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THE LIMITS OF THE NEW DEAL ANALOGY

Barry Cushman

THE PAST THREE YEARS OF THE Obama Administration inevitably have elicited comparisons between the present day and the era of President Franklin D. Roosevelt's New Deal. Law journals have organized symposia around the issue, and bar associations have commissioned panels to discuss and debate points of similarity and contrast.¹ These conversations have been frequently illuminating, but they often overlook an important point that many may have forgotten: compared with the major reform initiatives undertaken during President Obama's tenure, the measures enacted by New Deal Congresses enjoyed a remarkable degree of bipartisan support.

It is widely recognized that support for the major bills enacted during the 111th Congress was far from bipartisan. For example, the first stimulus bill, also known as the American Recovery and

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¹ See, e.g., "FDR and Obama: Are There Constitutional Law Lessons from the New Deal for the Obama Administration?," University of Pennsylvania Journal of Constitutional Law 15th Anniversary Symposium, January 20, 2012; "The New New Deal: From De-Regulation to Re-Regulation" (Thrower Symposium), Emory University School of Law, February 11, 2010; "Judging the 'New' New Deal: The Constitution in Times of Economic Crisis," Virginia Bar Association Annual Meeting, Williamsburg, Virginia, January 22, 2010.

Reinvestment Act of 2009,² garnered the support of only three Republican Senators,³ one of whom, Arlen Specter, would soon become a Democrat,⁴ and not a single Republican member of the House.⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act passed the House with the support of only three Republicans, and likewise received the support of only three Republican senators.⁶ The Affordable Care Act⁷ passed the House by a vote of 220-215, with only one Republican voting in favor,⁸ and in the Senate without any Republican support.⁹

Compare the votes on major pieces of recovery and reform legislation during the New Deal. The Emergency Banking Act of 1933 passed the House by a voice vote and the Senate by a margin of 73-7, with 22 Republicans voting in favor and only five opposed.¹⁰ The Glass-Steagall Banking Act passed the Senate by a voice vote and the House by a vote of 262-19.¹¹ The Federal Emergency Relief Act of 1933 passed the Senate by a voice vote, and the House by a vote of 331-42, with 74 Republicans voting in favor.¹² The Securities Act of 1933 was passed by a voice vote in both houses of Congress.¹³ The

² 123 Stat. 115 (2009).

³ 155 Cong. Rec. S2069 (2009).

⁴ 155 Cong. Rec. S4953 (2009).

⁵ 155 Cong. Rec. H748 (2009).

⁶ 124 Stat. 1376 (2010); 156 Cong. Rec. H5261 (2010) (House); 156 Cong. Rec. S5933 (2010) (Senate).

⁷ 124 Stat. 119 (2010).

⁸ 155 Cong. Rec. H12967-68 (2009). This is the initial vote in the House, taken on November 7, 2009. When the House voted for the adoption of the Senate's amendments on March 21, 2010, the vote was 219-212, with no Republicans voting in favor. 156 Cong. Rec. H2153 (2010).

⁹ 155 Cong. Rec. S13891 (2009).

¹⁰ 48 Stat. 1, 4 (1933); 77 Cong. Rec. 81 (1933) (House); 77 Cong. Rec. 67 (1933) (Senate).

¹¹ 48 Stat. 162 (1933); 77 Cong. Rec. 4182 (1933) (Senate); 77 Cong. Rec. 4058 (1933) (House).

¹² 48 Stat. 55 (1933); 77 Cong. Rec. 2615 (1933) (Senate); 77 Cong. Rec. 2129-30 (1933) (House).

¹³ 48 Stat. 74 (1933); 77 Cong. Rec. 2954 (1933) (House); 77 Cong. Rec. 2995

The Limits of the New Deal Analogy

Securities Exchange Act passed the House by a vote of 281-84 with the support of 22 Republicans, and the Senate by a vote of 62-13, with 14 Republicans in the yes column, one Democrat voting no, and eleven Democrats not voting.¹⁴ The National Industrial Recovery Act passed in the House by a vote of 325-76, with Republicans voting in favor by a margin of 54-50 and 25 Democrats voting no, and in the Senate by a vote of 58-24, with the support of nine Republicans, while four Democrats voted no and nine did not vote.¹⁵ The Agricultural Adjustment Act of 1933 passed the House by a vote of 315-98 with the support of 39 Republicans, and the Senate by a vote of 64-20, with fifteen Republicans voting yes while four Democrats voted no and seven Democrats did not vote.¹⁶ The National Labor Relations Act was passed by a voice vote in the House, and by a vote of 63-12 in the Senate, with 12 Republicans voting in favor while four Democrats voted no and fifteen members of FDR's party did not vote on the measure.¹⁷ The Social Security Act was passed by a vote of 372-33 in the House, where Republicans supported the measure by a margin of 79-18, and by a vote of 77-6 in the Senate, where Republicans voted in favor by a margin of 15-5 and eight Democrats did not vote.¹⁸ And the Fair Labor Standards Act was passed by a vote of 314-97 in the House, with the Republicans voting in favor by a margin of 46-41 and 56 Democrats defecting. The Senate passed the bill by a vote of 56-28, with Democrats casting fully half of the negative votes while nine members of their

(1933) (Senate).

¹⁴ 48 Stat. 881 (1934); 78 Cong. Rec. 8116 (1934) (House); 78 Cong. Rec. 8714 (1934) (Senate).

¹⁵ 48 Stat. 195 (1933); 77 Cong. Rec. 4373 (1933) (House); 77 Cong. Rec. 5424-25 (1933) (Senate).

¹⁶ 48 Stat. 31 (1933); 77 Cong. Rec. 766 (1933) (House); 77 Cong. Rec. 2562 (1933) (Senate).

¹⁷ 49 Stat. 449 (1935); 79 Cong. Rec. 9731 (1935) (House); 79 Cong. Rec. 7681 (1935) (Senate).

¹⁸ 49 Stat. 620 (1935); 79 Cong. Rec. 6069-70 (1935) (House); 79 Cong. Rec. 9650 (1935) (Senate).

party did not vote.¹⁹

Such lopsided, bipartisan majorities also characterized congressional support for many of the lesser-known New Deal initiatives. The following bills were passed by voice votes in both houses of Congress: the act extending the charter of the Reconstruction Finance Corporation;²⁰ the Connally Hot Oil Act;²¹ both Frazier-Lemke Farm Debt Relief Acts;²² the Farm Credit Act;²³ the Rural Electrification Administration Act;²⁴ the Agricultural Marketing Agreement Act of 1937;²⁵ and the act creating the Civilian Conservation Corps.²⁶ The Homeowners Refinancing Act of 1933 was passed in the Senate by a voice vote and by a vote of 383-4 in the House, where three of the four negative votes were cast by Democrats.²⁷ The National Housing Act of 1934 passed the House by a vote of 176-19, and in the Senate by a vote of 71-12, with 21 Republicans voting in support, three Democrats voting no, and nine Democrats not voting.²⁸ The Emergency Relief Appropriation Act

¹⁹ 52 Stat. 1060 (1938); 83 Cong. Rec. 7449-50 (1938) (House); 81 Cong. Rec. 7957 (1937) (Senate).

²⁰ 49 Stat. 1 (1935); 79 Cong. Rec. 998 (1935) (Senate); 79 Cong. Rec. 1196 (1933) (House).

²¹ 49 Stat. 30 (1935); 79 Cong. Rec. 2150 (1935) (House); 79 Cong. Rec. 764 (1935) (Senate).

²² 48 Stat. 1289 (1934); 78 Cong. Rec. 12138 (1934) (House); 78 Cong. Rec. 11302 (1934) (Senate); 49 Stat. 943 (1935); 79 Cong. Rec. 14334 (1935) (House); 79 Cong. Rec. 13645 (1935) (Senate).

²³ 48 Stat. 257, 258 (1933); 77 Cong. Rec. 4710 (1933) (House); 77 Cong. Rec. 5529 (1933) (Senate).

²⁴ 49 Stat. 1363, 1364 (1936); 80 Cong. Rec. 3317 (1936) (Senate); 80 Cong. Rec. 5318 (1936) (Senate).

²⁵ 50 Stat. 246 (1937); 81 Cong. Rec. 3594 (House); 81 Cong. Rec. 4969 (1937) (Senate).

²⁶ 48 Stat. 22, 23 (1933); 77 Cong. Rec. 937 (1933) (Senate); 77 Cong. Rec. 995 (1933) (House).

²⁷ 48 Stat. 128 (1933); 77 Cong. Rec. 4995 (1933) (Senate); 77 Cong. Rec. 2584-85 (1933) (House).

²⁸ 48 Stat. 1247 (1934); 78 Cong. Rec. 11394 (1934) (House); 78 Cong. Rec. 12013 (1934) (Senate).

The Limits of the New Deal Analogy

of 1936 passed the House by a vote of 341-38, with Republicans voting in favor by a margin of 62-31, and the Senate by a vote of 62-14, with seven Republicans voting yes, three Democrats voting no, and sixteen Democrats not voting.²⁹ The Housing Act of 1937 passed the House by a vote of 275-86 with the support of 23 Republicans, while 39 Democrats voted against it. The Senate passed the bill by a vote of 64-16, with six Republicans voting in favor while eight Democrats voted no and eleven Democrats did not vote.³⁰ The Bituminous Coal Conservation Act of 1937 passed the House by a voice vote, and the Senate by a vote of 58-15, where seven Democrats voted no and thirteen Democrats did not vote.³¹ The Railroad Retirement Act of 1937 passed the Senate by a voice vote, and the House by a vote of 363-1, with the sole dissenting vote cast by a Democrat.³² The companion Carrier Taxing Act passed both chambers by a voice vote.³³

Even the more contentious pieces of legislation enacted by the New Deal Congresses managed to attract some nontrivial measure of bipartisan support. The act creating the Tennessee Valley Authority passed the House by a vote of 306-92 with the support of 17 Republicans, and the Senate by a vote of 63-20, with 14 Republicans voting yes while three Democrats defected and nine Democrats did not vote.³⁴ The Emergency Relief Appropriation Act of 1935 passed the House by a vote of 317-7 with the support of 31 Republicans, and the Senate by a vote of 66-13, with 9 Republicans crossing the

²⁹ 49 Stat. 1597, 1608 (1936); 80 Cong. Rec. 7022-23 (1936) (House); 80 Cong. Rec. 8519 (1936) (Senate).

³⁰ 50 Stat. 888 (1937); 81 Cong. Rec. 9293-94 (1937) (House); 81 Cong. Rec. 8373 (1937) (Senate).

³¹ 49 Stat. 991 (1937); 81 Cong. Rec. 2128 (1937) (House); 81 Cong. Rec. 3145 (1937) (Senate).

³² 50 Stat. 307 (1937); 81 Cong. Rec. 6228 (1937) (Senate); 81 Cong. Rec. 6093-94 (1937) (House).

³³ 50 Stat. 435 (1937); 81 Cong. Rec. 6304 (1937) (House); 81 Cong. Rec. 6345 (1937) (Senate).

³⁴ 48 Stat. 58 (1933); 77 Cong. Rec. 2341 (1933) (House); 77 Cong. Rec. 2808-09 (1933) (Senate).

aisle in support while four Democrats voted no and nine Democrats did not vote.³⁵ The Soil Conservation and Domestic Allotment Act passed the House by a vote of 267-97, with the support of 20 Republicans and over the dissent of 25 Democrats, and the Senate by a vote of 56-20, with five Republicans voting yes while eight Democrats voted no and twelve Democrats did not vote.³⁶ And the Agricultural Adjustment Act of 1938 passed the House by a vote of 264-135 with the support of 14 Republicans and over the objection of 54 Democrats, and the Senate by a vote of 56-31, where sixteen Democrats joined twelve Republicans, two Farmer-Laborites, and a Progressive in opposition, while eight Democratic senators did not vote.³⁷ In sum, on major issues of relief, recovery, and reform, there was far more bipartisanship during the New Deal than there has been in the 111th and 112th Congresses.

Republican support, though welcome, was not indispensably necessary to carry these measures through Congress. Throughout the 1930s, the Democrats enjoyed large majorities in both houses. The circumstances of the Great Depression and the inadequacy of the Hoover Administration's efforts to deal with them cemented the influence of a political coalition that would entrust the presidency and both Houses of Congress to the Democratic Party from 1933 forward. Consider the results of the biennial elections from 1932 to 1940. After the 1932 election, according to Congressional Quarterly's *Guide to Congress*, there were 310 Democrats and 117 Republicans in the House of Representatives; in the Senate there were 60 Democrats and 35 Republicans. After the 1934 election, there were 319 Democrats and 103 Republicans in the House; in the Senate there were now 69 Democrats and 25 Republicans. In the wake of the 1936 election there were 331 Democrats and only 89 Republicans in the House; in the Senate there were now 76 Democrats and

³⁵ 49 Stat. 115 (1935); 79 Cong. Rec. 5150 (1935) (House); 79 Cong. Rec. 5135 (1935) (Senate).

³⁶ 49 Stat. 1148 (1936); 80 Cong. Rec. 2578-79 (1936) (House); 80 Cong. Rec. 2165 (1936) (Senate).

³⁷ 52 Stat. 31 (1938); 83 Cong. Rec. 1727 (1938) (House); 83 Cong. Rec. 1881-82 (1938) (Senate).

The Limits of the New Deal Analogy

only 16 Republicans. In the 1938 election, the Democrats lost and the Republicans gained seven seats in the Senate; in the House the Democrats lost 70 seats and the Republicans picked up 75, bringing the margin of the Democratic majority down to 261-164. After the 1940 election, the Democrats still held 66 seats to the Republicans' 28 in the Senate, and the Democrats enlarged their margin in the House to 268-162.³⁸ Notwithstanding some bruising losses in 1938, the Democrats enjoyed substantial majorities in the House throughout the period, and a filibuster-proof majority in the Senate from 1934 on.

Coupled with the bipartisan congressional support, this electoral dominance had two important implications for the durability of New Deal legislation. First, it guaranteed that in the near term there would be no significant movement within Congress to repeal that legislation. Second, it ensured that if the Supreme Court held such legislation unconstitutional, Congress would get a second bite at the apple. In several instances in which the Hughes Court held that a legislative attempt to address a particular problem did not pass constitutional muster, the New Deal Congresses would have, and would take, the opportunity to reformulate the program to achieve the desired end through means consistent with prevailing constitutional doctrine. In 1935, for instance, the Court unanimously invalidated the first Frazier-Lemke Farm Debt Relief Act on the ground that it impaired the vested rights of mortgage creditors.³⁹ Justice Brandeis's opinion for the Court offered Congress guidance on how the statute might be reformulated so as to conform to the requirements of the Fifth Amendment, and Congress quickly accepted his counsel and enacted an appropriately redrafted measure. When the revised statute was challenged in 1937, the Court – without any intervening change in personnel – unanimously sustained it.⁴⁰ Similar patterns of judicial invalidation and legislative reformulation salvaged congressional efforts to regulate the struggling agricultural

³⁸ 2 Congressional Quarterly, Guide to Congress 1305 (6th ed. 2008).

³⁹ *Louisville Joint Stock & Bank Co. v. Radford*, 295 U.S. 555 (1935).

⁴⁰ *Wright v. Vinton Branch Bank*, 300 U.S. 440 (1937).

and energy sectors, and to provide retirement pensions for railway employees.⁴¹ As these examples demonstrate, throughout the 1930s, Congress repeatedly employed this adaptive legislative strategy with remarkable success.

This success, again, was made possible by the dual luxuries of electoral dominance and bipartisan support. But as the results of the 2010 mid-term elections made abundantly clear, the Democrats of today do not enjoy the same electoral dominance that their forbears in the 1930s did. And as the roll call votes from the 111th Congress make equally clear, their signature legislative achievements did not enjoy bipartisan support. It requires no great insight to predict that, in the event the Court were to declare all or portions of the Affordable Care Act unconstitutional, it would not be re-enacted in anything like its current form by the present Congress. Nor does it require clairvoyance to see that if President Obama is not re-elected and the Republicans hold the House and regain control of the Senate in the 2012 elections, that Act is virtually certain to undergo substantial modification if not outright repeal in the next Congress.

The post-War era of “consensus” culture was possible in part because there was a broad measure of popular agreement about the proper role of government in the nation’s economic life. We do not live in such an era of consensus with respect to such issues today. Compare, for example, polling data on the momentous constitutional issues facing the Supreme Court in 1937 with public opinion data on the Affordable Care Act. Polls from the 1930s consistently showed strong public support for minimum wage regulation and for the old-age pension provisions of the Social Security Act.⁴² In invalidating either of those statutes, the Court would have been frustrating both the legislative and the popular will. By contrast, the most recent Gallup poll on the Affordable Care Act, taken in November of 2011, shows the American people favoring repeal by a margin of

⁴¹ See Barry Cushman, “The Hughes Court and Constitutional Consultation,” 1998 *J. Sup. Ct. Hist.* 79.

⁴² See Barry Cushman, “Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s,” 50 *Buff. L. Rev.* 7, 40-41, 56-57 (2002).

The Limits of the New Deal Analogy

47%-42%.⁴³ The more recently released Kaiser Health Tracking Poll reports that 67% of Americans have an unfavorable view of the Act's individual mandate, and 54% would like to see the Supreme Court declare the mandate unconstitutional.⁴⁴ And as a result of the 2010 elections, the Act as a whole does not enjoy the support of the present Congress. A Court decision striking down the Act's individual mandate therefore would be flouting neither the current congressional will nor present popular preferences. Instead, such a decision would be consistent with them. We should bear such important differences in mind when contemplating the extent to which the 1930s provide an illuminating analogy to our present circumstances.



⁴³ www.gallup.com/poll/150773/americans-tilt-toward-favoring-repeal-healthcare-law.aspx.

⁴⁴ www.kff.org/kaiserpolls/8274.cfm.