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The Beard Thesis and Franklin Roosevelt

Cass R. Sunstein*

I.

Of the numerous writings surrounding the debate over the American Constitution, *The Federalist No. 10*¹ is probably the most important. In that essay, Madison set out the somewhat surprising thesis that a large republic would be better able than a small one to promote traditional republican goals. According to Madison, a small republic would likely be ridden by factional warfare. In a large republic, by contrast, public-spirited representatives would emerge. Such representatives, Madison claimed, would have the wisdom and the virtue to escape parochial pressures and to promote deliberation in government. A large republic would contain so many factions that they would effectively offset each other. The result would be an increased likelihood that the system will be protected against the effects of factionalism and that republican deliberation will actually occur. Interest-group trade offs — the grant of wealth or opportunity to *A* rather than to *B* simply because of *A*'s political power — would therefore be reduced or eliminated.

These aspects of *The Federalist No. 10* are highly congenial to many modern readers.² But other aspects are more controversial.

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1. THE FEDERALIST NO. 10 (J. Madison).

2. But not for all; a belief in local self-determination is a prominent theme in modern political and constitutional thought. See, e.g., B. BARBER, *STRONG DEMOCRACY* 117

Madison suggests that:

The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results³

And Madison closes the essay by emphasizing the advantages of the proposed constitution in countering "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."⁴

In this respect, there are powerful antiegalitarian and anti-democratic dimensions in *The Federalist No. 10*. The insulation of representatives from popular will appears to be intended not only to promote deliberation, but also to protect against popular desires for the redistribution of wealth and entitlements. Indeed, the two themes were merged in much of the thinking of the Framers. Factionalism was sometimes thought to consist precisely in changes in the existing distribution of property.⁵ In this sense, constitutionalism was designed partly as a self-conscious check on democracy — a notion that came up frequently in the constitutional convention.

It is instructive to compare Madison's claims in *The Federalist No. 10* with a discussion by President Franklin D. Roosevelt in accepting the Democratic nomination for the presidency in 1936. Roosevelt said:

[I]t was to win freedom from the tyranny of political autocracy that the American Revolution was fought. . . .

. . . .

The royalists of the economic order have conceded that political freedom was the business of the government, but they have maintained that economic slavery was nobody's business. They granted that the government could protect the citizen in his right to vote but they denied that the government could do anything to protect the citizen in his right to work and live.

Today we stand committed to the proposition that freedom is no half-and-half affair. . . .

. . . .

Better the occasional faults of a government that lives in a spirit

(1984) (stating that "[s]trong democracy is a distinctly modern form of participatory democracy [that] rests on the idea of a self-governing community of citizens who are united . . . by civic education and who are made capable of common purpose and mutual action by virtue of civic attitudes and participatory institutions").

3. THE FEDERALIST No. 10, at 58 (J. Madison) (J. Cooke ed. 1961).

4. *Id.* at 65.

5. This is of course an overgeneralization, for the Framers were well-disposed to some kinds of redistributive measures, particularly the poor laws.

of charity than the consistent omissions of a government frozen in the ice of its own indifference.⁶

Ideas of this sort contributed to Roosevelt's eventual endorsement of a "second Bill of Rights," available to all "regardless of station, race, or creed," and including:

The right to earn enough to provide adequate food and clothing and recreation;

....

The right of every family to a decent home;

The right to adequate medical care;

The right to adequate protection from the economic fears of old age, sickness, accident and unemployment; [and]

The right to a good education.⁷

The New Deal understanding of the functions of constitutionalism, embodied in Roosevelt's program for constitutional reform, thus departed dramatically from the original conception. In the New Deal reformulation, constitutionalism was no longer to be regarded as a check on popular demands for the redistribution of wealth and entitlements. On the contrary, constitutionalism was intended to promote at least a certain degree of redistribution. Roosevelt was of course no socialist; he believed strongly in both private property and private industry. His goal was to soften the harsh edges of the economic system, not to overturn it. But a principal purpose of the New Deal was to protect the poor and the disadvantaged from the risks of the marketplace. In the New Deal period, such efforts at protection did not appear to be a product of "faction," or to represent raw interest-group transfers, but were instead a plausible outcome of a deliberative process among citizens and representatives. The point holds even though some of the innovations of the New Deal period turned out to be difficult to defend on economic or noneconomic grounds.

Thus the insulation of administrative officials from political pressure — a prominent New Deal theme — was designed to allow for a measure of government intrusion on the privileges of powerful private groups. In this respect, Roosevelt's version of constitutionalism endorsed the Madisonian belief in the insulation of political actors from parochial pressures, but to bring about, rather than to prevent, collective action to redistribute resources.

The refashioning of the constitutional structure during the period of the New Deal sheds considerable light both on the original framework and on current constitutional predicaments. Indeed, the New Deal period furnishes some basis, though partial and indirect, for understandings of the original system that can be roughly associated with the work of Charles Beard — a conclusion that should not be

6. Acceptance Address by President Franklin D. Roosevelt, Democratic National Convention (June 27, 1936), *reprinted in* 2 VITAL SPEECHES OF THE DAY 634, 634-36 (1935-1936).

7. State of the Union Address by President Franklin D. Roosevelt (Jan. 11, 1944), *reprinted in* 10 VITAL SPEECHES OF THE DAY 194, 197 (1943-1944).

surprising in light of the fact that Beard was a part of the progressive movement, which provided much of the underpinning of the New Deal. In this essay, I explore some of the central economic commitments of the original constitutional design, not by offering biographical data about the Framers, but by pointing to a number of features of that design and by providing a comparison of the original document with the New Deal reforms.

During the celebration of the bicentennial, it is important to appreciate not only the achievements of the Constitution's original drafters, but also those of others who have affected the meaning and structure of the Constitution. One need look no further than the founding generation itself for counsel of this sort. It was Thomas Jefferson who asserted that members of the preceding age were "very like the present, but without the experience of the present,"⁸ and who criticized those who "look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched."⁹ Jefferson advised: "Let us . . . [not] weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. . . . [T]he dead have no rights."¹⁰ Of those who followed this advice, those associated with the New Deal reformulation — above all Franklin Roosevelt — occupy a singularly important place.

II.

Three basic commitments underlay the original constitutional design. The first was to some form of "limited government," understood in a vaguely libertarian fashion; the second was to a system of checks and balances; the third was to federalism. The three commitments were closely allied. The institutional principles of the system were designed to serve the substantive belief in rights of private property and contract.

The substantive commitment, reflected in *The Federalist No. 10*, was to a degree of immunity from government incursions into the private realm — whether those incursions were supported by a minority or a majority. Thus the original Constitution singled out protection of private contract as one of its rare safeguards of substantive rights; and the Eminent Domain Clause, protecting private property, was a prominent feature of the Bill of Rights. It would be a mistake to suggest that the Framers intended to abolish all of what we would currently describe as redistribution of prop-

8. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in *THE PORTABLE THOMAS JEFFERSON* 552, 559 (M. Peterson ed. 1977).

9. *Id.* at 558-59.

10. *Id.* at 559-60.

erty, but there can be little doubt that their conception of private rights led to deep suspicion about forms of government action that are now taken as unobjectionable. Modern zoning regulation, social security, minimum-wage and maximum-hour provisions, occupational safety and health controls, environmental measures, labor and civil rights laws — all of these would likely have been quite mysterious to the founding generation.

At the national level, a variety of efforts were made to insulate public representatives from constituent pressures, in the interest of bringing about a kind of deliberative democracy. Modern pluralist or economic theories, understanding the political process as a kind of market among self-interested actors, were thus rejected by the Framers at both the positive and normative levels. Well aware of the risks posed by self-interested private groups, the founding generation sought not to ensure an equilibrium among those groups, but instead to insulate representatives from factions in order to promote the performance of deliberative tasks. Thus the President was to be selected by the electoral college, a deliberative body. The Senate was to be elected indirectly; only members of the House of Representatives were to be elected directly.

In the premium placed by the Framers on deliberative democracy, it is possible to see the impact of classical republican thought on the constitutional framing — a significant theme of modern historians writing on the founding period. The Framers did not disparage civic virtue, or believe that self-interest was the inevitable motivating force of human behavior. As Hamilton wrote in *The Federalist No. 55*, “[a]s there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence.”¹¹ Thus the Framers emphasized, time and again, their hope and expectation that virtuous leaders would emerge in a national republic.

In recent years, there have been many efforts to understand the Framers as thoroughgoing modernist skeptics — indeed as forerunners of Chicago-school economists — treating economic self-interest as the basis of political conduct and understanding the task of representatives as the largely mechanical one of translating the political power of various constituents into political outcomes. Such efforts are badly off the mark; they read into the period of the framing something that simply was not there.¹²

But the Framers did not believe that a system of deliberative representation was sufficient in itself. The system of checks and balances was designed to serve a variety of supplemental functions, providing safeguards in the event of a breakdown in representative processes. That system would, for example, furnish a measure of

11. THE FEDERALIST NO. 55, at 378 (A. Hamilton) (J. Cooke ed. 1961).

12. See Meyers, *Reflection and Choice: Beyond the Sum of the Differences*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON at xi-xix (M. Meyers rev. ed. 1981).

protection against factionalism; some groups might be able to usurp the power of one branch, but they would be unlikely to obtain power over all three. At the same time, checks and balances would diminish the risk that rulers might have and act upon interests adverse to those of the ruled — to minimize what we might now call “agency costs.” In the words of *The Federalist No. 51*, “[a]mbition must be made to counteract ambition,” and incursions by government restricted.¹³ Moreover, as Montesquieu suggested, a system of separated powers should naturally produce “a state of repose or inaction.”¹⁴ The result would be to promote stability, to disable the public sphere at least in some respects,¹⁵ and to protect the private spheres of property and contract. In this last sense in particular, the institution of checks and balances comfortably coexisted with the substantive understanding underlying the original system.

The federal system provided an additional set of safeguards. Thus *The Federalist No. 51* understands federalism as a kind of vertical separation of powers, protecting private rights:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”¹⁶

In this respect, federalism operated in the service of limited government. Under an approach that sees freedom in immunity from governmental restraints, this additional safeguard is highly desirable.

At the same time, the federal structure provided a set of opportunities for local self-determination. This was an entirely distinct strand in federalist theory. The idea here is that local self-government furnished a vehicle for active citizen participation in a largely commercial republic. The traditional republican goal of local self-determination¹⁷ was thus promoted through a two-tier set of governing bodies. Madisonian representation at the national level, supplemented by a system of checks and balances, was accompanied by state and local avenues for self-government. The state and national

13. THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Madison ed. 1961).

14. 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 160 (T. Nugent trans. rev. ed. 1899).

15. The Constitution was also designed to promote a healthy division of labor by splitting the legislative and executive functions; and an energetic executive was of course a principal purpose of the shift from the Articles of Confederation.

16. THE FEDERALIST NO. 51, *supra* note 13, at 351.

17. See generally Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) (discussing the civic-republican tradition of “self-government realized through politics” as the ideal manifestation of freedom).

governments were also intended to "controul each other,"¹⁸ providing a kind of vertical check and balance that would also work to promote liberty.

Judicial review of course fit comfortably with this system. Insulated actors would check majoritarian excesses, often redistributive or the result of factionalism, and furnish a final set of constraints on the operation of democracy. It was for this reason that the Federalists readily rejected concerns raised by the Anti-Federalists, who were fearful that judicial review would create a "countermajoritarian difficulty" of the kind that has been so prominent in recent constitutional theory.

What emerges from this brief sketch is a system in which constitutionalism operated as a self-conscious series of checks on the operation of democracy — a system designed to prevent factionalism and self-interested representation, but also to protect the existing distribution of wealth. It is hardly necessary to examine the economic incentives of the Framers, or to attribute to them sinister motives, to agree that one purpose of the original system was to guard a large set of individual rights, including the prerogatives of private property and contract. The structure of the original Constitution itself furnishes powerful evidence for that view.

III.

Each of the original constitutional commitments traced above is recognizable as part of the modern constitutional structure. But each of them has undergone considerable reformulation since the framing. A principal source of the reformulation is the New Deal, which altered the original system in a number of ways.¹⁹ First, the preexisting understanding of legal entitlements, with its heavy emphasis on the protection of wealth and property from democratic control, was rejected. For the New Deal reformers, the common law system of private rights was a regulatory system, serving the interests of some at the expense of others; it had no prepolitical status. The Supreme Court's conclusion, in *Lochner v. New York*,²⁰ that regulatory measures should be understood as a sort of "taking" from *A* for the benefit of *B* depended on a view that the common law was natural and prepolitical.²¹ The very notion of a taking depends on an antecedent theory of entitlement, and the baselines drawn from the common law and the existing distribution of wealth and entitlements underlay pre-New Deal understandings. In *West Coast Hotel v. Parrish*,²² by contrast, the Court stated that the failure to establish minimum wages could be understood as providing a kind of "sub-

18. THE FEDERALIST NO. 51, *supra* note 13, at 351.

19. The New Deal was not, however, a sudden break from tradition. It should be seen as the culmination of a longer period of administrative and institutional development. See S. SKOWRONEK, BUILDING A NEW AMERICAN STATE 288-89 (1982).

20. 198 U.S. 45 (1905).

21. For an elaboration, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. (1987).

22. 300 U.S. 379 (1937).

sidy for unconscionable employers.”²³ This opinion reflected a dramatic shift in the baselines from which legal decisions were made, a shift that upset original understandings about the primacy of property rights.

The understanding that the common law was constructed rather than natural led to a dramatically different conception of legal entitlements. In the New Deal period, the previous catalogue appeared both over- and underinclusive. Some items that were treated as legally protected rights became subjects for legal intervention. In particular, rights of private property were no longer immunized from state control. To a large degree this understanding derived from a perception that rights of property were not prepolitical but a product of positive law, above all the law of trespass.²⁴ Because such rights were socially constructed rather than natural, they were permissible objects of legal control.

At the same time, the New Deal reformation led to a belief that interests that were previously seen as legal gratuities, or more often a product of private charity, should be protected by the legal system. Hence, for example, Roosevelt’s “second Bill of Rights.” More concretely, the New Deal period resulted in the creation of legal rights in the form of regulatory protection against poverty, unemployment, accident, disease, oppression by employers, and a wide range of related harms. In this system, factionalism was seen not as the redistribution of property rights, but as the insulation of existing practice from collective control. This theme — a dramatic departure from original constitutional principles — played a prominent role throughout Roosevelt’s presidency. Some of the New Deal initiatives, particularly in the area of economic regulation, were built on shaky foundations. But the understanding that factionalism could manifest itself in government inaction rather than action and the concern that failure to protect the disadvantaged could itself be a product of interest-group power were fundamental.

Understandings of this sort had drastic institutional implications. In particular, they led quite naturally to skepticism about the original system of checks and balances and about tripartite government. That system was closely associated with the common law and with the system of *laissez-faire*, because as we have seen, it “naturally form[ed] a state of repose or inaction.”²⁵ The most radical suggestions of the time called for a total abolition of checks and balances in favor of a concentration of power in one entity. Those suggestions

23. *Id.* at 399.

24. This was of course a prominent theme in the legal realist movement. See Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470, 471-77 (1923).

25. See *supra* note 14 and accompanying text.

were repudiated, but some of the impetus behind them was reflected in the enthusiasm for an increase in presidential power and for administrative regulation. The result was that the system of tripartite government was substantially altered. Power that was formerly exercised by Congress and by common law courts was concentrated in the presidency.²⁶ Administrative agencies combined traditionally separated functions. In both cases, the goal was to ensure an institutional structure accommodating the belief that national intervention into the economic structure should be facilitated rather than blocked.

At the same time, original understandings of federalism were significantly altered. The states, it was thought, were too large to provide genuine self-determination. The notion that the states and the federal government should control each other by ensuring a kind of stasis — the idea of vertical separation of powers — seemed perverse. Finally, states had proved themselves ineffectual in dealing with social and economic problems. The depression of the 1930s is of course the critical development here. In the New Deal reformation, it was the presidency, not the states, that was the locus of self-government. In a single stroke, this understanding allied Hamiltonian beliefs in a strong executive with Jeffersonian aspirations for genuine self-determination by the citizenry.

The New Deal thus produced a radically different constitutional structure, one that sheds considerable light on the purposes and effects of the original framework and on the origins of current constitutional predicaments. During the New Deal period, the original understanding of rights was substantially altered, the system of tripartite government was abandoned, and federalism took a significantly different form. Most modern constitutional controversies arise out of nostalgia for the original framework, on one or more of these fronts, or from concern that the insights of the New Deal period have been taken insufficiently far.

IV.

This is hardly the place to evaluate the claims made by those skeptical about the New Deal reformulation. We may suggest, however, that the New Deal rejection of the federal system was far too cavalier. The President does not provide an avenue for self-determination by the citizenry, and national solutions have often ignored the need, emphasized by the Framers, for diversity and flexibility in a large republic. There is a continuing need to achieve traditional republican goals of local self-determination, though avenues are not simple to find. Moreover, the New Deal enthusiasm for technocratic government, embodied in the belief in regulatory administration, has proved myopic. Failure in regulatory implementation has been relatively common. In the last twenty-five years, there have thus been efforts on the part of the three constitutionally specified

26. See T. LOWI, *THE PERSONAL PRESIDENT* 57-58 (1985).

branches to oversee regulatory performance, and those efforts have often operated in the service of the substantive agenda of the New Deal.

With respect to the new conception of rights, in some ways the New Deal reformulation did not go far enough. Much of modern law depends on common law or status quo baselines. Most strikingly, common law categories continue to exert a powerful hold on modern administrative law. Consider the definition of liberty and property interests, where the Court distinguishes between benefits created by the government and those said to be simply "given." In the areas of standing²⁷ and reviewability²⁸ the Court continues to treat the beneficiaries of regulatory statutes less generously than regulated class members, in part because the latter, unlike the former, are always able to point to a common law interest. Consider as well the areas of discrimination on the basis of race and sex. Discriminatory effects are constitutionally unobjectionable, affirmative action is seen as constitutionally troublesome, and both of these conclusions depend on the idea that the existing distribution of benefits and burdens as between whites and blacks and men and women should be seen as simply "there."

However the future may treat the legacy of the original constitutional framework and the New Deal reformulation, an understanding of the 1930s illustrates the variety of possible relationships between constitutionalism and democracy. Historians have recited a large number of reasons for skepticism toward Charles A. Beard's thesis about the relationship between the economic self-interest of the Framers and the Constitution. Beard and his followers were far too crude in this regard, and they undervalued the breadth and the power of central features of the Framers' vision. But the progressive historians were correct in pointing to the central importance of controversial understandings of private property to the original constitutional regime, and the ways in which those understandings have been repudiated in modern political and constitutional thought. In a time in which the nation celebrates the enormous achievements of the drafters of the original document, it is important to remember the accomplishments of others who have played a role in developing the modern constitutional structure. This category includes not merely the most important Justices of the Supreme Court, but a small group of others who have attained the status of constitutional framers — prominent among them Franklin D. Roosevelt.

27. See *Allen v. Wright*, 468 U.S. 737, 753 (1984) (holding that black parents do not have standing to challenge tax deductions for segregated private schools).

28. See *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (concluding that agency inaction is presumed to be unreviewable).