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How to Think about Constitutional Change Part I: The Progressive Vision

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Liberal academics and newspapers have proclaimed that the Rehnquist Court and conservative intellectuals are attempting to resurrect a pre–New Deal "Constitution in Exile." This absurd campaign illustrates the intellectual impoverishment of what now passes for "progressive" constitutional thought. Still, liberals are right in suggesting that conservatives may not have thought as sharply and constructively about constitutionalism as they should. This Outlook *discusses the liberal constitutional project. The next* Outlook *will outline a conservative response.*

Ye Olde Newe Deale

AEI's Federalism Project has risen to fame. A long article in *The New York Times Magazine* (April 17) identifies the author of this publication as a leader of the "Constitution in Exile movement," which believes that the New Deal should be overturned by judicial fiat.[1] The movement, the article says, has gained many adherents among federal judges. Conservatives no longer set their sights on Earl Warren but on FDR, and they may be only a few appointments from total victory. Who needs Social Security reform? If Greve et al. have their way, the beast will be declared unconstitutional.

We may hear more about the "Constitution in Exile" from Democratic senators on the Senate Judiciary Committee, who rarely pass up a talking point delivered by the *New York Times* even when it must be stripped from a largely fair-minded article. But in truth, there is no plan to topple the New Deal by judicial decree. Few conservative or libertarian scholars were familiar with the "Constitution in Exile" prior to its recent outing.[2] The vaguely sinister phrase has been popularized by self-proclaimed progressives—who, under the auspices of the American Constitution Society and Yale Law School, are themselves engaged in an ambitious project to imagine a "Constitution in 2020."[3]

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Jeffrey Rosen's omission of this context not only casts the supposed exilists in a false light but also obscures puzzling questions about the progressive agenda. Little in the record of judicial nominees—and virtually nothing in the record of the Rehnquist Court—suggests an incipient return to the pre-New Deal Constitution. Equally perplexing, the Left not so long ago appeared to have surrendered at the economic front, preferring instead to emphasize issues of race, sex, and homosexuality. Why now, when most Americans born after the baby boom probably think that the New Deal was a rock band, has it come to occupy center stage in the liberal imagination?

Every thought is a child of its time. Much like conservative "originalism"—that is, the idea that the Constitution ought to be enforced more or less as written—came about as an attempt to constrain the Brennan Court, the "Constitution in Exile" talk is inseparable from the brutal fight over judicial nominations. On every issue of interest to the Left—abortion, affirmative action, the death penalty, homosexual rights, campaign finance law—the supposedly conservative Rehnquist Court has done as progressives desire. Liberalism's theocracy scarecrow is beginning to look ridiculous, and there is the added problem that decades of liberal

noodling have failed to unearth a principle to justify *Roe v. Wade*. For purposes of liberal mobilization, the best part of wisdom may be to marry one fading icon (*Roe*) to another (FDR) in the hope of sustaining a progressive constitutional tradition.

Not every child of its time, however, is a bastard. Originalism merits serious intellectual engagement regardless of its political context, and the same is true of the New Deal revival. Bruce Ackerman (Yale Law School) has developed his constitutional theory in an ambitious, rewarding series entitled *We The People*. Cass Sunstein (University of Chicago Law School) has made his case for a New Dealish Constitution in a torrent of forceful books and articles, such as *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (2004). Many conservatives are inclined to dismiss this work with a complacent sneer: "It's not originalism." No, it is not. But new New Dealers believe that they have discovered a political and intellectual weakness in the conservative armor. They may be right.

Originalism's Open Flank

Conservatives are committed to originalism. But the constitutional understanding clearly, and radically, changed in 1937 in the aftermath of Franklin Delano Roosevelt's "court packing plan."[4] So what is an originalist to do?

The traditional answer, peddled by the New Dealers themselves and by their modern heirs (many of them conservatives), is that the pre–New Deal *Lochner* Court was as wrong as *Roe v. Wade*, and for the same reason: the invention of "substantive due process" rights that have no basis in the Constitution. But the New Deal notion that a few Neanderthals in black pushed their laissez-faire convictions to the constitutional breaking point has been thoroughly discredited, especially by liberal scholars.[5] The revisionists' persuasive showing that the *Lochner* Court was well within the bounds of the traditional understanding blocks the convenient position that the New Deal and its Court restored a recklessly endangered constitutional balance. The New Deal was a genuine transformation—a "constitutional moment," as Ackerman calls it. And if conservatives concede the legitimacy of *that* constitutional transformation, how can they contest other transformations, past or proposed?

Justice Antonin Scalia, originalism's most resourceful defender, has declared himself a "faint-hearted originalist." One constitutional transformation is probably one too many, but precedent and political realities at some point dictate acceptance. We should nonetheless resist *further* departures from the Constitution. The difficulty, though, is obvious. If one accepts the New Deal transformation, then what is left of the originalist commitment? Perhaps the best response is that the alternatives—a suicide assault on the New Deal on the one hand, an infinitely malleable, "living" Constitution on the other—are even less attractive. Originalism is the "lesser evil," as Justice Scalia has put it.[6] But while that may ultimately be right, a lesser-evil theory depends on a juxtaposition with its competitors. Viewed and attacked in isolation, it simply looks implausible. And it will always be attacked in isolation: witness the "Constitution in Exile" campaign.

Progressives have put the New Deal front and center because originalists must forever tiptoe around it. But that advantage comes at a price. First, progressives must defend the New Deal as a matter of substance. If the policies were worthless, why revamp the Constitution to accommodate them? Second, progressives must defend the New Deal as a *democratic* constitutional change. If the *Lochner* Court simply capitulated to a mob in 1937, that might demonstrate the inevitability of constitutional transformation—but hardly its legitimacy. Working through this two-pronged project has proven a surprisingly demanding task. Let's start on the policy side.

Monopoly at Every Level

One of the New Deal's "constitutive commitments," Cass Sunstein has written, was against monopoly and monopolization. True, the New Dealers romanticized small business. They sought to protect local merchants against then-emerging chain stores, and they were critical of standardized contracts through which large enterprises conduct consumer transactions. But that is chiefly because the New Dealers had a pre-modern economic model: give us low volume and high transaction costs, and maybe we can haggle our way out of the depression. In general, the contention that the New Deal stood against monopoly is 180 degrees off. Monopoly at every level was the organizing principle of the New Deal.

Nebbia v. People of New York (1934) is widely viewed as a precursor to the New Deal revolution. Here, the Court sustained a state law and regulation criminalizing the retail sale of milk at a price below nine cents per quart. The point was to "stabilize" the milk market—in other words, to prop up dairy farmers and distributors.

The pro-cartel position of *Nebbia* had been urged two years earlier in Justice Louis D. Brandeis's dissent in *New*

State Ice Co. v. Liebmann (1932), which celebrated the states as "laboratories of democracy." The Oklahoma ice industry had helped itself to a government scheme of price fixing and output restrictions. The famed Brandeis dissent defended this "experiment" (which we don't need, because we know it to be destructive) as an attempt to stabilize an industry that tends to monopoly *because it has low entry costs*—a contention that qualifies as a howler even by the distinctly modest standards of New Deal economics. In any event, the Oklahoma law did not prevent monopoly; it promoted it.[7]

United States v. Carolene Products (1938) originated the dual standard of judicial review that is the basis of post–New Deal constitutional law: essentially no scrutiny for economic regulation, and heightened scrutiny for matters listed in the famous footnote four of the opinion (such as laws that burden "discrete and insular minorities").[8] The act at issue prohibited the interstate shipment of filled milk, a cheap and wholesome consumer product. The dairy industry sought to eliminate this inconvenient competition, and Congress obliged. Economic regulation then still required some public-interest rationale. The dairy industry hired a public health expert to tell Congress that the world population divides in two: big, healthy white people who consume milk, and little brown people who climb palm trees and live on coconut oil (an ingredient in filled milk).[9] This racist claptrap glorified what Cass Sunstein has called a "naked" wealth transfer. The old Constitution inhibited such transfers. The New Deal Constitution does not.

The pursuit of monopoly pervades the entire New Deal Constitution. Foremost is the boundless expansion of congressional authority under the Commerce Clause, culminating in *Wickard v. Filburn* (1942), the famous case that sustained the federal regulation of wheat grown for home consumption. So long as only states but not Congress may regulate, say, employment conditions, states must compete on that margin. The point of giving Congress authority over these matters is to replace state competition (a "race to the bottom," as the New Dealers falsely called it) with federal cartels.

Since the notoriously cumbersome Congress may not always act with sufficient speed or resolve, the New Deal not only expanded federal power but also enabled the states to cartelize the economy without federal assistance. A classic case in point is *Parker v. Brown* (1943), involving California's output restrictions for raisins (more precisely, the 1940 allotments for Raisin Proration Zone No. 1). At the time, California supplied some 95 percent of the nation's raisin market, meaning that the monopoly profits were reaped almost entirely in markets outside California. The Supreme Court deemed this exploitation a splendid exercise in federalism and, under the eponymous *Parker* doctrine, immunized state-sponsored cartels from challenges under antitrust and constitutional law.

The Constitution, My Dear

And on it goes, ad nauseam. Virtually all of the Supreme Court cases surrounding the New Deal involved government-sponsored price fixing and output restrictions. The National Industrial Recovery Act enabled industries across the American economy to lock themselves into cartels, until a unanimous Court invalidated the act in the 1935 *Schechter* case. The mighty coal industry had its own cartel statute, which was struck down one year later.[10]

Conversely, New Deal programs that served a discernible public purpose were never endangered. Nothing in the Constitution precluded the New Deal from paying unemployed artists to adorn U.S. post offices with Soviet-Realist murals. And contrary to progressive myth, a properly structured Social Security system was never likely to be invalidated. The Roosevelt administration belly-ached over the matter. But when Labor Secretary Frances Perkins mentioned the perceived difficulties to Justice Harlan Stone at a cocktail party in 1934, the justice whispered to her, "The taxing power, my dear, is all you need." Armed with this startling revelation (*"The taxing power! Right there in the Constitution!"*), Secretary Perkins returned to her advisers, who managed to design a constitutional scheme in what in Perkins's telling appears to have been a boozy all-nighter. Social Security passed Supreme Court review with flying colors.[11]

Much can be said against the *Lochner* Court. Say this much *for* it: on substantive economic grounds, its error rate appears to have been zero—unless one counts the numerous *Nebbia*-style monopoly laws that the Court let stand.

The New Deal: What Is It Good For?

Grocers in New York eagerly sell milk at below nine cents a quart. Millions of consumers, a great many of them impoverished, are able and willing "to buy a necessity of life in an open market"—but cannot do so at "the figure appointed by three men at headquarters." On what principle does the government criminalize the open

market transactions? So asked Justice James McReynolds, the most intransigent of the *Lochner* justices, in his dissent in *Nebbia*.[12]

The rote answer is that the Supreme Court has no business striking down democratically enacted (though perhaps unwise) laws, least of all under fanciful theories of substantive due process. But that is not a complete answer. The "democracy" at work here is a special interest deal on the backs of consumers, and a judicial presumption in favor of such schemes is no more natural than a presumption against them. And if such *Lochner*-style review axed only odious laws, why not bring it back? In short, the new New Dealers have to argue that *Lochner* review—the "Constitution in Exile," if you must—endangered something worth having. Beyond the right to buy milk at not less than nine cents, then, what normative principle can one extract from the New Deal? The New Deal's own answer, and the best its modern advocates can do, is the collective provision of social security.

Cass Sunstein's favorite case—to his mind, the foundation for a Constitution in 2020—is the 1937 decision in *West Coast Hotel v. Parrish*, which sustained a state minimum-wage law for women and, in the process, effectively ended the *Lochner* era. Minimum-wage laws were a cornerstone of the New Deal. But a strategy of increasing the demand for labor by raising its price is implausible, and Sunstein actually opposes minimum-wage laws.[13] He likes *West Coast Hotel* not for what it holds but for what it seems to say. *Lochner*'s mistake, he says, was not judicial activism or substantive due process. Rather, *Lochner* was wrong because it treated private orderings (employment contracts) as a neutral constitutional baseline. *West Coast Hotel* repudiates that understanding by saying that the denial of a "living wage" is "in effect a subsidy for unconscionable employers." The state, Chief Justice Charles Hughes explained, would have to provide the existential minimum when employers in a competitive labor market fail to do so.

On this theory, the employer who employs nobody (for example, because minimum-wage laws have rendered his business unprofitable) is superior to the sub-minimum-wage employer: at least he does not collect a subsidy. Moreover, the poor who deserve a living wage would also benefit if they could rake food off the supermarket shelves without paying for it, or if they could make themselves comfortable in your living room without an invitation. Why should employers but not grocers or homeowners be made to pay for the baseline shift? "Those who lack housing," Sunstein explains, "do so because other people's property is protected by the law of trespass."[14] On his reading of *West Coast Hotel*, everything is literally up for grabs.

The Poverty of Progressivism

Sensibly, Sunstein qualifies this position. Property rights, he hastily adds, are "essential," albeit only in a pragmatic social calculus, not as a constitutional baseline. So the alternative to *Lochner*-ism is not necessarily socialism. But then, what is it?

Sunstein advocates something like the European welfare state (an affinity he candidly acknowledges). His reference point is Roosevelt's 1944 State of the Union address. To provide "freedom from want" and "economic security, social security, moral security," FDR proposed a "Second Bill of Rights" to a useful and remunerative job; to adequate food, clothing, and recreation; to a decent home; to good health; to a good education; and to adequate protection against the basic risks of life. Sunstein endorses this program, and he subtitles his book on the subject *FDR's Unfinished Revolution and Why We Need It More Than Ever.*

We do not. A program of "freedom from want" and security has undeniable appeal in a society mired in a great depression. It is unsuited and perhaps even dangerous to an affluent society such as ours. Rights mean rigidity. For example, we all agree on the desirability of increasing labor-market participation for the disabled. But our expensive disability policies have done nothing to advance this objective because they create rights without regard to allocative efficiencies. (Tax credits would work. Accommodation mandates do not.) Conversely, the one unambiguous social policy success of the past decade, the 1996 welfare reform, succeeded in large part *because it abolished* individual entitlements to welfare and instead treated the problem as one of (state-based) political management.[15]

Sunstein would obligate governments to realize his rights "within available resources." But what at first looks like a commendable concession to resource constraints turns into the opposite. An education is "good," and food and shelter are "adequate," only in relation to some generally accepted level, which will tend to rise in tandem with economic affluence. So while the "rights" may have a floor, they have no ceiling and no stopping point. Nothing prevents their mutation into middle-class entitlements.

Wealthy societies will gladly put a floor under poor people's lives. Our policies to that end are often inefficient

and sometimes counterproductive, and demand more good sense and perhaps more money than they receive. All this, though, is manageable and affordable. But that is not true of Social Security, Medicare, and Medicaid (which has long ceased being a poverty program). These programs most pristinely embody the New Deal commitment to security—and, paradoxically, now frighten everyone who cares to pay attention. Having flooded the streets with transfer dollars, we must unwind those transactions before they drown the economy.

President George W. Bush has boldly proposed an "ownership society" as an alternative to the New Deal's cradle-to-grave security model. While that proposal is intensely controversial, all agree that the existing security programs are unsustainable. The one idea that contributes nothing whatever to the debate is a Second Bill of Rights. At best, or rather worst, it would further entrench programs and constituencies that have entrenched themselves without it. Come to think of it, that has to be the point. Why else would one lob policy disputes into the Bill of Rights stratosphere?

Cass Sunstein understands all this—intermittently. The volume and content of his *oeuvre* suggest that there are two Sunsteins: the one on the progressive warhorse, and another one under a policy wonk hat. The former trumpets rights; the latter has warned, instructively and persuasively, against the attendant risks and rigidities. *The Second Bill of Rights* attempts to finesse the difference by conceding that the "rights" need not necessarily be enforced by courts, and that they ought to be realized through flexible techniques. But this is inadequate. Judges will take "need not" to mean "might as well," and nothing suggests that either Sunstein would mind that misunderstanding. Similarly, efficient techniques usually founder on the interest-group dynamics that play out below the mounted Sunstein's lofty vision.[16] European welfare states have spent a full generation in economic paralysis, and their transfer programs are in worse shape than ours. If they could salvage their beloved social model through better "techniques," they would have adopted them by now. They cannot do so because entitlements produce interest-group entrenchment and irreversibility.

Beyond the stubborn defense of accumulated middle-class entitlements, the "security" refrain retains resonance because an increasingly mobile, fast-paced, global economy exposes us to unknown and troubling risks. Unlike the New Deal, however, we comprehend that the effort to produce stability and security in one economic sector creates instability and dislocations across the board. Politics cannot insulate us from risks; at most, it can help us to deal with them.

In a signal political event in 1992, breathtakingly captured in John Travolta's performance in *Primary Colors*, William Jefferson Clinton told the hardhats at a New Hampshire shipyard that he could not, would not promise them security against the vicissitudes of global capitalism. That candid speech revived Clinton's then-flagging presidential campaign. To his great credit, President Clinton remained resolutely committed to free trade over protectionism. Has this already been forgotten? A nominally conservative administration protects favored constituencies, and liberals propose to constitutionalize elusive promises of security. That may be progressive in a taxonomic sense. Progress, it is not.

Democracy!

The second leg of the progressive project, I noted earlier, is an effort to understand constitutional transformation as a *democratic* enterprise. Most conspicuously and ingeniously, Bruce Ackerman has elevated the New Deal to a "constitutional moment." In the 1936 presidential election, he claims, "We the People" rose above normal, pathological interest-group politics and effectively debated a constitutional referendum: the Supreme Court's Constitution or FDR's? FDR's record-shattering victory created a mandate for a constitutional transformation or "amendment." That process could have taken the path—widely discussed at the time—of a formal constitutional amendment. It did not come to that because the Supreme Court itself recognized the demands of constitutional politics, acceded to the New Deal program, and, after the replacement of several justices, developed its constitutional logic.

Sunstein resists the talk of "amending" the Constitution in this fashion as too loose. Still, he maintains that the New Deal had a commitment to "deliberative democracy," and like Ackerman, he makes much of the New Deal's supposed constitutional content. Where Ackerman explores Roosevelt's 1936 public addresses and fireside chats, Sunstein extols the 1944 State of the Union address—also delivered as a fireside chat—as "The Speech of the Century."[17] As in Ackerman's rendering, the New Deal here soars above ordinary politics. And for Sunstein as for Ackerman, the Supreme Court plays a crucial role in the process of democratic constitutional change. The Brennan Court, Sunstein rightly observes, came very close

to enacting the Second Bill of Rights—a development that was arrested only by the appointment of conservative justices after the 1968 election.

These attempts to join a progressive constitutional jurisprudence with democratic politics embody a distressingly thin idea of "democracy." First, Ackerman and Sunstein both acknowledge that their democratic aspirations revolve around the presidency. They are rather more Rousseauan than our Tocquevillean traditions of structured self-government, and one can plausibly argue that the nationalist, plebiscitarian elements of post–New Deal politics have done quite a bit to undermine self-government.[18] A presidential promise to leave no child behind may or may not fulfill a constitutive commitment to a good education. Unquestionably, however, it compromises state and local self-governance.

Second, one cannot reliably distinguish Ackerman's "constitutional politics" or even Sunstein's politics of "constitutive commitments" from rank interest-group politics. FDR was no constitutional theorist in the vein of Madison or Lincoln. His genius was to cobble together a lasting political coalition—the New Deal coalition—by means of transfer payments and labor cartels. The programs that Ackerman and Sunstein want to elevate into a higher politics are more plausibly viewed as a way of cementing a power base by means of rent procurement.

Third, the substantive progressive program is corrosive not only (as noted) of the economy but also of democratic debate. At some point, a transfer economy becomes so central to the voters' livelihoods that none can afford to vote against it. That is why no classical-liberal party of any size can emerge in Europe. A meaningful debate, let alone an actual election, over the European social model is effectively foreclosed, even though the politicians and most voters understand that the model is neither social nor sustainable. If the debate and future elections in the United States are still open, that is because we have in some measure managed to resist progressive democracy.

Oui, the People

Ackerman and Sunstein both want to entrench progressive politics at a constitutional level. Barring a formal constitutional amendment, the most plausible prospect is entrenchment by, or with the help of, the Supreme Court. This logic forces both authors into an extreme anti-formalism and, in the end, into what can only be described as an elitist account of constitutional change.

The New Deal Court validated the constitutional moment of 1936, Ackerman writes. But recall the difficulty of separating constitutional from interest-group politics: did the Court institutionalize a democratic constitutional verdict, or did it simply side with the winning constituencies (as Martin Shapiro has argued)?[19] Suppose, for the sake of argument, the constitutional interpretation holds up: does the supposed verdict of 1936 really signal support for the *Carolene Products* Constitution that flowed from it, from the good (*Brown v. Board*) to the debatable (*Miranda*) to the bad (*Roe v. Wade*)? Suppose you had put all this before the voters either in 1936 or subsequently, by way of a formal amendment: what would their verdict have been? In other words, did "We the People" in 1936 have any inkling of what they are now said to have embraced?

On a more cautious route, Cass Sunstein has defended judicial "minimalism," embodied in Justice Sandra Day O'Connor's pronounced inclination to decide "one case at a time."[20] He distinguishes minimalism from the broad, "perfectionist" rulings that characterized the Brennan Court's liberalism and from Justice Antonin Scalia's formalist originalism. Minimalism, Sunstein argues, allows room for democratic deliberation, and may even promote it. Upon inspection, however, minimalism proves to be perfectionism on a tricycle. It pedals toward the same results, and little democratic substance remains.

Judicial decisions are "minimalist" (or not) with respect to the depth of their reasoning and the width of their holding, not with respect to an external constitutional reference point. Hence, minimalism per se has nothing to say about dealing with perfectionist precedents, no matter how far they stray. Suppose the perfectionist Brennan Court had succeeded in constitutionalizing the Second Bill of Rights, as it very nearly did: would we now be compelled to accept that result as constitutionally mandated? Legitimate? Sunstein does not say.

Roe v. Wade was a perfectionist precedent par excellence. Sunstein concedes that "it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously."[21] But it did not. What is the minimalist response? The Supreme Court's response was *Planned Parenthood v. Casey* (1992). Minimalist in a way (it actually sustained a few abortion regulations that

were questionable under *Roe*), it inspires no confidence in minimalism's democratic content. Overruling *Roe*, the plurality opinion by Justice O'Connor said, would look like a judicial capitulation to public pressure. The Court must therefore remain steadfast, and the people will be "tested by following."[22]

While the authoritarian tone here may flow from the perceived need to protect the perfectionist *Roe* decision, democracy and deliberation have fared equally poorly under minimalist rulings. For example, Sunstein describes the Supreme Court's meandering affirmative action cases, and especially the 1978 *Bakke* decision, as a commendable way of encouraging public debate and democratic decision making. The truth is very nearly the opposite. The principal effect of the incoherent *Bakke* formula—modest racial "plus factors," yes; rigid quotas, no—was to give elite universities nearly a generation to "diversify" their student bodies by means of de facto quotas, while professing compliance with *Bakke*. The truth was exposed through entrepreneurial litigation, not democratic debate. When it came out, the Supreme Court, per Justice O'Connor, issued another minimalist ruling: quotas for another generation, provided we all agree to lie about them.[23]

Progressive constitutionalists place themselves in the tradition of our Founding Fathers. They, too, are said to have been committed to "deliberative democracy"—to "reflection and choice," as Hamilton famously put it in *Federalist* No. 1. A *choice*, however, presupposes an ability to say "no," along with a certain degree of formality and finality. The Founders proposed a formal, difficult-to-amend Constitution. They leveled with the people and in fact dramatized the choice: "This Constitution means a virtually unlimited, direct federal taxing power. It means a standing army. It means a powerful federal judiciary. It all comes in a package, which we refuse to unravel. Yes or no?"

Despite Bruce Ackerman's attempts to read the Founding Fathers through the lens of the New Deal (as far less formal and final than just sketched), a chasm separates the Founders' constitutionalism from the modern progressives'. Like the progressives' policy prescriptions, their understanding of democratic constitutionalism eerily resembles that of Europe. A constitution is a "process," European politicians like to say. They have made a big production of organizing a European public debate about their proposed constitution. The public, however, has largely tuned out—because the "constitution," a monstrosity of 448 articles, is incomprehensible; because it marks not a final decision but only another step towards "ever closer union"; and because the elites have made perfectly clear—most recently, in response to the French "Non" on the so-called constitution—that they will take that step regardless of what "we the peoples" may think. So, too, with the progressives' constitutional transformations: we sidle into them. Democratically, and one case at a time.

A Choice, Not an Echo

The progressive Constitution is the one we have. Somewhere along the way, that Constitution has come to enshrine an Equal Rights Amendment that fizzled in the constitutionally envisioned amendment process. The progressive Constitution still permits the death penalty, but that may change next year. It still contains no right to homosexual marriage but that, too, may be only a matter of time. Its free speech clause last year ceased to protect political speech during election time, the better to protect deliberative democracy. It is to lend legitimacy to this construct that the progressives have mobilized the New Deal and its constitutional transformation.

And yet: the transparency of polemical intentions does not settle an intellectual debate. (If it did, originalism would have been dismissed decades ago.) Conservatives would be making a huge mistake in dismissing progressive theory simply because it is not originalism. Precisely the anti-originalist thrust has enabled progressives to think seriously and productively about constitutional change. The progressives' fundamental problem lies elsewhere: they must fill the New Deal, one of the intellectual low points in American history, with a content that it never had. The New Deal's economics, pathetic even for their day, are unfit for modern consumption. Its political theory was primitive and tendentious, and its policy prescriptions—monopoly, security—have proven illusory. The New Deal's normative commitments, however plausible for their day, now fail to inspire.

The next *Federalist Outlook* will argue that the best conservative response is to bracket interpretive theory and to meet the progressives on their own chosen ground. Yes, the New Deal was a transformation. But was it a good one? Should we finish that revolution, or should we change course? At the heart of our confused constitutional debate is a basic choice between monopoly and welfare rights on one side, and competition and choice on the other. Let progressives man the ramparts of monopoly, and let conservatives take a confident stand for a competitive constitutional order. *Aux barricades.*

Notes

1. Jeffrey Rosen, "The Unregulated Offensive," *The New York Times Magazine*, April 17, 2005, 45.

2. The phrase, coined by Chief Judge Douglas H. Ginsburg in a 1995 book review, has not been used since by any conservative or libertarian scholar, activist, or judicial nominee. The most frequent law review cites are to a 2001 *Duke Law Journal* symposium, where the keynote speaker—William W. Van Alstyne, one of the great constitutional minds of his generation—expressed gratitude at the invitation but utter befuddlement at the meaning of the phrase. See "The Constitution in Exile: Is It Time to Bring It in from the Cold?" *Duke Law Journal* 51, no. 1 (October 2001): 1. The congressional record turns up one mention: at a 2001 Senate Judiciary Committee hearing, Senator Richard J. Durbin (D-Ill.) asked Professor Viet Dinh, then nominated for the position of assistant attorney general, whether he was, or had ever been, a member of the Federalist Society (answer: yes) and whether he had heard of "the Court in exile, the Constitution in exile." Viet Dinh answered "no" and departed.(For more on this, see Senate Committee on the Judiciary, *Confirmation Hearing on the Nominations of Michael Chertoff and Viet D. Dinh to be Assistant Attorneys General*, 107th Congress, 1st Session, May 9, 2001.)

3. See, for example, Bruce Ackerman, "The Art of Stealth," *London Review of Books*, February 17, 2005, 27; Cass R. Sunstein, "The Rehnquist Revolution," *The New Republic*, December 27, 2004; and the official website of the Constitution in 2020, islandia.law.yale.edu/acs/conference/index.asp.

4. Like much of the *Lochner* and New Deal eras, the conventional story of a "switch in time" that saved the New Deal and the Court in 1937 has come under heavy revisionist fire. See especially Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (London: Oxford University Press, 1998). For purposes at hand, however, nothing hangs on this spirited historical debate.

5. See, for example, Cass R. Sunstein, "*Lochner*'s Legacy," *Columbia Law Review* 87 (1987): 873; Bruce Ackerman, *We The People: Foundations* (Cambridge: Harvard University Press, 1991), 62–67; and Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993). Prominent revisionist contributions from non-liberal perspectives include Richard A. Epstein, "The Proper Scope of the Commerce Clause," *Virginia Law Review* 73 (1987): 1387; G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000); and David E. Bernstein, "*Lochner*'s Legacy's Legacy," *Texas Law Review* 82, no. 1 (November 2003): 1.

6. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849.

7. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932): 280–311.

8. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938): 152, note 4.

9. For a terrific account of this sordid history see Geoffrey P. Miller, "The True Story of Carolene Products," *Supreme Court Review* 1987 (1987): 397.

10. *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal*, 298 U.S. 238 (1936).

11. Frances Perkins, "The Roots of Social Security" (keynote address, Social Security Administration Headquarters, Baltimore, MD, October 23, 1962), available at www.ssa.gov/history/perkins5.html. The program that came to be known as "Social Security" was sustained by a 7 to 2 vote in *Helvering v. Davis*, 301 U.S. 619 (1937). The unemployment scheme contained in the same act survived only by a close 5 to 4 margin in a companion case to *Helvering, Steward Machine Company v. Davis*, 301 U.S. 548 (1937). That narrow outcome, however, was caused by the form of the unemployment insurance program, not its objectives. Unlike Social Security, which is run by the federal government without any participation by the states, the unemployment system was administered by the states. Justices Sutherland and Van Devanter, who voted with the majority in *Helvering*, dissented in *Steward Machine* on the grounds that the federal law impermissibly regimented or, as we now say, "commandeered" the states. Their position, which I believe to be correct, holds that there is no constitutional obstacle to federal insurance programs, provided they are structured properly—for example, like Social Security.

12. *Nebbia v. People of New York*, 291 U.S. 502 (1934): 557–558 (McReynolds, J., diss.).

13. Sunstein prefers the Earned Income Tax Credit—which, though he does not say so, would have been plainly constitutional even before *West Coast Hotel*. Remember: the taxing power.

14. Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 201.

15. On employment for the disabled, see Daron Acemoglu and Joshua Angrist, "Consequences of Employment Protection? The Case of the Americans with Disabilities Act," (working paper 6670, National Bureau of Economic Research, July, 1998), available at www.nber.org/papers/w6670.pdf; it suggests that the ADA had a negative impact on employment. On the demise of private welfare entitlements, see R. Shep Melnick, "Federalism and the New Rights," *Yale Law and Policy Review* 14 (1996): 325.

16. For example, Sunstein laments the New Deal's preoccupation with minimum-wage laws rather than more targeted and flexible income guarantees. He neglects to consider the obvious political reason for that policy choice—the support of labor unions.

17. Sunstein, *The Second Bill of Rights,* 9–16.

18. The point has been made before. See Stephen Macedo, review of *After the Rights Revolution: Reconceiving the Regulatory State*, by Cass R. Sunstein, *Political Theory* 19 (August 1991): 456–461.

19. Martin Shapiro, "The Supreme Court from Early Burger to Early Rehnquist," in *The New American Political System*, ed. Anthony King, 2nd ed. (Washington, DC: AEI Press, 1990), 47.

20. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

21. Ibid., 37.

22. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992): 868.

23. *Grutter v. Bollinger*, 539 U.S. 306 (2003): 343 (permitting the use of racial preferences for twenty-five years, provided that applicants receive individualized consideration). In separate dissents in a companion case, Justices Ruth Bader Ginsburg and David H. Souter both observed that the proviso serves no purpose except to conceal the nature of affirmative action programs. *Gratz v. Bollinger*, 539 U.S. 244 (2003): 297–98 (Souter, J., diss.); 304–05 (Ginsburg, J., diss.).