



## CHAPTER FOUR

# *Promoting the General Welfare*

One of the purposes of the Constitution, stated in the Preamble, is to “promote the General Welfare.” Promoting the general welfare has two dimensions. One concerns the duty of government to provide for the basic needs of the citizenry. In general, our Constitution has not been interpreted to encompass positive rights to social or economic provision,<sup>1</sup> although there are good arguments that the Constitution is properly read (at least by the political branches if not by the courts) to secure the material conditions necessary for full citizenship and equal opportunity.<sup>2</sup> The other dimension concerns the scope of government authority to respond to the nation’s needs. In this chapter, we examine the development of our constitutional understandings in this latter dimension.

Today, Americans do not think twice about the authority of government to respond to economic needs. Social Security, Medicare, collective bargaining and minimum wage laws, disaster assistance, regulation of the financial markets, and robust initiatives to stabilize the economy comprise large parts of the work we expect our federal and state governments to do. Reasonable people may disagree about the specific policies needed to deal with various economic conditions, with regulation of the marketplace, and with the economy as a whole. But there is no question that developing, enacting, and implementing such policies are an important and legitimate part of what government does.

It was not always so. Until 1937, two lines of judicial doctrine often prevented government from responding to pressing economic problems. First,

the Supreme Court interpreted the principle of federalism to limit Congress's power to regulate the economy, reserving much of that sphere for state governments. The principle of federalism is implicit in Article I's enumeration of limited federal powers, and it is made explicit in the Tenth Amendment's reservation to the states of powers not delegated to the federal government. However, the Constitution does not state the principle with the precision necessary to resolve particular disputes over the scope of federal power. Consider, for example, Congress's power to regulate interstate commerce.<sup>3</sup> Before 1937, the Supreme Court often applied the federalism principle by adhering to the eighteenth-century understanding of the term "commerce." As Justice Thomas has explained, "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. . . . [T]he term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture."<sup>4</sup> Applying this definition, the Court repeatedly struck down federal regulation of manufacturing, mining, agriculture, and other "local" activities on the ground that they occurred "prior to" commerce and affected commerce only "indirectly."<sup>5</sup>

Under this reading of the Commerce Clause, the federal government could not enact laws to address labor inequities or to establish minimum wages or maximum hours in vast parts of the American economy. Moreover, the Court took a similarly narrow view of the Taxing and Spending Clause, disabling Congress from imposing taxes on businesses in part to implement regulatory policy unless some other enumerated power authorized the objectives Congress sought to achieve.<sup>6</sup> This limitation cast serious doubt on the validity of the 1935 Social Security Act for workers in manufacturing, mining, and other activities occurring "prior to" interstate commerce. The National Labor Relations Act, which established procedures for collective bargaining, was also constitutionally suspect before 1937.

The second doctrinal roadblock to enacting social and economic policy was the Supreme Court's interpretation of the Due Process Clause in *Lochner v. New York*.<sup>7</sup> Just as narrow construction of the commerce and spending powers limited Congress's ability to regulate the economy, so too did the Court's construction of Fourteenth Amendment "liberty" to encompass "freedom of contract" disable state governments from enacting various labor laws, price regulations, maximum hours and minimum wage laws, and other economic

regulations.<sup>8</sup> On this view, the state had to leave workers free to accept any terms of employment they were offered, even if it meant, as a practical matter, that workers had to accept unfavorable terms dictated by their employers or else remain unemployed.

The Court's federalism and contractual freedom jurisprudence was not a marginal development. It significantly affected the power of government to meet society's needs. As the nation became more industrialized and as the national economy became more integrated, the impact of the Court's doctrines on government's ability to respond to economic conditions became more pronounced in the everyday life of the nation. In turn, both state and federal governments came to conclude that a market economy was vulnerable to serious distortions and inequities if left largely unregulated.

One of those conditions was the increasing concentration of corporate power through trusts and monopolies. In 1890, Congress passed the Sherman Antitrust Act, which prohibits contracts or combinations in restraint of trade.<sup>9</sup> When the federal government sued the American Sugar Refining Company for "acquir[ing] nearly complete control of the manufacture of refined sugar within the United States," the Supreme Court held that Congress had no power to regulate contracts governing activities that supposedly precede commerce, such as sugar production, even though the evident purpose of the production monopoly was to control the price of sugar in the national marketplace.<sup>10</sup>

The sweatshop conditions facing wage laborers who migrated from rural areas into the cities exposed the vulnerabilities of an unprotected workforce. When Congress responded by prohibiting the interstate shipment of goods produced by child labor, the Supreme Court invalidated the law again on the ground that manufacturing occurred prior to interstate commerce and thus the working conditions associated with manufacturing were outside of Congress's control.<sup>11</sup> Such matters were left to individual states, the Court said, because the Commerce Clause gave Congress no authority to set a national baseline of fair competition among states with respect to child labor, minimum wages, or maximum hours.<sup>12</sup>

And yet, when states attempted to establish minimum wages or maximum hours pursuant to their authority to regulate local employment conditions, they encountered judicial resistance based on the doctrine of freedom of contract.<sup>13</sup> Although the decisions were not uniformly anti-regulation,<sup>14</sup> the

freedom of contract doctrine prevailed for more than three decades after *Lochner* and prohibited many government efforts to ensure equitable terms and conditions of employment. Striking down a New York minimum wage law for women in 1936, the Court continued to state the doctrine in broad terms:

The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception.<sup>15</sup>

In these and other ways, the Supreme Court articulated a restrictive view of federal and state authority that blocked measures to reduce some of the inequities, hardships, and economically harmful conditions that accompanied the industrialization and urbanization of the economy. While these doctrinal roadblocks were consequential even before 1929, they deepened the genuine crisis facing the nation after the economy fell into the grip of the Great Depression. When President Roosevelt took office in 1933, he voiced the American people's widely shared belief that "the economy would almost certainly remain debilitated without substantial government intervention" and that "government had an affirmative obligation to do whatever was necessary to restore a healthy economy."<sup>16</sup>

In the first hundred days of his administration, President Roosevelt proposed and Congress enacted ambitious programs to stabilize the supply side of the economy. The cornerstones of his early efforts were the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA), each intended to prevent destructive competition, to establish equitable wages, and to maintain stable supplies and profitability. In 1935, the Supreme Court struck down the core provisions of the NIRA and, in the next year, invalidated the AAA.<sup>17</sup> In the latter decision, *United States v. Butler*, the Court ruled that despite the apparently broad authority of the federal government to tax and spend for the "general welfare,"<sup>18</sup> the tax-and-subsidy provisions of the AAA were beyond the powers of Congress. "Coming on top of the 1935 opinions, the *Butler* verdict appeared to indicate a determination by the Court

to wipe out all of the New Deal.”<sup>19</sup> With these decisions as well as others that invalidated the federal railroad workers’ pension law<sup>20</sup> and provisions of the Bituminous Coal Conservation Act,<sup>21</sup> the Supreme Court thwarted the focused response of the President and Congress to the most pressing economic crisis the country had ever faced.

On June 2, 1936, the day after the Court invalidated New York’s minimum wage law for women, President Roosevelt said: “It seems to be fairly clear, as a result of this decision and former decisions, using this question of minimum wage as an example, that the ‘no-man’s-land’ where no Government—State or Federal—can function is being more clearly defined. A State cannot do it, and the Federal Government cannot do it.”<sup>22</sup> The impasse with the Court deeply frustrated President Roosevelt and his supporters. They could not believe that the Constitution forbade government from improving the working and living conditions of millions of Americans mired in poverty and hopelessness, or from regulating the marketplace to stabilize important industries and to stimulate growth. Constitutional authorities inside and outside of Roosevelt’s administration debated whether the problem lay with the Constitution itself or with the current composition of the Court. In the end, President Roosevelt saw the prospect of amending the Constitution as remote if not impossible<sup>23</sup> and decided to pursue the course he thought most feasible to reform the Court’s misguided doctrines.

On February 5, 1937, the President proposed the Judiciary Reorganization Act of 1937. It contained a provision to add one judge or Justice to any federal court on which a judge or Justice over the age of seventy and one half was sitting. The impact on the Supreme Court would have been dramatic and immediate: the bill would have enabled Roosevelt to appoint six new Justices. Despite widespread dissatisfaction with the Court, the court-packing plan met fierce and widespread resistance even among members of Roosevelt’s party in Congress.

But before its validity could be tested legally or politically, the Supreme Court handed down a remarkable series of decisions dismantling the jurisprudence that had stymied federal and state legislative action. On March 29, 1937, the Court rejected a freedom-of-contract challenge to a minimum wage law from the state of Washington that was in all material respects identical to the New York law struck down a year earlier.<sup>24</sup> Two weeks later, the Court interpreted the Commerce Clause to sustain federal protections for labor

organizing provided in the National Labor Relations Act,<sup>25</sup> and six weeks after that, it construed the Spending Clause to uphold the unemployment compensation provisions of the Social Security Act.<sup>26</sup> In each of these 5-4 decisions, Justice Roberts abandoned the pre-1937 jurisprudence that he had previously endorsed, providing the so-called “switch in time” that saved the nine-person composition of the Court. The court-packing plan was never enacted, as congressional support for the bill dwindled. In the ensuing years, several departures from the Court enabled President Roosevelt to solidify, through new appointments, the change in direction that the 1937 decisions had signaled. Ultimately, the Court repudiated all significant aspects of its earlier doctrine blocking federal and state initiatives to promote equity, fair competition, and stability in the market economy.<sup>27</sup>

The legitimacy of the specific sequence of events by which the doctrinal transformation occurred has been much debated by constitutional scholars, with one leading theorist arguing that the 1937 change was an unorthodox but valid amendment of the Constitution outside of the Article V process.<sup>28</sup> Through all of the scholarly debate, the Court’s changed understanding of the scope of federal and state power to oversee the economy has endured with the support of a broad national consensus. Today, as the nation faces its most severe economic crisis perhaps since the Great Depression, that understanding informs proposals for aggressive government action to stimulate growth and to cushion the free market’s effects on individuals and corporate entities. Far from requiring a formal amendment to the Constitution, the legitimacy of such government action rests comfortably on a proper reading of the Constitution as written—that is, as a declaration of general principles “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs”<sup>29</sup> and not as a set of narrow legalisms that “would cripple the government, and render it unequal to the object for which it is declared to be instituted.”<sup>30</sup> In short, the constitutional history of the New Deal reveals the inadequacy of the Court’s pre-1937 interpretive methodology rather than any shortcoming of the Constitution itself.

The error of the Court’s jurisprudence on the scope of federal power lay in its adherence to formal conceptions of “commerce” that failed to correspond to the economic reality of the challenges Congress tried to address. The contrived distinctions between activities that “precede” or “succeed” commerce, or between activities with “direct” or “indirect” effects on commerce,

disabled Congress from responding to problems, such as anticompetitive practices and unfair labor standards, with clearly national dimensions. Whatever resonance such distinctions might have had in a smaller nation comprised of distinct local economies, they bore little relationship to the functional realities of the integrated national economy emerging from the forces of industrialization and urbanization, the rise of large corporations, and advances in transportation and communication.<sup>31</sup> In applying eighteenth-century definitions of commerce to the twentieth-century economy, the Court's conception of federalism failed to account for the more interdependent nation that the United States had become. As Justice Souter has observed, "[t]he first call of a theory of law is that it should fit the facts," and "[t]he facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people."<sup>32</sup> The lesson of the New Deal is thus similar to the lesson of *Brown*: constitutional interpretation that is untethered to social context and unresponsive to the lived experience of the American people cannot keep faith with a charter of government designed to endure and meet the challenges facing each generation, and will not long command legitimacy.

The *Lochner* doctrine was also grounded in an implausible account of economic and social realities. Whatever the merits of construing "liberty" in the Due Process Clause to encompass a right of contractual freedom, the Court's recurring portrait of state regulation as unwarranted interference with supposedly voluntary and consensual relationships between employers and employees or between businesses and consumers<sup>33</sup> often ignored the conditions of hardship, privation, and unequal bargaining power in the face of ascendant corporatism that made true freedom of contract illusory. Moreover, the doctrine of contractual freedom failed to recognize that market ordering under the common law is itself a social and legal construct rather than a natural baseline from which to evaluate the validity of government action.<sup>34</sup> Once the Court recognized that traditional market mechanisms were "state-created, hardly neutral, and without prepolitical status," government regulation of market exchange could no longer be deemed suspect on the ground that it disturbed the purportedly "natural" outcome of private choices.<sup>35</sup>

After 1937, the Court generally applied minimal scrutiny under the Fourteenth Amendment to "regulatory legislation affecting ordinary commercial

transactions” and reserved “more searching judicial inquiry” for legislation that may reflect “prejudice against discrete and insular minorities.”<sup>36</sup> And with respect to congressional power, the Court, appropriately pressed by the nation’s needs and experiences, found a new equilibrium that adapted the principle of federalism to accommodate national authority to facilitate a productive and fair economy. As the Court eventually explained, “the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>37</sup>

In recent years, the Court has signaled new interest in policing the boundaries of Congress’s commerce power, perhaps “portend[ing] a return to the untenable jurisprudence from which the Court extricated itself [over] 60 years ago.”<sup>38</sup> The Court has declared certain subjects off-limits to federal regulation by attempting to draw a line between “economic” and “non-economic” activity<sup>39</sup>—a line that “looks much like the old distinction between what directly affects commerce and what touches it only indirectly” in its incoherence and inefficacy in advancing federalism values.<sup>40</sup> Rejecting the distinction between direct and indirect effects many decades ago, Justice Cardozo wisely observed that “a great principle of constitutional law is not susceptible of comprehensive statement in an adjective.”<sup>41</sup> That admonition remains as pertinent today as it was then in pointing the way toward faithful interpretation of constitutional text and principle.

In sum, the constitutional foundations of the government’s ability to respond to the nation’s economic needs rest on an interpretation of the Constitution that adapts its words and principles to the actual experiences and changing conditions facing the American people. Neither original understandings nor static, formal categories provide an adequate account of what we take for granted today as the legitimate scope of government power and responsibility to promote the general welfare. The adaptation of the Constitution’s text and principles to authorize government to address contemporary economic challenges provides another illustration of what we mean by constitutional fidelity.