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Supreme Court Goes Back to the 1930s

by Edward Spannaus

On Feb. 21 of this year, the five-justice majority on the U.S. Supreme Court, led by William Rehnquist and Antonin Scalia, issued a new ruling which signals the return of the court to its pre-1937 period, when the high court routinely invalidated any and all measures designed to deal with the 1930s economic emergency which had nearly destroyed the nation's productive economy, and had impoverished its citizens.

With the U.S. and the global economy plunging into a new Great Depression, the Supreme Court's action on Feb. 21—taken in conjunction with its unprecedented intervention in December to hand the Presidential election to George W. Bush—should set off alarms among all citizens concerned about the future of this nation. It should also be taken as striking confirmation of Lyndon H. LaRouche, Jr.'s warning in "Scalia and the Intent of Law," published in the Jan. 1 issue of *EIR:*

"If Scalia's dogma were to continue to define the majority view of the U.S. Supreme Court," LaRouche wrote, "an early slide into chaos could occur simply as a result of a specific political inability of the incoming government: its inability to muster the kind of political support needed for any of those kinds of legislative and other measures, by means of which our nation could be saved from the now rapidly accelerating threat of financial and economic chaos. No effective measures to deal with this present crisis, could be taken, without overriding promptly virtually every principle which Scalia has presently come to represent in that Court."

Here, we will first review the court's Feb. 21 ruling in *Alabama v. Garrett,* and then discuss the appropriateness of Justice Stephen Breyer's comparison of that ruling, with the one of the more notorious anti-New Deal rulings of the 1930s Supreme Court.

Fourteenth Amendment

The *Garrett* ruling sharply limited the scope of the Americans with Disabilities Act (ADA), a 1990 law which, ironically, was signed by former President George H.W. Bush with strong support from Republican Senate leader Bob Dole (who himself is partially disabled by a war injury). The court held that Congress could not authorize lawsuits by citizens, against a state, for denial of equal protection of the law under the Fourteenth Amendment. Specifically, the majority said that the enactment of the ADA exceeded the powers granted by Sec. 5 of the Fourteenth Amendment, which states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The majority decision was nominally written by Chief Justice Rehnquist, but it bears all the markings of the behind-the-scenes intellectual maneuvering by Scalia, which is well-known to those who have studied the inner workings of the current court.

While the majority ruling made a distinction between lawsuits for discrimination against disabled persons, and lawsuits for violations of voting rights, no one who has followed the Rehnquist-Scalia bloc's determination to rip up the Voting Rights Act of 1965, would put any faith in such a distinction. The majority said that Congress had not shown a pattern of state-sponsored discrimination against disabled persons, which would be sufficient to overcome the Eleventh Amendment's prohibition against the Federal court's hearing lawsuits by a citizen of one state against another state. Of course, in this case, the court said that the Eleventh Amendment extends to lawsuits by citizens against their *own* state.

In true Alice-in-Wonderland fashion, Rehnquist explains that this is so, because *we say it is so*. "Although by its terms the Amendment applies only to suits against a State by citizens of another State, *our cases* have extended the Amendment's applicability to suits by citizens against their own States" (emphasis added). For "textualists" like Scalia's majority, who profess to rely on the strict wording of the Constitution and its Amendments, this is an astounding exercise in "judicial activism."

In his dissenting opinion, joined by the other three justices, Justice Breyer blasted the majority for invading the powers assigned to Congress by the Constitution. And he especially attacked the majority for its conclusion that Congress did not have sufficient evidence of discrimination against disabled persons, when it enacted the ADA: He showed the extensiveness of the evidence gathered by Congress itself and by a special Congressional task force.

But, as retiring Supreme Court Justice Thurgood Marshall said in 1991, "power, not reason" is the currency of this court's decision-making.

Supreme Court vs. the General Welfare

To understand the implications of the *Garrett* case, we have to go back 55 years, to another time when the court operated on the basis of pure power, exercised on behalf of property rights, against the General Welfare.

In his dissenting opinion in *Garrett,* Justice Breyer compared that ruling to the 1936 ruling in *Carter v. Carter Coal*

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Co., in which the Supreme Court threw out the Bituminous Coal Act (the "Guffey Act"), which provided a code of conduct for the bituminous coal-mining industry with respect to price and trade practices, and which also guaranteed collective bargaining and other labor rights. This law was enacted by Congress after the Supreme Court had thrown out the National Industrial Recovery Act and other New Deal legislation in 1935. Time after time, the Supreme Court had rejected the Administration's arguments that, under its "General Welfare" powers, Congress could enact legislation to regulate and attempt to restart the economy, or to provide a safety net of minimum wages and protections for the labor force.

At that time, the Supreme Court repeatedly threw out economic legislation, on the pretext that such laws exceeded Congress's power to regulate interstate commerce. This was especially preposterous in the case of coal. The court claimed that coal mining was simply a "local" activity—when in fact 97% of the coal mined by the Carter company went into interstate commerce. Congress could do nothing about the conditions of labor in this or any other industry, the court held; these were strictly local matters left to the states.

Robert Jackson—a former U.S. Attorney General, and later Associate Justice of the Supreme Court—wrote in 1940, that the majority opinion in the *Carter Coal* case was "a states' rights opinion which would have done credit to the talents and sentiments of Roger Taney"—the Chief Justice and notorious author of the *Dred Scott* decision, much praised by William Rehnquist today.

But, in fact, "states' rights" was only a pretext—then and now. The real target was the General Welfare, versus property and contract rights. This was demonstrated by the Supreme Court shortly after the *Carter* case, when it struck down the New York State minimum wage law for women, on the grounds that the *states* could not interfere with the freedom of contract.

Mobilizing Against the Court

The *Carter* case and related atrocities by the Supreme Court, gave rise to a political movement to force the high court, one way or another, to acknowledge the Federal government's constitutional power to promote and protect the General Welfare.

The 1936 Presidential election was not only a referendum on the New Deal, but also on the Supreme Court. Although FDR said little explicitly about the court during the campaign, the Republicans mounted a vigorous defense of it. In fact, some of Roosevelt's advisers had urged him to include in the Democratic Party platform, a proposal for a Constitutional amendment which would definitively spell out the meaning of the "General Welfare" clause, to eliminate all doubt as to Congress's power to enact national economic legislation.

In his Second Inaugural Address, on Jan. 20, 1937, Roosevelt launched a campaign to educate the American people about the Constitution's commitment to protecting the General Welfare. Describing the situation when he first took office, four years earlier, FDR said that "we knew that we must find practical controls over blind economic forces and blindly selfish men."

FDR recalled why the Constitution had established a strong Federal government: "We of the Republic sensed the truth that democratic government has innate capacity to protect its people against disasters once considered inevitable, to solve problems once considered unsolvable. . . . We refused to leave the problems of our common welfare to be solved by the winds of chance and the hurricanes of disaster."

"This year marks the one hundred and fiftieth anniversary of the Constitutional Convention which made us a nation," FDR continued. "At that Convention our forefathers . . . created a strong government with powers of united action sufficient, then and now, to solve problems utterly beyond individual or local solution. A century and a half ago they established the Federal Government in order to promote the general welfare and secure the blessings of liberty to the American people."

Two weeks later, FDR proposed his so-called "court-packing" plan to reform the Supreme Court. Then he took his case directly to the people, in a Fireside Chat on March 9, 1937. He warned of the danger of another 1929, and said that measures were necessary to prevent this and to complete the recovery program—measures that only the national government could undertake.

FDR urged the people to re-read the Constitution, and explained: "In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare." Roosevelt said that the powers given to Congress could be best described as being "all the powers needed to meet each and every problem which then had a national character and could not be met by merely local action"—a direct swipe at the Supreme Court. And he noted that the Framers were aware that in future times, other things would emerge as national problems, so "they gave to Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States.' "

As it turned out, Roosevelt's mobilization of the American people was sufficient to force the court to shift ground. By May 1937, the Supreme Court had begun to reverse course, issuing two rulings which affirmed New Deal programs—for the first time—on the basis of the General Welfare clause. One case involved the unemployment tax and compensation provisions of the Social Security Act, and the other, the old-age benefits provisions of the Social Security Act.

The Feb. 21 ruling in the *Garrett* case, shows that that same type of mobilization, may soon be needed again.