

v. Our Common Good—BOOKS

by Jim Tarbell

Any story of our highly personal, completely undemocratic, frequently unpredictable, and thoroughly manipulated judicial system, almost always ends up at the Supreme Court. But as three recent books show the story goes much deeper than the Supreme Court. Although the Supreme Court and its interpretation of the US Constitution are consistently the end game in the drive to control the direction of the legal system, there has been much more involved in bringing us the corporate-friendly judiciary that we have today.

Many books have been written about the Supreme Court, but for our purposes, Pulitzer Prize winning Professor James MacGregor Burns' 2009 book *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court*, provides the best overview. Named after FDR's attempt to control the court by appointing additional justices, *Packing the Court* shows how the court has been continually controlled by packing it with appointees favorable to one political viewpoint or another. Citing Charles Beard, Burns acknowledges that the game was rigged since the framers of the Constitution were "determined to frustrate popular rule in order to safeguard 'the rights of private property against any leveling tendencies on the part of the propertyless masses'...and empowered a judiciary removed from direct contact...in order to 'control' legislation and guard the wealth and power of the propertied elite."

From this starting point, Burns portrays how the Federalists packed the court with John Marshall and his cohorts who cemented the "constitutional status to the 'absolute right' of property." By the latter half of the 1800s, with railroads dominating the economic world, Lincoln began a trend of appointing his fellow railroad lawyers to the court. "Observing the high bench in the decades after the war," Burns points out, "Americans might have mused that corporation heads packed the court as much as presidents...an astonishing number of railroads and other industries put their people on the Supreme Court... all of Grant's appointees were railroad lawyers... corporations would come to be endowed with the full dignity of citizenship. But for many millions of others—the poor and working classes and, above all, the freed slaves—the space of freedom would shrink as the nation's wealth and power burgeoned."

Relating that situation to the present Burns concludes, "Whether in the Gilded Age of the late nineteenth century or the Gilded Age of the turn of the twenty-first century, the justices have most fiercely

protected the rights and liberties of the minority of the powerful and the propertied. Americans can not look to the judicial branch for leadership. They cannot expect leadership from un-elected and unaccountable politicians in robes."

The interim story of the courts between the two Gilded Ages is highlighted by FDR's success at getting the courts to shun the interests of big business and bless his popular reforms encased in the New Deal. From there the story is picked up in Kim Phillips-Fein's book *Invisible Hands: The Businessmen's Crusade Against the New Deal*. For immediately upon being ousted from their traditional seats of power, big business, led by the Duponts, mounted a charge that led to the conservative movement that eventually elected Ronald Reagan. It was this business-led charge that discovered and coveted the Austrian economists Ludwig Von Mises and Friedrich von Hayek, whose free market devotion gave a holy glow to the elites of monopoly capitalism.

It was this movement that found and promoted Goldwater, who, faltering in the polls during his 1964 run for the presidency, realized that his pro-business agenda fit well with the racist conservatives upset by the civil rights movement and the cultural bigots angered at the cultural revolution unfolding during the sixties. From there, the businessmen simply had to wait in the wings, controlling the show while their populist minions and millions of corporate foundation dollars got Reagan elected.

Steven M. Teles' *The Rise of the Conservative Legal Movement: the Battle for Control of the Law* takes the story from there. He documents how even though the business lords had taken over the Presidency, they still had difficulty controlling the courts and their interpretation of the Constitution. He also highlights the realization that in order to change the courts, the conservative legal movement had to change the entire culture of law. To do this, they reached back to Von Mises and Hayek and using massive corporate foundation funding created a legal philosophy that became known as law and economics, in which the free-market principles of von Mises and Hayek became enshrined as "divine truths" demanding that law "bow" to their "universal wisdom." They funded lavish retreats for law professors and judges. They started the Federalist Society to network conservative law students, professors and the judiciary. They established their own law schools, then infiltrated and co-opted the most prestigious law schools in the country. And now they finally have their majority on the Supreme court.

