitutes the real and only conservative second chamber of the federal government . . . [and] for each of the state governments." He added that the Court is "organized to defeat the popular will as expressed in legislation when that will appears to endanger what the Court may regard as a fundamental requirement of the social structure itself."²

Should we conclude, then, that the Supreme Court has, since 1937, abandoned this alleged decades-long attempt to defeat the "will of the people"?

* B.A., University of Minnesota; M.A., University of Wisconsin; Ph.D., The Johns Hopkins University; former professor, University of Detroit; presently a staff member, Bureau of Municipal Research, Philadelphia, Pa.

¹ ROE, OUR JUDICIAL OLIGARCHY 22 (1912).

² *New Methods in Due Process*, I MAGGS (ed.), SELECTED ESSAYS ON CONSTITUTIONAL LAW 488. In 1941 Robert H. Jackson referred to the Supreme Court as "an overriding legal authority completely independent of the popular will." He asserted that the current "truce between judicial authority and popular will may, or may not, ripen into permanent peace." JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, p. viii.

As a re-interpretation of the role of the Supreme Court since 1870, this article will attempt to distinguish the pre-1930 period from the post-1930 period, and to suggest (1) that prior to 1930 the Supreme Court did not in any important way frustrate the fundamental popular will, but (2) that after 1930 the Court, by nullifying various New Deal measures, was, in effect, attempting to obstruct a decisive public opinion, with the result that the justices were forced eventually to retreat. This article also ventures an evaluation of the function which the Court has fulfilled since 1870, and speculates as to the role which the Court may play in the immediate future.

* * * *

For the past sixty or seventy years the United States—like other industrialized nations of the world—has been burdened with exasperating economic and political problems. By 1870 laissez faire capitalism had released, and was releasing, much of the productive capacity of America's rich resources, human and material. But already, as a by-product, the perplexing problems associated with the historically new monsters of industrial corporate enterprise had appeared. What, if anything, was to be done about effecting an adequate distribution of the fruits of mass-production? How much control, if any, should be exercised by whom, if anybody, over the expanding corporations, trusts, and industrial-combines? What, if anything, should be done about explosive employer-employee relationships?

From the vantage point of today, perhaps it should be concluded that the United States was in the throes of an evolutionary process which was carrying it down the road to some form of collectivism. But be that as it may, the underlying motif of American history during the past sixty or seventy years—up until the 1930's—has been the inability of the American people (and their representatives in the Congress and the State legislatures) decisively to decide upon a definite course of action. If there was any popular agreement at all regarding economic problems, it consisted more or less of a desire to perpetuate what was usually called "individualism." By individualism was meant that philosophy of life (and government) whereby each man was to strive for survival and success in open competition with his fellow-men. It was held that a natural result of this struggle was that the most capable obtained the positions of leadership in all walks of life. A further consequence, it was held, was that political liberty and maximum material benefits accrued to all members of society. To allow the laws of nature to work out this beneficent conclusion, individualism required that government intervene in the affairs of men as little as possible.

But while opinion was decisive throughout those years as to the desirability of perpetuating individualism, indecision arose in times of

stress as to methods of coping with perplexing economic problems. And then, for reasons to be examined below, indecision, without ever being resolved, would time and again give way to indifference. Historical evidence seems to point to the fact that *individualism*, *indecision*, and *indifference* are the keys for the understanding of American political history since at least 1870. While this triad represents an over-simplification, it nonetheless comprises a valid and useful analytical tool.

* * * *

Individualism originally had been rooted in the conditions of a frontier and frontier-conscious nation. Thereafter it was sustained by a tenacious ideological heritage. And equally, or more important, it was sustained by the unquestionable social and economic gains which had resulted from adhering to such an economic system and to such a mode of living.

Indecision was attributable to many factors, including what might be termed (1) incomprehension of the forces at work; (2) disagreement over proposed plans of action; (3) fear of governmental power; and (4) the nature of federalism. The average citizen was not alone in his inability to gauge and comprehend the dynamics of the economic problems; he was in the company of the politician, the statesman, the professor, the judge, the journalist. . . . Unable to diagnose the ailment, neither the average citizen nor the expert could confidently or persuasively prescribe a remedy. It was impossible, therefore, to obtain agreement on a well-reasoned, integrated, comprehensive plan of action. Every plan met opposition from some minority group or groups (together these opposing groups perhaps aggregated a majority of the population.). And always operating in the background—sometimes openly in the foreground—were highly organized interest groups which, through propaganda, or corruption, or social pressure, or some combination of the three, sought to weigh the scales in favor of no program.

The fear of all governmental solutions was explicable in the light of the fact that the essence of individualism is antipathy to governmental intervention. But individualism had produced problems and abuses which, it was strongly urged by reformers and radicals, only state intervention could remedy. Americans found themselves in the predicament of having to call upon government to preserve a way of life and economic system which was based on the absence of governmental intervention. As a result, although piece-meal governmental intervention was effected from time to time, each extension of such power was undertaken with misgiving. It is not difficult, therefore, to understand how this anomalous situation resulted in indecision.

Also making for indecision were the peculiar problems associated with federalism and constitutionalism. The task of preserving State sovereignty and of preventing undue centralization of power plagued

the proponents of those schemes which recognized the interstate nature of the economic and political disturbances. Thus even if a course of action could tentatively be accepted, indecision arose as to *who should* execute it, the States or the federal government? And then a further source of indecision resulted from a searching of souls as to whether either government *could* "constitutionally" undertake the job.

In view of the fact that *indifference* alternated with indecision, it is perhaps somewhat inaccurate to list it as a "third feature" of pre-1930 history. In any event, individualism may perhaps be viewed as the "constant"—the ever-desired end and symbol. Accompanying individualism was the attitude of either indecision or indifference. Distress, discontent, and a demand that some remedy be found—these were most acute during depression periods, such as those of 1873-1878; 1882-1885; 1892-1894; 1907-1908; 1914-1915; and 1920-1921. It was in these periods of need, suffering, and discontent that the public's state of mind was, for reasons outlined, indecisive. Then, with the upturn of the business cycle, indecision always faded into indifference. Time and again, recurring periods of prosperity served to undermine whatever support had been tendered certain proposed plans for the solution of economic problems.

This attitude of indifference as to ameliorative or regulative legislation was reinforced by the appearance of various "diverting" issues, such as the easy-money agitation; the imperialistic adventures of the early twentieth century; the "direct government" movement for initiative, referendum, recall, et cetera; the feminist and prohibition program; the first World War; and the perennial tariff question.

In the light of the above analysis, it is perhaps explicable why an integrated and comprehensive approach was not adopted to cope with the problems of corporate mass-production industrialism. But discontent and distress—rising and falling with the business cycle—did force the government, federal and State, to hazard pragmatic, piece-meal regulative and ameliorative measures.

At all times, however, such groupings were aimed more or less at preserving an individualistic society, in the sense that government was grudgingly utilized in an attempt to cope with privately-created and privately-enforced rigidities and privileges—elements which threatened to destroy in entirety the free competition basic to individualism. No attempt, however, was made to displace private enterprise with government ownership, nor to replace private control of the economy with overhead governmental direction. So, too, no thorough-going ameliorative program—to include unemployment compensation, old age and health insurance, and so forth—was adopted by either the State or federal government.

Thus it might be said that the people and their representatives were seeking an economic solution in terms of which the preservation of basic individualism would be possible. But the people appeared to be unable to make up their minds *how*, if at all, to utilize the governmental apparatus to attain the individualist end. Their disposition was to fear and oppose the use of governmental power. Each extension of that power, however small, was greeted by misgivings and warnings. The result was that, until the New Deal era, the United States remained, so far as aims and symbols were concerned, the most individualistic of the Great Powers.

* * * *

Turning now to the subject of the exercise of judicial power in connection with the economic order, since about 1886 the notion has been frequently voiced that the Supreme Court, by invalidating reglative measures dealing with the problems of corporate mass-production industrialism, was thereby frustrating the execution of the will of the people. But this writer contends that such a proposition is untenable, so far as the period 1870-1930 is concerned. The point is that the measures which were voided did not actually represent decisive manifestations of the popular will. As has been suggested, if there was such a thing as a discernible and imperious popular sentiment respecting economic problems, it centered in the main about the desire to perpetuate individualism, in the belief that only under such a system could the good life be achieved. Accompanying this goal, which might be termed a decisive popular will as to *ends*, there were, for the greater mass of people, the generalized attitudes of either indecision or indifference as to any or all means. Apart from the particular special interest groups directly involved, the greater mass of the people were far from certain that the congressional and State enactments provided the correct expedients for coping with the difficulty. Consequently, when adverse judicial rulings were rendered in a time of indecision, they had the effect of making more profound the existing confusion and uncertainty. On the other hand, when rendered during a period of indifference, the decisions were either applauded or disregarded by the people.

In the light of these prevailing attitudes, we can understand why the Court could with impunity strike down legislative measures. And we can understand how some observers, by failing to take these attitudes properly into account, were led to subscribe to the notion that the Court was obstructing the popular will. Thus, regarding the Sherman Anti-Trust Act, while it was probably true that the *E. C. Knight* case "did to all intents and purposes nullify the Sherman Act, and keep it nullified during the most critical period in our industrial history, when most of

the great trusts were formed,"³ nevertheless this did not mean that the Court was thereby frustrating the popular will. It is safe to say that there was no decisive popular will regarding trusts, corporations, and the Sherman Act. The philosophy behind the Sherman Act was "individualism, pure and undefiled," as Charles A. Beard put it,⁴ but neither the people nor their legislators were convinced that the Sherman Act represented the best way of dealing with abuses. The debates relating to this Act, according to Walton Hamilton and Irene Till, showed that the Congress "sensed the rush of an oncoming industrialism" but "could bring itself to do something about it only in a babble of voices." The Sherman Act, he concluded, was born "out of an inability of Congress to face the economic problems of its day."⁵ In such an indecisive context, the Court's decisions cannot be regarded as obstructing the "will of the people."

It was during the periods of rather general indifference that the Court most strikingly seemed to be all-powerful. During the twenties, for example, the Court was severely criticized by minorities consisting of liberals and radicals for nullification of federal statutes in such cases as *Bailey v. Drexel Furniture Company*, *Adkins v. Children's Hospital*; and for a long string of decisions hostile to State regulative measures. Scholars joined reformers in warning of the dire consequences that would befall the country as a result of this abuse of judicial power. Yet it is safe to say that the people as a whole were profoundly unconcerned as to what the Court was doing. In the twenties, said Lindsay Rogers, "mental relaxation in politics was desired. The country did not want to think. . . . From 1921 to, say, 1929, a specious kind of prosperity made the people suppose that there was a divine correlation between lack of thinking on public problems and material well-being."⁶ Under such circumstances, again it can hardly be maintained that the Supreme Court, by nullifying marginal regulatory measures, was flouting the basic desires of the American people.

In sum, so far as the half century prior to 1930 was concerned, the Court was not frustrating the popular will. Both the people and the Court were more or less agreed on the fundamental—the ever-desired individualism. Far from frustrating the popular will, the Court actually reinforced it. With regard to particular measures adopted by Congress or State legislatures to cope with the problems of corporate mass-production industrialism, the Court did at times interpose a stymie. But due

³ E. S. Corwin, quoted in Edgerton, *The Incidence of Judicial Control over Congress* (1937), in 1 *SELECTED ESSAYS* 814.

⁴ Beard, *The Myth of Rugged American Individualism*, 164 *HARPER'S MAGAZINE* 17 (Dec., 1931).

⁵ Hamilton and Till, *Antitrust in Action* (T.N.E.C. Monograph No. 16, 1940), p. 11.

⁶ ROGERS, *CRISIS GOVERNMENT* 116 (1934).

to the factors of indecision and indifference, it is inaccurate to say this represented vetoing the will of the people.

* * * *

The unprecedented "prosperity" of the twenties had blinded statesmen, professors, business-men, labor leaders, and average citizens to the dislocations and malfunctioning of the economic machinery. It was believed that poverty had been, or was being, abolished for the first time in the history of man. "Two chickens in every pot and a car in every garage" appeared to be in the offing. Apparently a basis had been laid for an economy of abundance. People congratulated themselves for having resisted the temptation to abolish private enterprise and abandon individualism.

Then came the catastrophic crash of 1929. On the heels of a promised economy of abundance, there developed a depression the severity of which had never been equalled. The American people were shocked and distressed. As the depression deepened, and as private enterprise appeared to be unable to repair the ravages, opinion began to swing away from individualism. The American people became enamored with the notion that the federal government must assume responsibility for the welfare of the individual and must assume responsibility for the efficient functioning of the economy. With the advent of the New Deal, opinion came decisively to welcome state intervention. While the articulateness and acuteness of this change in popular will should not be over-exaggerated, nevertheless the existence of such a change was unmistakable.

Why had not such a decisive anti-individualist shift in public opinion taken place in previous depression periods? What was peculiar about conditions in the thirties so as to make this shift possible? Many reasons may be listed. Two have already been mentioned. First, the severity of the depression was unprecedented. Secondly, the people had, in the twenties, been led to believe that prosperity had come to stay. The subsequent shock had a compound effect upon the basic thought-processes of the citizenry.

But even more important was this fact: economic and political forces had, for some fifty or sixty years, been tearing away at the fabric of individualism. Briefly, the quest for security, the desire to avoid the rigors of "cut-throat" competition, the ever-increasing volume of group pressures upon government for aid and subsidies—like an acid, these factors eroded the individualism of the American economy. The catch-as-catch-can struggles, the bitter-end survival of the fittest, and so on, seemed to have lost their appeal, in practice if not in principle. Manufacturers sought security, a guaranteed market and a guaranteed profit. Workers sought security and a guaranteed standard of living. Farmers sought security and a guaranteed income. . . . In sum, individualism

had been alive both as substance and symbol in the first few decades after 1870, but by 1929, although individualism had survived as a symbol, much of its substance had perished.

Furthermore, it was to the national government that individuals and the highly organized interest groups had been turning for succor. Down through the years, just as individualism was in fact worn thin, so too federalism was obviated as a deterrent to the exercise of governmental power. As a result of the interstate nature of the problems of corporate mass-production industrialism, the federal government had gradually become recognized as the only jurisdiction able to cope with them. Witness the expansion of the grants-in-aid program; the national regulation of railroads, radio, grain exchanges, airplanes, and so on; and the establishment of such agencies as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, and the Federal Farm Board.

In the 1930's, under the impact of the forces outlined above, symbol went the way of substance; and individualism as a fundamental tenet was more or less discarded. This is not to deny the fact that individualism retained a kind of nostalgic hold upon the public mind, but nevertheless it was clear that the people had definitely become conditioned to acquiesce in (or to demand) the expansion of governmental power so as to protect and foster individual welfare.

Thus, in 1935 and 1936 when the Supreme Court nullified New Deal legislation, the Court was, in effect, attempting to thwart the execution of the will of the people. For the New Deal laws, taken as a whole, were overwhelmingly decisive manifestations of the changed popular will, a state of affairs which was the reverse of the situation in the pre-1930 era. In 1935 and 1936, therefore, the Court stood sharply outlined as a political institution which was pitting itself against an imperious public will. In such a decisive context, to dam up the expression of the will of the populace is to tempt the gods of force and anarchy. Happily the crisis was speedily resolved. By 1937 the Court had for all practical purposes capitulated. President Franklin D. Roosevelt's "court battle" undoubtedly had the effect of hastening the capitulation. But the surrender was nonetheless inevitable.

The 1930's have shown that when the decisive will of the people is at stake, the Supreme Court cannot successfully impede that will for any great length of time. The Court is after all but one of the several political agencies of the government. When the people experience a decisive change of heart or mind as to fundamentals, the Court may lag behind the other agencies in responding to that change. But respond it must and does, and thereafter the Court is just as much—if not more—a tenacious exponent of the new fundamental as are the other agencies. Therefore, so long as the will of the people decisively demands that

government shall assume the responsibility for—and if necessary, the actual management of—the functioning of the economy, the Court will not, cannot interfere.

The writer is not trying to minimize the importance of the role which the Court did play during the past sixty or seventy years. As a superb articulator of the creed of individualism, the Court reinforced and sustained the prevailing popular will. In times of stress, the Court was able to deepen the indecisiveness of the community regarding means of effecting the popular will. Thus, for better or worse, the Court, through its strategic position, was able to weight the scales against radical innovation and experiment.

The Court definitely was a force making for gradualism. Because it was, basically, following the will of the people, the Court was able to exercise a restraining influence upon the legislators and the people, urging them to go slowly, to be "reasonable," to strive for an evolutionary, pragmatic solution. Thus it was able to slow down the legislative process until opinion was more settled regarding specific measures. And it was able, unconsciously, to facilitate a gradual change from individualism to a new philosophy of government. By keeping vigorously alive the judicial process, the Court helped make it possible that the political process should be effected with ballots instead of bullets; and that the political battles should be fought over constitutional symbols rather than over barricades.

One might view the Supreme Court as a wailing wall for frustrated reformers and radicals. The latter, chagrined by the failure of the people to adopt their schemes, vent their wrath upon the Supreme Court whenever it renders conservative decisions. For example, a favorite implied or explicit thesis of reformers for many years was that were it not for *United States v. E. C. Knight*, and, later, *Hammer v. Dagenhart*, the Congress would have fallen over itself in its haste to regulate manufacturing. Undoubtedly this tendency grossly to over-estimate the effect of Supreme Court decisions contributed not a little to the development of the notion that the Court was obstructing the popular will.

The 1930's, then, mark the turning point of American political and economic history. The will of the people is now decisive as to the ultimate responsibility of the government for the furthering of general welfare and the efficient functioning of the economy. How far government—the federal government—will exercise this latent power probably depends upon the ability of the highly organized special interest groups to work together to attain these ends. The fact remains that government is "authorized" by decisive public opinion to intervene, whenever necessary and to whatever degree necessary.

It is a tenable hypothesis that so long as the popular will regards security as the primary economic goal and is willing to forego individu-

alism (in the sense of anti-statism) to reach that goal, the Supreme Court will be unable again to bring into play judicial supremacy (in the sense of vetoing economic legislation).

Perhaps "social planning" will become (or is already) the inarticulate premise of the popular will, and perhaps judicial supremacy and social planning are incompatible.

Be that as it may, several important functions appear to remain within the province of the present Supreme Court. First to act as a sort of administrative court, attempting to prevent administrative abuse of power, and guiding administrators in the interpretation of congressional legislation. Second, to clear the path for national supremacy whenever State and national governments seem to clash. And third, to exercise a measure of restraint upon legislators in matters of civil liberties. In the latter instance, its role is important because opinion regarding the propriety of restrictions upon freedom of speech, press, and so on, is yet indecisive or indifferent.