

COMPARING F. D. ROOSEVELT AND B. H. OBAMA IN DEVELOPING WELFARE

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The New Deal gave the laid-off worker a guarantee that he could count on unemployment insurance to put food on his family's table while he looked for a new job. It gave the young man who suffered a debilitating accident assurance that he could count on disability benefits to get him through the tough times. A widow might still raise her children without the indignity of charity. And Franklin Roosevelt's greatest legacy promised the couple who put in a lifetime of sacrifice and hard work that they could retire in comfort and dignity because of Social Security. ... Today, we're told by those who want to privatize that promise, how much things are different and times have changed since Roosevelt's day. I couldn't agree more. A child born in this new century is likely to start his life with both parents—or a single parent—working a full-time job. They'll try their hardest to juggle work and family, but they'll end up needing child care to keep him safe, cared for, and educated early (Senator Obama at the Washington National Press Club luncheon, June 1, 2005).

KEY WORDS

Antitrust; Health care; Competition; Energy; Institutional reform; New Deal; Poverty; Supreme Court of Justice; Insurance.

PALABRAS CLAVE

Competencia; pobreza; salud pública; seguridad social; energía; reforma institucional; seguro; Tribunal Supremo.

ABSTRACT

Obama's expert communication skills have been recognized from day one of his campaign to compare him to Roosevelt. Comparisons, however, go beyond rhetoric when studying the similarities and differences in developing the welfare state using measures of antitrust, healthcare, energy and institutional reform in order to prevent or alleviate the grievous effects of poverty.

Individually or combined together,¹ these policies take a large share of a nation's budget² and can have a direct effect on the individual and on recession-induced plans to reform welfare. This same effectiveness is the reason why their implementation runs the risk of surrendering to the powers of monopoly; in the case of health in the form of insurance companies and in the case of energy through the position of holding companies in the market. Antitrust is the indispensable tool to prevent this yielding under the supervision of the Supreme Court which oversees its constitutional implementation.

Analysis of these policies also serves to describe the current scenario in American politics, how it compares to Roosevelt's and the lessons to be learnt from the past.

RESUMEN

La experta habilidad comunicativa de Obama ha sido reconocida desde el primer día de su campaña para compararle con Roosevelt. La comparación, sin embargo, va más allá de la retórica a la hora de estudiar las semejanzas y diferencias en el desarrollo del bienestar a través de las políticas de competencia, sanidad, energía y reforma institucional y así prevenir o aliviar las graves consecuencias de la pobreza.

Individualmente o combinadas, estas políticas constituyen gran parte del presupuesto nacional, y pueden tener un efecto directo en el individuo y en los planes que con el fin de atajar la recesión, modifican el estado de bienestar. Esta misma eficiencia es la razón por la que su implementación corre el riesgo de rendirse ante el poder del monopolio; en el caso de la sanidad en forma de las compañías aseguradoras y en el caso de la energía a través de la posición en el mercado de los holding. La política de competencia es el instrumento indispensable para prevenir esta cesión

¹ "Obama believed that in the twenty-first century all the big problems were directly connected to one another. Education reforms (particularly community colleges, which he was bolstering) were connected to economic growth, which was in turn dependent on reducing health care costs and transitioning to clean energy" (Alter 269).

² For details on the U.S. budget see the Executive Office of the President of the United States website: gpoaccess.gov/usbudget. Only the health industry constitutes "one sixth of the American economy" (Alter 256).

bajo la supervisión del Tribunal Supremo que supervisa la constitucionalidad de su implementación.

El análisis de estas políticas sirve también para describir el escenario actual en la política norteamericana, para compararlo con el de Roosevelt y así aprender del pasado.

ANTITRUST

On June 16th, 1933, during the first New Deal, the National Industry Recovery Act (NIRA) was passed. It envisaged suspension of antitrust enforcement as a means to achieve recovery during the economic downturn. Behind the idea of suspension was Roosevelt's conviction on the principle of concerted action in industry and agriculture looking to a balanced economy as opposed to "a murderous doctrine of savage and wolfish competition and rugged individualism" (General Hugh S. Johnson, at the time director of the NRA quoted by Schlesinger, *Vol. II*: 88). Under government supervision by the National Recovery Administration (NRA), planning and controls were to be implemented in the form of codes of conduct or codes of fair competition, tantamount to binding laws, for each industry; these codes were supposed to stop wasteful competition and to bring about more orderly pricing and selling policies.

Soon it was made obvious that these codes were hindering economic growth by promoting cartels and monopolies and providing unfair competition against small businesses. Big business (the large commercial farmers, farming corporations, banks and insurance companies) got government authorization to draft agreements exempt from the antitrust laws:

What was the result of these industrial codes? Competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power. (Varney, *Remarks*)

Roosevelt's reaction was to trim the NRA's powers, limit its jurisdiction and appoint a less radical chief; this strong antitrust crusade³ included the creation of the Temporary National Economic Committee and the Department of Justice (DOJ) Antitrust Division to change the monopolistic scenario created by lax enforcement of antitrust. Legislation was passed seeking protection for small retailers and

³ Thurman Arnold, who replaced Johnson as head of the NRA, commented: [the Roosevelt Administration] "was responsible for the first sustained program of antitrust enforcement on a nationwide scale" quoted in Varney, Christine A. Assistant A-G: "It was not until 1937, during the second Roosevelt Administration, that the country saw a revival of antitrust enforcement" (Varney, *Remarks*).

manufacturers: the Robinson-Patman Act of 1936 was passed to supplement the previous Clayton Antitrust Act of 1914; it sought to protect small retailers from the economic power of chain stores. The Miller-Tydings Act of 1937, a.k.a. “fair trade” law, was an amendment of the Sherman Act of 1890 giving manufacturers control over the prices charged by retailers. These measures came too late however, and the Supreme Court, invalidated the code system on constitutional grounds with the *Schechter Decision* (*Schechter Poultry Corp. v. United States*, 1935 a.k.a. the Sick Chicken case).

Schlesinger summarizes the change in position thus: “The 1st New Deal characteristically told business what it must do, the 2nd New Deal characteristically told business what it must not do” (*Vol. III* 389-392).

Obama has been an advocate of antitrust since his time as senator.⁴ He seems to be personally on top of the antitrust enforcement. During the presidential campaign, he identified industries that require “more vigorous merger and monopolization enforcement, including: health care, insurance, pharmaceuticals and energy” (Perlman).

Unlike Roosevelt, the current administration is not doubtful about the need to implement antitrust:

As Shakespeare once put it – ‘what’s past is prologue.’ In particular, I have considered the Government’s response to the market conditions that followed the Great Depression, and I believe there are important lessons we can learn from that era. . . . The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government’s response to economic crises to ensure that markets remain competitive. (Varney, *Remarks*)

Soon after taking office, Obama appointed new leaders of the institutions in charge of antitrust. The Department of Justice Antitrust Division is now headed by Christine A. Varney who in a public statement soon after nomination clearly showed that she’s not doubtful of the need to enforce antitrust⁵ given the close relationship between antitrust and welfare. Ultimately antitrust protects consumers against the almighty power of corporate America: “The focus of economic analysis needs to be on the

⁴ Antitrust for him is “the American way to make capitalism work for consumers” (AAI).

⁵ “There is no doubt that the challenges we face in our current economic crisis are great, but I believe it is important to remember that robust antitrust enforcement is essential for the free market to function properly. In these tough economic times, more than ever, it is important to remember that clear and consistent antitrust enforcement - protecting competition and thus consumers while being conscious of the need for economic stability - is essential to a growing and healthy free market economy” (Varney, *Hearings*).

power of competition in the market to ensure the American consumer's access to the best products at the lowest prices" (Varney, *Remarks*).

The chairman of the Federal Trade Commission (FTC), Jon Leibowitz, aims at challenging anti-competitive agreements on pharmaceuticals, the result of an abusive practice by originators which has harmful effects on the American consumers. He even includes an appendix on the calculation of consumer savings to fully back up his point ("*Pay-for Delay*" *Settlements*). He envisages the possibility of using a different legal basis to bring an antitrust action: using "section 5 to prevent conduct which some pharmaceutical companies reportedly engage in"⁶—basically ever-greening and reverse-payment settlements⁷ of pharmaceutical patent cases—and so avoid the harmful effects of these anticompetitive settlements in the American consumers. In early 2009 legal action was brought against a deal involving testosterone gel Androgel.⁸

Senator Obama co-sponsored the Kohl-Grassley bill to ban these anticompetitive settlements as early as 2007. Once in office and not before January 2011,

U.S. Senators Herb Kohl and Chuck Grassley reintroduced legislation limiting pay-for-delay settlements used to keep lower-cost generic drugs off pharmacy shelves. [...] On July 21st, 2011 the Senate Judiciary Committee approved this bipartisan bill to save billions by stopping 'payoffs' that hinder competition from generic drugs. The Preserve Access to Affordable Generic Drugs Act would deter the brand name drug company practice of settling patent disputes by paying generic drug manufacturers in exchange for the promise that its generic version of the drug will be kept off the market. Under the bill, these anti-consumer pay-off agreements would be presumed illegal and the Federal Trade Commission would be given the authority to stop the agreements. (Kohl)

SOCIAL SECURITY

Social insurance constitutes a fundamental component of the welfare state. Providing for the well-being of citizens is a fundamental role of government. In

⁶ For a full explanation see the reasoning by the FTC Commissioner (Leibowitz, *Tales from the Crypt*).

⁷ "The arrival of a new Administration determined to make health care more available and affordable to all Americans has created momentum for a national solution to stop reverse payments" (Leibowitz, "*Pay-for Delay*" *Settlements*).

⁸ Originator Solvay's patent for Androgel, which was granted in 2003 and provided 17 years protection, was successfully challenged and generic products were granted marketing approval by the US FDA. However, as a result, Solvay (now a unit of Abbott Laboratories) made deals with Watson Pharmaceuticals, Par Pharmaceuticals and Paddock Laboratories not to produce generic versions until 2010, in exchange for a share of Solvay's profits for the product.

this sense, Roosevelt quoted the following words when he passed the first American act on social security:

One hundred years earlier John Quincy Adams [in his First Annual Message to Congress, 6 December 1825] had declared that ‘the great object of the institution of civil government was the improvement of the condition of those who are parties to the social compact, and no government, in whatever form constituted, can accomplish the lawful ends of its institution but in proportion as it improves the condition of those over whom it is established. (Schlesinger, *Vol. II* 315)

Indeed, president Roosevelt managed to get the first National Social Security bill through Congress on June 19th, 1935; this Act became a cornerstone in the gradual development of policies which render a welfare state: “With the Social Security Act, the constitutional dedication of federal power to the general welfare began a new phase of national history” (Schlesinger, *Volume II* 315). The president himself was aware of its historical importance⁹ and so was Frances Perkins, Secretary of Labour and first woman cabinet member who served as chairman of the Committee on Economic Security:

Few legislative proposals have had as careful study, as thorough and conscientious deliberation, as that which went into the preparation of the social security programs. It is embodied in perhaps the most useful and fundamental single piece of Federal legislation in the interest of wage earners in the United States. This is truly legislation in the interest of the national welfare. We must recognize that if we are to maintain a healthy economy and thriving production, we need to maintain the standard of living of the lower income groups of our population who constitute ninety per cent of our purchasing power. (*F.D.R. Presidential Library*)

The SSA addressed two key areas: unemployment compensation and contributory old-age insurance. It created “a national system of old-age insurance in which most employees were compelled to participate. [...] The act also set up a federal-state system of unemployment insurance, and provided national aid to the states, on a matching basis, for the care of dependent mothers and children, the crippled, and the blind, and for public health services” (Leuchtenburgh. *FDR and the New Deal*. 132).

From an antitrust policy perspective, this law had groundbreaking effects for it was a step towards putting an end to the anticompetitive strategy that entailed having in each state different welfare costs,¹⁰ by spreading them among all compet-

⁹ “If the Senate and House of Representatives in their long and arduous session had done nothing more than pass this bill, the session would be regarded as historic for all time” (fdrlibrary.marist.edu).

¹⁰ In effect, “a complex system of private and state-mandated employment benefits” (Gordon 240).

ing states and firms. Ultimately, the SSA brought much needed and demanded stability to industry. It was pushed forward by employers who lobbied for federal regulation as a means of forcing their competitors to share the costs of a regulated market: “employers, pressed by the costs and inconsistencies of private welfare, looked to the states to socialize the resultant financial burden; in turn, inconsistent state legislation compounded the inequities of that burden and encouraged welfare capitalists to look to the federal government” (Gordon 242). Frances Perkins talks about the need for “a uniformity of standards” in her explanatory radio address of 2 September 1935.

The SSA was also paramount in reversing “historic assumptions about the nature of social responsibility, and it established the proposition that the individual has clear-cut social rights.” This was an achievement in itself. “For all the defects of the Act¹¹ it still meant a tremendous break with the inhibitions of the past. The federal government was at last charged with the obligation to provide its citizens a measure of protection from the hazards and future major economic vicissitudes of life”¹² (Schlesinger, *Volume II* 315). The SSA clashed with deeply rooted ideas about American individualism. American people –especially those not needing to benefit from its passing– would find it hard to accept the urgent need to have such a thing as a fund to cope with the eventualities of the unemployed. In her speech, Frances Perkins acknowledges this as well: “It does not represent a complete solution of the problems of economic security, but it does represent a substantial, necessary beginning.” It was deemed at the time “a new landmark in American history” (Leuchtenburg, *F.D.R. and the New Deal* 132).

Senator Obama’s acknowledgement of the need to curb the power of the insurance monopoly as a preliminary measure to further undergo health care reform envisaged a prosperous future for this flawed policy given the number of failed attempts to reform it; it is a hard fact that:

Since 1935, the U.S. welfare state has moved little beyond the limited premises of New Deal welfare policy. While close to international standards of old-age security and benefits for retired workers, the United States is a serious laggard in family allowances, health coverage, and various forms of public assistance and unemployment insurance. There is little pretence of redistribution; the core federal ‘welfare’ programme, Social Security, acts primarily as an income-forwarding machine for the middle class. Indeed, the New Deal distinguished sharply between welfare redistribution and self-funded social security, a bifurcation that persisted after 1945 and was deepened by the reforms of the mid-1960s” (Gordon 299).

¹¹ It excluded large categories of workers: domestic servants and agricultural workers; single mothers and their children; black Americans by exemptions for agricultural and domestic labour.

¹² “Vicissitudes of life” is an expression used by Frances Perkins in her radio address of September 2, 1935, where she presents an overview of the Social Security Act.

Obama has managed to make several former presidents' dream¹³ come true: fourteen months into this presidency, on 23 March 2010, he succeeded in muscling through Congress what has been described as "an imperfect but nonetheless history-making bill" (Krugman): the Patient Protection and Affordable Care Act (PPACA).¹⁴

Ultimately the reform aims at restructuring America's insurance market and one of the tools envisaged is antitrust; in fact, the current Administration's attempt to repeal the antitrust exemption currently granted to health insurance companies is a good example of how antitrust enforcement has a direct effect on the health policy.

This exemption provided for by the McCarran-Ferguson Act of 1945 envisages regulation by state governments to prevent collusion, price-fixing and other anti-competitive behaviour; this random regulation has in effect allowed health insurance companies since the end of WWII to essentially divide the country into geographic zones and thus benefit from what amounts to local monopolies. Allowing interstate competition created

a race to the bottom in which the states with the weakest regulations –for example, those that allow insurance companies to deny coverage to victims of domestic violence- would set the standards for the nation as a whole. The result would be to afflict the afflicted, to make the lives of Americans with pre-existing conditions even harder. (Krugman)

In light of the pernicious effects of this exemption, on February 24th, 2010, the House voted the Health Insurance Industry Fair Competition Act, in order to restore the application of the Federal antitrust laws to the business of health insurance thus protecting competition and consumers, since "health insurance reform should be

¹³ Other presidents have tried healthcare reform: "Since FDR, U. S. presidents (Theodore Roosevelt, FDR, Harry Truman, John Kennedy, Lyndon Johnson, Richard Nixon, and Bill Clinton) have struggled to enact national health care reform. The highly charged political landscape and the skills he has brought to bear contrast with the experiences of his Oval Office predecessors; most failed and none of Obama's predecessors managed to make health care universal" (Alter). In fact, on his September 9, 2009 joint-session address to Congress on health care, President Obama insisted: "I am not the first President to take up this cause, but I am determined to be the last"; in the same line: on March 19, 2010 in a health-care rally held in Fairfax: "Every decade since, we've had Presidents, Republicans and Democrats, from Harry Truman to Richard Nixon to JFK to Lyndon Johnson -- every single President has said we need to fix this system;" and on the night the House of Representatives passed the health-care bill (March 21, 2010) "This legislation will not fix everything that ails our health care system. But it moves us decisively in the right direction."

¹⁴ The full title is the following: An act to provide affordable, quality health care for all Americans and reduce the growth in health care spending, and for other purposes.

built on a strong commitment to competition in all health care markets, including health insurance” (Lee).

This Act amends the McCarran-Ferguson Act “to provide that nothing in that Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance”; and “Federal Trade Commission Act prohibitions against using unfair methods of competition shall apply to the business of health insurance without regard to whether such business is carried on for profit.” Under the new regime, insurers are required to offer plans that meet minimum government requirements for health coverage, and price them transparently.

This piece of legislation demonstrates the current Administration’s staunch determination to regulate the health insurance industry. Its passing has been praised by health professionals:

This vote is an important step towards breaking the monopoly power of some health insurers. [...] Many believe that their exemption from federal anti-trust law has allowed some players in the insurance industry to gain too much power. Right now, the health insurance industry is highly concentrated, and the lack of competition hurts doctors as well as patients. [...] It will open the door to competition. It’s good for everyone—except insurance industry executives. (Bussey)

The Affordable Care Act seeks reform of Medicare. The other biggest welfare-state programme is Social Security.¹⁵ In his 2011 State of Union address Obama mentioned the Administration’s plan “to find a bipartisan solution to strengthen Social Security for future generations” in order to fix a long-term funding shortfall: “It’s one of the government’s biggest long-term challenges – the growing costs of paying Social Security benefits- by raising the age or reducing benefits for future retirees.”

Much has been commented on the timing of the decision to undertake reform of the health system. Jonathan Alter describes the atmosphere at the White House when the decision to tackle health care was being pondered; Axelrod, Rahm and Biden strongly argued Obama to hold off and focus on the economy:

Romer argued, ‘after coming to office in 1933 Roosevelt postponed introducing Social Security for two years, until the economy began to revive’ [...] [Obama’s] strategic view was that the health care system could no longer be patched up, and that the recovery wouldn’t last if it came without long-neglected structural changes. It was almost a national security issue for him, (Alter 245 - 246)

Health reform has also triggered a profound ideological debate on how large a role must government play in the individual; a debate which parallels the one triggered

¹⁵ Social Security “ended destitution among the elderly.” [...] It “was strengthened in every decade that followed” (Alter 131, 251).

when the SSA was passed. Reform of this policy is a step towards ending what has been described by Krugman as “an unacceptable case of American exceptionalism. [...] In America, a bout of cancer, an inherited genetic disorder, or even, in some states, having been a victim of domestic violence can make you uninsurable, and thus make adequate health care unaffordable.” At the core, Americans still view health care as a privilege, not a basic right” (Blumberg).

Alter describes the situation thus: “heartless insurance companies telling people with pre-existing conditions to fend for themselves” (32). Obama himself in the January 25th State of the Union Address put it this way: “What I’m not willing to do is go back to the days when insurance companies could deny someone coverage because of a pre-existing condition. I’m not willing to tell James Howard, a brain cancer patient from Texas, that his treatment might not be covered.”

ENERGY

Roosevelt is known for having successfully implemented a federal regulation of utilities as a means to reduce the differences in the price of electricity; these have a negative effect on the efficiency of the resource location and result in an unequal access to energy.

Antitrust was one of the tools he used to cut back the power of holding companies; i.e. to cut back their “evil”: “The restoration of sound conditions in the public-utilities field through abolition of the evil features of holding companies” (State of the Union Address 1935).

After a hard-fought campaign, and in the face of bitter opposition from the utility companies, Congress passed the Public Utility Holding Company Act (PUHCA) of 1935 to reduce the conglomerates that dominated the electrical power industry:

By 1932 and according to the NPPC (National Power Policy Committee), thirteen holding groups controlled three-quarters of the privately owned electric utility industry. The three largest groups –United Corporation, Electric Bond and Share, and Insull- controlled some 40 per cent themselves. These holding companies had grown up, not because managers wanted efficiency, but because bankers and speculators wanted profits. (Schlesinger, *Volume III* 303)

Another important component of Roosevelt’s fight for public power was the creation of federal agencies. The whole purpose of these agencies was to distribute power to those who had been traditionally neglected by the utility companies, i.e. farmers and other customers in rural areas. His administration created the Tennessee Valley Authority (TVA) in 1933 and the Rural Electrification Administration (REA) in 1935 to create and finance rural utility companies; its primary goal was to promote rural electrification. Obama mentioned this fact in his 2011 State of the Union

speech: “America is the nation that [...] brought electricity to rural communities.” The Federal Power Act of 1935 gave the Federal Power Commission (FPC) regulatory power over interstate and wholesale transactions and transmission of electric power.

Roosevelt was also open to new sources of energy despite the fact that oil was the main source of energy (and still is); the Quoddy Dam Project (a plan to harness tides in order to generate electricity) and the nuclear energy plan are good examples. The latter envisaged the creation of a new source of energy closely linked to energy security: “he poured federal money into the all-public Manhattan Project¹⁶ and created the first atomic bomb” (Norris).

Obama is trying to put an end to the disparities in energy prices among states (and within states between residential and industrial uses) that render an unequal access to energy, and in the long run, have a pernicious effect on policies closely linked to welfare state procurement:

States with large energy price disparities between sectors have statistically higher poverty, lower incomes, more pollution and use more energy but with less efficiency. Higher energy price disparities also result in higher throughput per unit of output thus reducing the chances for sustainability and lower public welfare. (Templet)

Antitrust is once again a key tool, a fact highlighted by the current FTC chairman himself: “protection of American consumers from potentially anticompetitive practices in the energy sector” is one of the institution’s major responsibilities. “No other sector of the economy is subject to more antitrust scrutiny by the FTC than the energy industries ... given its potential for market manipulation” (F.T.C. Report 2008) and “anticompetitive behaviour” (F.T.C. Report 2010).

The current administration is tackling energy and environment together for despite creating huge wealth, “the development of energy also brings about a series of severe environmental problems which impose a direct threat to sustainable economic and social development” (Shengxian).

The unchecked exploitation of resources –whether land, energy or capital– ultimately can prove unsustainable and detrimental to welfare. It is indeed urgent business to deal with this policy given the following data:

The sheer, staggering scale of the world’s energy demand places this issue as one of the central challenges of our era. Since the first energy price crisis in 1973, the world’s overall energy appetite [“America is addicted to oil” (Bush)] has increased by an amount equal to adding another United States to the planet. [...] Today the world uses

¹⁶ Albert Einstein sent a letter to President Roosevelt on August 2, 1939, alerting him to the importance of research on nuclear chain reactions and the possibility that research might lead to developing powerful bombs. Einstein notes that Germany had stopped the sale of uranium and German physicists were engaging in uranium research (NNSA).

the energy equivalent of 2,500 barrels of oil every second. If those were real barrels stacked up, the pile would grow taller at 5,000 mph. (Mills)

Having tackled health care,¹⁷ the current administration feels it is time to take serious steps dealing with the environment. This tendency has been strengthened due to the oil spill in the Gulf of Mexico¹⁸ which has been construed as a 21st century Dust Bowl: “The consequence of exploiting a resource without adequate controls and safeguards in place. Instead of clouds of dust blowing across the landscape, clouds of oil billow from the seabed” (Wagman).

There is also a threat of a severe, multi-year drought in the southwestern United States with likely hydrologic, environmental, economic, and social impacts. This situation is worsened by adding the effects of global warming which “will cause flows on the Colorado River to decrease by 10-30% in the next half century” (Hydrosphere).

Measures were taken as soon as Obama took office in 2008 with the appointment of a special Associate General Counsel for Energy which is responsible

for providing legal advice, counsel, and support to the Secretary, Deputy Secretary, and all Departmental elements, except the National Nuclear Security Administration and the Federal Energy Regulatory Commission. This Office assures that the Department [of Energy] operates in compliance with all pertinent laws and regulations. (U.S. Department of Energy)

The American Recovery and Reinvestment Act of 2009 foresees in Title VIII (Departments of Labor, Health And Human Services, and Education, and Related Agencies) the creation of specialized green-collar jobs to increase energy efficiency; and the American Clean Energy and Security Act, 2009, enhances national security by attacking climate change and global warming. The Administration also favours a substantial cap-and-trade law that would significantly restrict greenhouse gases by allocating allowances to businesses.

The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling was created on May 22, 2010 to tackle the environmental disaster and to prevent future oil spills. A six-month moratorium was imposed on certain sorts of deep-water drilling.¹⁹

¹⁷ The need to upgrade energy has been on the Obama agenda together with healthcare; in fact, David Axelrod, Senior Advisor to the President, argued, “voters cared more about energy than health care (specifically, ‘universal coverage’) and that ‘energy and education were more compelling for the public and should be tackled first’” (Alter 245).

¹⁸ That is, the explosion of the Deepwater Horizon on April 20th, 2010; to get an idea of the dimension of the disaster: an estimated 1,000 billion litres per day of crude oil began to leak into the Gulf some 50 miles (80 km) southeast of Venice in Louisiana.

¹⁹ This moratorium was later “thrown out” by the Supreme Court of Justice.

With regard to new sources of energy the current administration fosters innovation in this area, breaking with the expensive oil dependence,²⁰ creating jobs and ultimately improving welfare conditions:

We've begun to reinvent our energy policy. We're not just handing out money. We're issuing a challenge. We're telling America's scientists and engineers that if they assemble teams of the best minds in their fields, and focus on the hardest problems in clean energy, we'll fund the Apollo projects of our time. [...] With more research and incentives, we can break our dependence on oil with biofuels,²¹ and become the first country to have a million electric vehicles on the road by 2015. We need to get behind this innovation. And to help pay for it, I'm asking Congress to eliminate the billions in taxpayer dollars we currently give to oil companies. [...] I don't know if you've noticed, but they're doing just fine on their own. So instead of subsidizing yesterday's energy, let's invest in tomorrow's. Now, clean energy breakthroughs will only translate into clean energy jobs if businesses know there will be a market for what they're selling. So tonight, I challenge you to join me in setting a new goal: By 2035, 80 percent of America's electricity will come from clean energy sources. Some folks want wind and solar. Others want nuclear, clean coal and natural gas. To meet this goal, we will need them all -- and I urge Democrats and Republicans to work together to make it happen. (State of the Nation Address 2011)

INSTITUTIONAL REFORM

As a result of the staunch decision to implement reforming policies which have a direct impact on welfare, both presidents have / had to address issues relating to institutional framework.

During the first New Deal, judgements by the Supreme Court ultimately obstructed New Deal measures; basically the Schechter Decision²² invalidated the fair trade code system²³ on constitutional grounds: the codes constituted an illegal delegation of legislative authority. In addition, the federal government had invaded

²⁰ "We can remain one of the world's leading importers of foreign oil, or we can make the investments that would allow us to become the world's leading exporter of renewable energy. We can let climate change continue to go unchecked, or we can help stop it" (Remarks of President Obama at Southern California Edison Electric Vehicle Technical Center. Pomona, California, 19 March 2009).

In the same sense: "With more research and incentives, we can break our dependence on oil with biofuels, and become the first country to have 1 million electric vehicles on the road by 2015" (State of the Union Address 2011).

²¹ The US is currently "*experiencing a boom in ethanol and other biofuels*" (Tyner).

²² Already mentioned in the section on antitrust.

²³ In this particular case, the Live Poultry Code. The Supreme Court ruled against the AAA (Agricultural Adjustment Administration) processing taxes, the NRA, the Municipal Bankruptcy Act, the Farm Mortgage Act and the Coal Act.

fields reserved to the individual states when the Tenth Amendment²⁴ reserves intrastate regulation to the latter. This decision entailed the demise of NIRA, i.e., the centrepiece of Roosevelt's plan to stabilize the national economy.

Less than one week after the Schechter decision was announced, Roosevelt publicly condemned the Court: he declared that the Court's "horse-and-buggy definition of interstate commerce" was an obstacle to national health; he charged the judges of taking a "horse-and-buggy age view" of federal regulatory power (Northrup 251).

Having won by a landslide on November 3, 1936, Roosevelt was determined to remove the impediment the Supreme Court posed for the necessary implementation of policies. As a result, the need "to pack" the prime opponent of his plans was felt an urgent measure to successfully pass the constitutional filter.

On February 5, 1937, the President sent Congress the Judicial Reorganization Bill (a.k.a. court-packing plan) i.e. his design to reorganise the judiciary in the interest of efficiency. This ingenious plan was initially presented by Roosevelt as a measure to help an overburdened court carry out its business more efficiently by seeking the reorganization of the court system: it permitted Justices of the high court to retire on full pay at the age of 70 and it empowered the President to appoint an additional Justice for every judge over the age of 70 who refused to retire.

The pretence was soon dropped and the real purpose –to produce a more amenable Supreme Court- was explicitly acknowledged in one of his Fireside Chats (March 9, 1937). He just wished the court would interpret the Constitution more broadly for "the Court [has] been acting not as a judiciary body but as a policy-making body." The Court "[had] improperly set itself up as a third house of the Congress – a super-legislature, reading into the Constitution words and implications which are not there, and never intended to be there."

The Court plan was greeted with predictable outrage by conservative Republicans and Democrats highly alienated from the New Deal. The Court itself was divided. *United States v. Butler* (January 6, 1936) clearly illustrates the gulf between the liberal and conservative viewpoints in the Court.

While Roosevelt vented his rage on the radio, the Supreme Court in the meantime started in 1937 upholding constitutional measures involving both state and federal economic regulation.²⁵ In the context of social reform, *Helvering v. Davis*, May 24, 1937, was passed by the Court sustaining the Social Security Act. The favourable opinion was written by the member of the court most sympathetic to the broad social objectives of the New Deal: Benjamin N. Cardozo. In a case

²⁴ Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

²⁵ The Supreme Court decided in *West Coast Hotel v. Parrish*, March 29, 1937, that a Washington state minimum wage law was constitutional. The vote was 5 to 4, and the fifth vote was from Roberts, who had voted the opposite way in a nearly identical case from New York just the previous season.

involving the unemployment insurance provisions of the act (*Steward Machine Co. v. Davis*, May 24, 1937), he noted that because unemployment had become a national problem, “there was need of help from the nation if the people were not to starve;” this case upheld the Act’s old-age pension provisions.

The Court had veered its position quite fundamentally to make the change historic: scholars refer to it as “the switch in time that saved nine” (Shughart II 79). The change in attitude of one of the judges (Justice Owen Roberts) saved the rest of the justices and hindered the attempt from the executive to reform the institution as a whole. In the end it was the strategic retreat of the Court that brought about the defeat of the plan.

The Judiciary Reorganization Bill was then deemed unnecessary and did not pass Senate. Moreover, death (Benjamin N. Cardozo) and resignation (Van Devanter) permitted Roosevelt to remake the membership itself. Soon conservative Justices were replaced by liberals ones and the Court withdrew farther and farther away from the realm of law-making.

Scholars differ in the construction of these events. Some argue that the Court’s “switch” was the natural result of an evolutionary process in the institution; others, on the contrary, argue that the Court was influenced by both the 1936 landslide election and Roosevelt’s threat to implement his Court-packing bill. One thing is clear for all: this chapter is in essence “the greatest constitutional somersault in the history of the U.S.” (Leuchtenburg, *Constitutional Revolution* 176).

Obama, like Roosevelt, took office at a time of economic crisis, pushed through a progressive legislative response, and now awaits a verdict on that response from a Supreme Court that is dominated by his political adversaries. “The forty-fourth President is now feeling the pain of the thirty-second” (Toobin).

Since the *Citizens United* decision of January 21st, 2010, which invalidates on free speech grounds the restrictions on corporate spending in elections, “Obama has publicly criticized the court, even during his 2010 State of the Union address with Justices in the audience” (Baker).

As he presses an ambitious agenda expanding the reach of government, “Mr. Obama has come to worry that a conservative Supreme Court could become an obstacle down the road” (Baker). “A court threw out the six-month moratorium on drilling in deep water imposed by the administration after the original accident, despite fears that the practice is inherently unsafe” (“Court Tester” *The Economist*, 24 June 2010: 68).

Chief Justice John G. Roberts, Jr., and his conservative fellow-Justices, are engaging in what’s known as judicial activism. On Air Force One, Obama, a former law professor, gave a useful definition of the term, saying that “an activist judge is somebody who ignores the will of Congress, ignores democratic processes, and tries to impose judicial solutions on problems instead of letting the process work itself through politically” (Toobin).

On January 31st, 2011, a federal judge in Florida found the health care act's individual mandate²⁶ to be unconstitutional; and the provision which withholds funds from states that refuse to participate as well. The matter has reached the Supreme Court which will have to establish its constitutionality, whether the government can require citizens to buy a product like health insurance. The Court's decision of 1937 whereby the Washington state minimum wage law was deemed constitutional (*West Coast Hotel v. Parrish*, March 29, 1937) serves as a feasible indicator of likely reactions. It has already announced that it will take up the case in March 2012 "allotting the most time for oral arguments in nearly half a century" (Dias).

Constitutional-law scholar Randy E. Barnett of Georgetown University Law Center considers the mandate unique in federal law:

'Never before in American history has the commerce clause been used to impose a mandate on all Americans to enter into a commercial relationship with a private company,' Barnett told a crowd of constitutional-law professors at a panel discussion of the individual mandate in August. 'Up until today, all previous exercises of the commerce power had been to regulate activity or to prohibit certain activity.' (Lindenberger)

Obama is having to deal with staunch opposition (e.g. Tea Party movement; courts of justice) to his measures especially those concerning health (or Obamacare in the derisive G.O.P. nomenclature) and scholars viewed his appointment of Justices Sotomayor and Kagan from the perspective of a pre-emptive measure against opposition from the highest judicial body.²⁷

CONCLUSION

Implementation of welfare policies by either President show that they both have a vision, an idea of the America²⁸ they want for themselves and generations to come which endorses the basic components of a welfare state. They both tackle problems without losing sight of the future as a method to avoid having to deal with the same situation over and over.

They are both forced to fight against varied opposition in order to carry out their plans (from Father Charles E. Coughlin to the Tea Party movement). The

²⁶ This provision requires most Americans to obtain insurance by 2014. The commerce clause of the Constitution allows Congress to regulate "activities that substantially affect interstate commerce," so the judges must decide whether the failure to obtain insurance can be defined as "activity."

²⁷ "Justice Anthony Kennedy, who was appointed by Ronald Reagan, sometimes sides with the court's more liberal wing. And this might be such a case: since the 1930s, when the court accepted the New Deal, it has generally defined the federal government's power to regulate interstate commerce very broadly" (Adler).

²⁸ Brian Gilmore has written a paper comparing President Obama and Rousseau on the grounds that they both dealt with a social contract, the latter in practice, the former in theory.

opponents haven't varied significantly and even less their arguments. Roosevelt was accused of being a traitor to his own class.²⁹ During a Milwaukee labour rally, Obama inveighed against Republicans complaining thus: "They talk about me like a dog." However, "when arrived in office some perceived him as the second coming of FDR" (Hirsh). Both Presidents manage to cause extreme reactions either radically positive or negative; they leave nobody indifferent.

Obama and Roosevelt are both able to overcome opposition coming from all sides and push through much needed reforms that question America's deeply ingrained convictions. Antitrust, healthcare, energy – all of these policies carry with themselves many of these convictions. Through the measures taken and since day one of his mandate, Obama is aiming at the same kind of beliefs that Roosevelt shattered; in other words, President Obama's self-imposed role is veering policies in such fundamental manner as to affect future generations.

Both Presidents had a vision of a different contract, a different deal. Roosevelt inherited a failed capitalism and a new model capitalism was put in place during his first term (1933-1937). His new model "served well the United States, and the world, for almost half a century" (Minsky). All policies eventually merged into the creation of the state of welfare in the United States.³⁰ Indeed, "few Congresses in American history (15 years) achieved so much than during Roosevelt's presidency." Given the ample legislation pushed by the Obama administration to date, experts refer to "President Obama's reformist agenda" (Przybyla).

Obama wants to make a difference too and he won't leave one area untouched. If all of Obama's programmes were enacted, it would entail "a dramatic, perhaps radical, change in government institutions and progress that would have a direct effect on the gradual creation of a welfare state in the United States." Rappaport continues: "The basic laws, institutions, and principles of the American system of government –its Constitution- would have been substantially altered." This fact

²⁹ Passing the 1935 and 1936 Revenue Acts which included an undistributed profits tax are behind these accusations. Roosevelt told William Randolph Hearst that he was implementing these measures because he wanted to save the system and "to save it is to take some heed to world thought of today. I want to equalize the distribution of wealth. It may be necessary to throw to the wolves the forty-six men who are reported to have incomes in excess of one million dollars a year. This can be accomplished through taxation" (Schlesinger, *Volume III* 325). "Major corporate figures were harassed and dragged to court on charges of tax evasion and antitrust violations. These included utility giant Samuel Insull, Andrew Mellon, treasury secretary under Harding, Coolidge, and Hoover; and T. S. Lamont and J. P. Morgan. Many of these giants were eventually cleared. . . . But for Roosevelt and his henchment, this was not about individual infractions, but a war against an entire class of Americans" (Toomey 33).

³⁰ Roosevelt's Island in New York was renamed after him when it was originally called Welfare Island; in truth, both words are synonyms and stand for the same desire to bring wellbeing to the citizens of the United States; and that is why the incumbent has even been compared to Rousseau (i.e. by Gilmore).

is in itself of such scope as to make president Obama worthy of comparison to Roosevelt.

In the meantime, many more chapters will be written on how Obama's policy implementation compares to Roosevelt's. Only time and historical analysis will tell whether Obama deserves to be added to Howard Zinn's list: "In times of crisis the American people look and find someone to save them: in the Revolutionary crisis, the Founding Fathers; in the slavery crisis, Lincoln; in the Depression, Roosevelt; in the Vietnam – Watergate crisis, Carter."

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