

# CONSTITUTIVE COMMITMENTS AND ROOSEVELT'S SECOND BILL OF RIGHTS: A DIALOGUE

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## I. ROOSEVELT'S SECOND BILL OF RIGHTS<sup>1</sup>

*Cass R. Sunstein*

On January 11, 1944, the United States was involved in its longest conflict since the Civil War. The war effort was going well. In a remarkably short period, the tide had turned sharply in favor of the Allies.

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1. Portions of the analysis in this section have been adapted from the Author's recent book, CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

Ultimate victory was no longer in serious doubt. The real question was the nature of the peace.

At noon, America's optimistic, aging, self-assured, wheelchair-bound president, Franklin Delano Roosevelt, delivered his State of the Union Address to Congress.<sup>2</sup> His speech was not elegant. It was messy, sprawling, unruly, a bit of a pastiche, and not at all literary. It was the opposite of Lincoln's tight, poetic Gettysburg Address. But because of what it said, this forgotten address, proposing a "Second Bill of Rights," has a strong claim to being the greatest speech of the twentieth century.<sup>3</sup>

Roosevelt began by emphasizing that that war was a shared endeavor in which the United States was simply one participant: "This Nation in the past two years has become an active partner in the world's greatest war against human slavery."<sup>4</sup> The war was in the process of being won. "But I do not think that any of us Americans can be content with mere survival."<sup>5</sup> Hence "the one supreme objective for the future"—the objective for all nations—was captured "in one word: Security."<sup>6</sup> Roosevelt argued that the term "means not only physical security which provides safety from attacks by aggressors," but includes as well "economic security, social security, moral security."<sup>7</sup> Roosevelt insisted that "essential to peace is a decent standard of living for all individual men and women and children in all Nations. Freedom from fear is eternally linked with freedom from want."<sup>8</sup>

Moving to domestic affairs, Roosevelt emphasized the need to bring "security" of all kinds to America's citizens. He argued for "[a] realistic tax law—which will tax all unreasonable profits, both individual and corporate, and reduce the ultimate cost of the war to our sons and daughters."<sup>9</sup> The nation "cannot be content, no matter how high that

2. For the full version of the address, see President Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32-42 (Samuel I. Rosenman ed., Harper & Bros. 1950) [hereinafter Roosevelt, *State of the Union Address*].

3. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987) (quoting Roosevelt's "Second Bill of Rights"); see generally SUNSTEIN, *supra* note 1 (recovering and reemphasizing Roosevelt's Second Bill of Rights).

4. Roosevelt, *State of the Union Address*, *supra* note 2, at 32.

5. *Id.*

6. *Id.* at 33.

7. *Id.*

8. *Id.* at 34.

9. *Id.* at 37.

general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.”<sup>10</sup> At this point the speech became spectacularly ambitious. Roosevelt looked back, and not entirely approvingly, to the framing of the Constitution. At its inception, the nation had grown “under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures.”<sup>11</sup> But over time, these rights had proved inadequate. Unlike the Constitution’s framers,

[w]e have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.<sup>12</sup>

Then he listed the relevant rights:

*The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;*

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

*The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;*

*The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;*

*The right of every family to a decent home;*

*The right to adequate medical care and the opportunity to achieve and enjoy good health;*

*The right to adequate protection from the economic fears of old age,*

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10. *Id.* at 40.

11. *Id.*

12. *Id.* at 41.

*sickness, accident, and unemployment;*

*The right to a good education.*<sup>13</sup>

Having catalogued these eight rights, Roosevelt immediately recalled the “one word” that captured the overriding objective for the future. He argued that these “rights spell security”—and hence that the recognition of the Second Bill was continuous with the war effort.<sup>14</sup> “[A]fter this war is won,” he said, “we must be prepared to move forward, in the implementation of these rights.”<sup>15</sup> There was a close connection between this implementation and the coming international order. “America’s own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.”<sup>16</sup> He concluded that government should promote security instead of paying heed “to the whining demands of selfish pressure groups who seek to feather their nests while young Americans are dying.”<sup>17</sup>

What made the Second Bill of Rights possible? Part of the answer lies in a simple idea, one pervasive in the American legal culture during Roosevelt’s time: *No one really opposes government intervention*. Markets and wealth depend on government. Without government creating and protecting property rights, property itself cannot exist. Even the people who most loudly denounce government interference depend on it every day. Their own rights do not come from minimizing government but are a product of government. Political scientist Lester Ward vividly captured the point: “[T]hose who denounce state intervention are the ones who most frequently and successfully invoke it. The cry of laissez faire mainly goes up from the ones who, if really ‘let alone,’ would instantly lose their wealth-absorbing power.”<sup>18</sup> Think, for example, of the owner of a radio station, a house in the suburbs, an expensive automobile, or a large bank account. Every such owner depends, every day of every year, on the protection given by a coercive and well-funded state, equipped with a police force, judges, prosecutors, and an extensive body of criminal and civil law.

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13. *Id.* (emphasis added).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 42.

18. LESTER WARD, *PLUTOCRACY AND PATERNALISM* 308 (1885), *quoted in* SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE* 262 (1964).

From the beginning, Roosevelt's White House understood all this quite well. In accepting the Democratic nomination in 1932, Roosevelt insisted that "[w]e must lay hold of the fact that economic laws are not made by nature. They are made by human beings."<sup>19</sup> Or consider Roosevelt's Commonwealth Club Address in the same year, where he emphasized "that the exercise of . . . property rights might so interfere with the rights of the individual that the Government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it."<sup>20</sup> The key point here is that without government's active assistance, property rights could not exist at all. As Walter Lippmann wrote in 1937:

While the theorists were talking about laissez-faire, men were buying and selling legal titles to property, were chartering corporations, were making and enforcing contracts, were suing for damages. In these transactions, by means of which the work of society was carried on, the state was implicated at every vital point.<sup>21</sup>

In this light it was implausible to contend that government should simply "stay out of the way" or "let people fend for themselves." Against the backdrop of the Great Depression, and the threat from fascism, Roosevelt was entirely prepared to insist that government should "protect individualism" not only by protecting property rights but also by ensuring decent opportunities and minimal security for all. The ultimate result was his proposal for the Second Bill of Rights.<sup>22</sup>

Roosevelt, dead within fifteen months of delivering this speech, was unable to take serious steps toward implementing the Second Bill. But his proposal, largely unknown within the United States, has had an extraordinary influence internationally. It played a major role in the Universal Declaration of Human Rights, finalized in 1948 under the leadership of Eleanor Roosevelt and publicly endorsed by American officials at the time. The Universal Declaration proclaims that

[e]veryone has the right to a standard of living adequate for the health

19. Franklin D. Roosevelt, *The Governor Accepts the Nomination for the Presidency* (July 2, 1932), in 1 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 657 (Samuel I. Rosenman ed., 1938) [hereinafter *Public Papers*].

20. Franklin D. Roosevelt, *Campaign Address on Progressive Government at the Commonwealth Club* (Sept. 23, 1932), in 1 *Public Papers*, *supra* note 19, at 746.

21. WALTER LIPPMANN, *AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY* 187 (1937).

22. *See* Roosevelt, *State of the Union Address*, *supra* note 2.

and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>23</sup>

The Universal Declaration also provides a right to education<sup>24</sup> and social security.<sup>25</sup> It proclaims that everyone “has a right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”<sup>26</sup>

By virtue of its effect on the Universal Declaration, the Second Bill has influenced dozens of constitutions throughout the world. In one form or another, it can be found in countless political and legal documents. The current Constitution of Finland states that “[e]veryone shall be guaranteed . . . the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.”<sup>27</sup> The Constitution of Spain announces, “[t]o citizens in old age, the public authorities shall guarantee economic sufficiency through adequate and periodically updated pensions.”<sup>28</sup> Similarly, the constitutions of Ukraine, Romania, Syria, Bulgaria, Hungary, Russia, and Peru recognize some or all of the social and economic rights catalogued by Franklin Roosevelt. We might even call the Second Bill of Rights a leading American export. As the most recent example, consider the interim Iraqi Constitution, written with American help and celebrated by the Bush Administration. In Article XIV, the interim Iraqi Constitution proclaims, “[t]he individual has the right to security, education, health care, and social security;” it adds that the nation and its government “shall strive to provide prosperity and employment opportunities to the people.”<sup>29</sup> In terms of constitutional thought, Article XIV can be directly traced to Franklin Delano Roosevelt and his Second Bill of Rights.

In fact the United States itself continues to live, at least some of the time, under Roosevelt’s constitutional vision. A consensus underlies

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23. Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, at 5, U.N. Doc. A/810 (1948).

24. *Id.* at art. 26.

25. *Id.* at art. 22.

26. *Id.* at art. 23(1).

27. FIN. CONST. ch. 2, § 19(2).

28. SPAIN CONST. tit. 1, § 2, ch. III, art. 50.

29. IRAQ CONST. (Interim) ch. 2, art. XIV (adopted March 8, 2004), available at [http://www.oefre.unibe.ch/law/icl/iz00000\\_.html](http://www.oefre.unibe.ch/law/icl/iz00000_.html) (last visited Jan. 7, 2005).

several of the rights he listed, including the right to education, the right to social security, and the right to be free from monopoly. In the 1950s and 1960s, the Supreme Court started to go much further, embarking on a process of giving constitutional recognition to some of the rights that Roosevelt listed. The idea that the Constitution might protect social and economic rights can be traced to an obscure Supreme Court decision in 1941<sup>30</sup>—revealingly, the very same year as Roosevelt's "four freedoms" speech. California had enacted a law banning people from bringing indigents into the state.<sup>31</sup> The Court ruled that the ban violated the commerce clause.<sup>32</sup> States are not entitled to regulate interstate commerce, and if a state prohibited people from transporting the poor from one state to another, it was effectively regulating such commerce.<sup>33</sup> Justice Robert Jackson, a close adviser to Roosevelt and his former Attorney General, went much further, with an emphasis on the idea of citizenship:

"Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. . . . Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.<sup>34</sup>

This passage, and especially Jackson's last sentence, could be understood to have far-reaching implications. In fact, Jackson was speaking Roosevelt's language here. In a short period from 1957 through 1969, the Court explored several of these issues, and it reacted sympathetically to people's complaints. In some of them, the Court went so far as to hold that the government must subsidize poor people in certain domains. In several, the Court ruled that indigent criminal defendants have a right to a lawyer at taxpayer expense.<sup>35</sup> Building on "the right to protect your rights," the Court struck down poll taxes.<sup>36</sup> In other cases, the Court went further still. In *Shapiro v. Thompson*,<sup>37</sup> the Court seemed to come close to saying that the Constitution conferred a right to welfare benefits. The case involved a Connecticut law imposing a one-year waiting

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30. *Edwards v. California*, 314 U.S. 160 (1941).

31. *Id.* at 171.

32. *Id.* at 177.

33. *Id.* at 176-77.

34. *Id.* at 184-85 (Jackson, J., concurring).

35. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

36. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-69 (1966).

37. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

period before new arrivals to the state could receive welfare benefits.<sup>38</sup> Obviously the state was trying to avoid becoming a magnet for poor people. Was this constitutional? Connecticut argued that states should have the right to create waiting periods to prevent fraud and to protect the state's taxpayers from a flood of out-of-staters hoping to get benefits.<sup>39</sup> In response, those attacking the law argued that the waiting period discriminated against them by depriving them of the basic necessities of life.<sup>40</sup>

The Court agreed. In striking down the waiting period, the Court relied on the constitutional right to travel.<sup>41</sup> The waiting period would "penalize" impoverished travelers and thus violate their constitutional right to go from one state to another.<sup>42</sup> By itself, this conclusion seemed to raise the possibility that states might have an obligation to provide welfare benefits, and perhaps moderately generous benefits at that. If a state had no welfare programs at all, wouldn't it "penalize" travelers in just the same way? If a state provided welfare benefits significantly below those of their neighbors, might it be "penalizing" travelers too? In any case, the Court spoke explicitly of the special needs of poor people, suggesting that those needs were relevant as a constitutional matter. In the Court's words, Connecticut "*denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.*"<sup>43</sup> If the decision turned only on the right to travel, this suggestion would seem purposeless. Thus the Court's emphasis on "food, shelter, and other necessities of life" seemed to be a recognition of the special status of at least parts of the Second Bill. The *Shapiro* opinion embodied some of Roosevelt's most dramatic claims about individual rights.

The Court went even further a few years later, in *Memorial Hospital v. Maricopa County*.<sup>44</sup> Arizona required one year's residence in the county as a condition for receiving nonemergency medical care at county expense.<sup>45</sup> The state argued that nonemergency medical care was quite

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38. *Id.* at 622-23 & n.2. The case also involved similar statutes from Pennsylvania, *see id.* at 625-26 & n.5, and the District of Columbia, *see id.* at 623-25 & n.3. All three were struck down by the Court. *Id.* at 642.

39. *Id.* at 627-28, 633-34.

40. *Id.* at 623-24.

41. *Id.* at 629-33.

42. *Id.* at 633-34.

43. *Id.* at 627 (emphasis added).

44. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

45. *Id.* at 252 & n.2.

different from “the very means to subsist”<sup>46</sup> and that the right to travel was not involved.<sup>47</sup> The Supreme Court disagreed.<sup>48</sup> It read *Shapiro* as holding that the “denial of the basic ‘necessities of life’ [is] a penalty.”<sup>49</sup> In an echo of Roosevelt, the Court added that it is “clear that medical care is as much ‘a basic necessity of life’ to an indigent as welfare assistance.”<sup>50</sup> Thus a majority of the Court said that “[i]t would be odd” to conclude that a state must afford a poor person “welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.”<sup>51</sup> On the basis of this language, it would not be implausible to see the Court as suggesting that the Constitution requires the state to provide a degree of medical care.

Of course these decisions did not go so far. In *Shapiro* and *Maricopa County*, the Court dealt with a form of discrimination. It did not say that the Constitution requires government to provide all citizens with a basic minimum. But in its 1970 decision in *Goldberg v. Kelly*,<sup>52</sup> the Court issued an especially dramatic ruling. There it concluded that welfare benefits count as a kind of “new property,” entitled to the protection of the Constitution’s due process clause.<sup>53</sup> The problem stemmed from the fact that New York refused to provide a full hearing before removing people from the welfare rolls.<sup>54</sup> Was this constitutionally permissible? Under the Due Process Clause, people are entitled to a hearing only if they can show that their “life, liberty, or property” is at stake. But since the nation’s beginning, welfare benefits had been seen as a mere privilege, not a right.<sup>55</sup> Such benefits certainly were not “liberty” or “property” within the meaning of the Constitution. The Court restricted the category of rights to the old kind of “property,” such as land, cash, bank accounts, and investments. Government benefits were in a quite different category. Of course Roosevelt believed that a fair minimum should be seen as a matter

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46. See *Shapiro v. Thompson*, 394 U.S. at 627.

47. *Mem'l Hosp. v. Maricopa County*, 415 U.S. at 254-55.

48. *Id.* at 254-61.

49. *Id.* at 259 (quoting *Shapiro v. Thompson*, 394 U.S. at 627).

50. *Id.*

51. *Id.* at 259-60 (footnote omitted).

52. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

53. *Id.* at 262-65 & n.8; see generally Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) (urging the abandonment of the “rights-privileges” distinction).

54. *Goldberg v. Kelly*, 397 U.S. at 256-60.

55. See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (treating social security benefits as a privilege, not a right).

of right, not charity. But the Constitution had not been understood in Rooseveltian terms. To succeed, welfare recipients had to convince the Court to reconsider its longstanding view about the meaning of the Constitution.

In *Goldberg*, the Court abandoned the right-privilege distinction and ruled that welfare was indeed a form of constitutional “property.”<sup>56</sup> Under the Due Process Clause, the government must provide a hearing before it removes people from the rolls. In *Goldberg*, the Court emphasized the “brutal need” of those who depended on welfare benefits.<sup>57</sup> In its most extraordinary passage, it noted that “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.”<sup>58</sup> Here is a clear reminder of a central lesson of the Great Depression. The Court continued:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>59</sup>

In a key footnote, the Court said “[i]t may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth of this country takes the form of rights that do not fall within traditional common-law concepts of property.”<sup>60</sup>

By the late 1960s, respected constitutional thinkers could conclude that the Court was on the verge of recognizing a right to be free from desperate conditions—a right that captures many of the rights that Roosevelt attempted to catalogue. But all this was undone as a result of the election of President Richard Nixon in 1968. President Nixon promptly appointed four justices—Warren Burger, William Rehnquist, Lewis Powell, and Harry Blackmun—who showed no interest in the Second Bill. In a series of decisions, the new justices, joined by one or two others, rejected the claim that the existing Constitution protects the rights that

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56. *Goldberg v. Kelly*, 397 U.S. at 262-65 & n.8.

57. *Id.* at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 900 (1968)).

58. *Id.* at 264-65 (footnote omitted).

59. *Id.* at 265 (quoting U.S. CONST. pmb.).

60. *Id.* at 262 n.8.

Roosevelt catalogued.<sup>61</sup>

Roosevelt himself did not argue for constitutional change (and on this I believe that he was right). He wanted the Second Bill to be part of the nation's deepest commitments, to be recognized and vindicated by the public, not by federal judges. He thought that the Second Bill should be seen in the same way as the Declaration of Independence—as a statement of the fundamental aspirations of the United States, which we might see as the nation's *constitutive commitments*.<sup>62</sup> But Roosevelt's hopes have not been fully realized. Much of the time, the United States seems to have embraced a confused and pernicious form of individualism, one that has no real foundations in our history. This is an approach that endorses rights of private property and freedom of contract, and respects political liberty, but claims to distrust “government intervention” and to insist that people must largely fend for themselves. This form of so-called individualism is incoherent—a hopeless tangle of confusions. As Roosevelt well knew, no one is really against government intervention. The wealthy, at least as much as the poor, receive help from government and from the benefits that it bestows.

Roosevelt himself pointed to the essential problem as early as 1932. In his words, the exercise of “property rights might so interfere with the rights of the individual that the Government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it.”<sup>63</sup> The key phrase here is “without whose assistance the property rights could not exist.” Those of us who are doing well, and who have plenty of money and opportunities, owe a great deal to an active government that is willing and able to protect what we have. Once we appreciate this point, we will find it impossible to complain about “government interference” as such or to urge, ludicrously, that our rights are best secured by getting government “off our backs.” The same people who object to “government intervention” depend on it every day of every year. Roosevelt was entirely aware of this point.

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61. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973) (finding no fundamental constitutional right to education); *Lindsay v. Normet*, 405 U.S. 56, 74 (1972) (finding no constitutional right to social and economic protections, such as safe, sanitary, and decent housing); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (rejecting any notion of a constitutional right to welfare benefits).

62. For more on this concept, see *infra* Parts II, IV, VI; see also SUNSTEIN, *supra* note 1, at 61-95.

63. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in 1 *Public Papers*, *supra* note 19, at 746.

Remarkably, the confusions that Roosevelt identified have had a rebirth since the early 1980s. Time and again, politicians argue that they oppose government intervention, even though property rights themselves cannot exist without such intervention. While proposing a sensible system of federal tax credits to increase health insurance coverage, President George W. Bush found it necessary to offer the senseless suggestion that what he was proposing was “not a government program.”<sup>64</sup> Time and again, American culture is said to be antagonistic to “positive rights,” even though property rights themselves require “positive” action and even though the Second Bill helped capture our nation’s political reforms for much of the twentieth century. Both at home and abroad, we are seeing a false and ahistorical picture of American culture and history. Unfortunately, that picture is far from innocuous. America’s self-image—our sense of ourselves—has a significant impact on what we actually do. We should not look at ourselves through a distorted mirror.

Roosevelt was right to insist that there is an inextricable link between freedom from fear and freedom from want.<sup>65</sup> Liberty and citizenship are rooted in security. In a sense, America lives under the Second Bill. But in another sense, we have lost sight of it. The Second Bill of Rights should be reclaimed in its nation of origin.

[*Editor’s Note:* As a guest blogger on the *Volokh Conspiracy*,<sup>66</sup> Professor Sunstein advanced, in abbreviated form, the argument of the previous essay. What resulted was a colloquy between him and Professor Randy Barnett on the nature and status of what Professor Sunstein calls “constitutive commitments.” That exchange, with some editing, appears below, and is followed by concluding remarks by Professor Barnett written for the *Drake Law Review*.]

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64. See President George W. Bush, Remarks by the President on Health Care Reform, Medical College of Wisconsin, Milwaukee, Wis., (Feb. 11, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020211-4.html>.

65. See Roosevelt, *State of the Union Address*, *supra* note 2, at 34.

66. See <http://volokh.com/>.

*Cass Sunstein (guest-blogging), June 24, 2004, at 10:43 a.m.:*

## II. CONSTITUTIVE COMMITMENTS

It is standard to distinguish between constitutional requirements and mere policies. An appropriation for Head Start is a policy, which can be changed however Congress wishes; by contrast, the principle of free speech overrides whatever Congress seeks to do. But there is something important, rarely unnoticed, and in between—much firmer than mere policies, but falling short of constitutional requirements. These are constitutive commitments. (We are still talking, or at least not not talking, about FDR's Second Bill of Rights.)

Constitutive commitments have a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in national understandings. These rights are “constitutive” in the sense that they help to create, or to constitute, a society's basic values. They are also commitments, in the sense that they have a degree of stability over time. A violation would amount to a kind of breach—a violation of a trust.

Current examples include the right to some kind of social security program; the right not to be fired by a private employer because of your skin color or your sex; the right to protection through some kind of antitrust law. As with constitutional provisions, we disagree about what, specifically, these rights entail; but there is not much national disagreement about the rights themselves. (At least not at the moment.)

We could learn a lot about a nation's history if we explored what falls in the category of constitutional rights, constitutive commitments, and mere policies—and even more if we identified migrations over time. Maybe some of the commitments just mentioned will turn into mere policies. Sometimes policies are rapidly converted into constitutive commitments (consider the 1964 Civil Rights Act). Sometimes constitutive commitments end up getting constitutional status (the right to sexual privacy is, to some extent, an example, with the line of cases from *Griswold v. Connecticut*<sup>67</sup> to *Lawrence v. Texas*<sup>68</sup>).

Back to FDR's Second Bill of Rights: He was not proposing a formal constitutional change; he did not want to alter a word of the founding document. He was proposing to identify a set of constitutive commitments.

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67. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

68. *Lawrence v. Texas*, 539 U.S. 558 (2003).

One possible advantage of that strategy is that it avoids a role for federal judges; another possible advantage is that it allows a lot of democratic debate, over time, about what the constitutive commitments specifically entail.

Presidents Johnson and Reagan also tried to redefine the nation's constitutive commitments, but FDR was much more ambitious. He did not quite succeed in turning the Second Bill of Rights into constitutive commitments; but if you go over the list,<sup>69</sup> you'll see that he didn't exactly fail.

*Randy Barnett, June 24, 2004, at 6:43 p.m.:*

### III. TAKING "CONSTITUTIVE COMMITMENTS" SERIOUSLY

In his recent post, Cass invokes the concept of a "constitutive commitment," by which he means something more than "a policy" and something less than "a constitutional requirement."<sup>70</sup> I take it that he would distinguish between constitutive commitments and Ackermanian ethereal unwritten constitutional amendments adopted during so-called "constitutional moments."<sup>71</sup> But I am still wondering about the concept of "constitutive commitment" itself.

Cass writes, "[t]hese rights are 'constitutive' in the sense that they help to create, or to constitute, a society's basic values."<sup>72</sup> In a pluralist or diverse society (what Hayek called the "Great Society"<sup>73</sup>), however, this brief description of the basic idea gives rise to some obvious questions: who exactly is constituted by which commitments? The claim is probably not that everyone has made this commitment, or is constituted by it, but then who? A majority? A super majority? A critical mass, whether a majority or not? An intellectual elite? The proletariat?

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69. See Roosevelt, *State of the Union Address*, *supra* note 2, at 41 (setting out the Second Bill of Rights).

70. See *supra* Part II.

71. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 4-5, 17-26, 410 (1998) (defining, identifying, and discussing "constitutional moments" as moments when the Constitution was, in effect, transformed through popular mandate, during periods such as the Reconstruction and New Deal).

72. See *supra* Part II.

73. See generally 3 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1976)

Assuming one of these is specified, in what manner does the “commitment,” whatever it may be, constitute the relevant “us”? Are we somehow defined as individuals by a commitment external to us, or is the group to which we belong so defined, and “defined” in what sense?

As a matter of political science, how does one determine the existence of such a commitment? Opinion polls? Opinion polls over time? In other words, if anything of importance turns on the existence of such a commitment (another question I raise below), what reliable means is there for ascertaining its existence, breadth and content?

In short, how is the concept of “constitutive commitment” of an entire “society” less epistemically and metaphysically problematic than the much-maligned collective “intentions of the framers”? The serious problems with discerning collective group intentions are well-known. I am wondering how constituent commitments are any easier either to identify or defend as real.<sup>74</sup>

Then there is the question of how uncontested such a commitment needs to be to be counted as constitutive? Does it matter that a substantial minority dissent? Does it matter if they do not speak up much any more because, however substantial in numbers, they know they are in the minority and would be pummeled by the majority if they did? (Think of the thirty to thirty-five percent of the Massachusetts electorate who are, gasp, Republicans. Given the stability of the Democrat majority among voters, it is as though these thirty to thirty-five percent do not even exist. They certainly lack all representation at the federal level. Would their silent and/or ignored dissent detract from the “constitutive commitment” of the majority?).

Relatedly, how does one distinguish such a constitutive commitment among the general public in practice from one that “constitutes” the world of elite intellectual opinion makers, such as those in academia or in certain media outlets? Another reason why a member of even a majority of the general public who holds a different view from that of the opinion elite might remain silent is to avoid the very real suffering that can be meted out by this crowd with they are crossed. Someone who not as impervious to hostile criticism as, say, Hootie Johnson or Richard Epstein—which describes most people I think—is likely to remain silent even when their

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74. To be clear, I reject an “original intent” approach to constitutional interpretation in favor of an “original meaning” approach that is based on the public meaning of the words used at the time of their enactment. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89-117 (2003).

views are shared by a “silent majority” of the public. How do we detect this phenomenon in assessing the existence of a constitutive commitment?

What turns on the existence of a constitutive commitment? That those who share it vote or act in certain ways? That the minority who dissent remain silent or acquiesce in some way? That legislators vote in certain ways? Cass says that one advantage of FDR’s constitutive commitment “strategy is that it avoids a role for federal judges,”<sup>75</sup> so I assume judicial review is more or less out of the picture, which distinguishes a constitutive commitment from an Ackermanian unwritten amendment. But perhaps I am misconstruing him here. I guess this is the eternal “so what?” faculty workshop question that I normally avoid asking.

Speaking of avoidance, is there any way of avoiding the sense that someone who invokes the concept of constitutive commitment is trying somehow to elevate, privilege or reify his or her own commitments or moral judgments—giving these judgments some higher status in the General Will of the Community, rather than that of a mere moral judgment, or even that of a mere consensus or a majority view?

All this does seem to relate to Cass’s invocation of a Second Bill of Rights. When he first posted, I had thought to inquire as to the sense in which these claims are “rights.” I was going to ask whether they are natural rights that belong to persons regardless of whether recognized by government—like the freedom of speech. Or are they positive rights that exist because they are adopted as part of the human laws—like the right to a jury trial. As James Madison explained, the original ten amendments included both of these two types, though I have concluded that the Ninth Amendment refers only to natural rights.<sup>76</sup> But it now appears that Cass

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75. See *supra* Part II.

76. In Madison’s notes for his speech to the House proposing his version of a bill of rights, he categorizes the “Contents of Bill of Rhts.” Under this heading he distinguishes between “3. Natural rights retained as speach” and “4. positive rights resultg. as trial by jury.” James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 51, 64 (Randy E. Barnett ed., 1989) [hereinafter *BARNETT, RIGHTS RETAINED*]. In the published account of his delivered speech Madison elaborates on the latter category: “In other instances, they specify positive rights, which may result from the nature of the compact.” He then elaborates on the example given in his notes: “Trial by jury cannot be considered a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” 1 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 454 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison). In addition to establishing the

means to claim Roosevelt's list, or some portion thereof, as "constitutive commitments," which are neither natural rights nor positive rights, thereby making a more precise account of this type of animal (or is it vegetable?) important to assessing the exact nature of his current argument.

*Cass Sunstein (guest-blogging), June 25, 2004, at 11:24 a.m.:*

#### IV. TAKING FDR SERIOUSLY

Thanks to Randy Barnett, and assorted emailers, for excellent questions and comments about constitutive commitments and FDR's Second Bill of Rights. Constitutive commitments first: They are not part of the formal constitution and they are certainly not for judicial enforcement. They nonetheless matter, because they have sufficiently wide and deep political support that they are effectively binding—unless and until there is a major transformation in public values.

It would be nice to have a clear sense of necessary and sufficient conditions for constitutive commitments, but lacking these, let's make a rough first cut: A constitutive commitment is in place if over a significant period of time, a presidential candidate could not seriously question that commitment without essentially disqualifying himself. This means that the commitment must have both wide and deep support (and not just among academics, elites, or the media; a strong political majority is needed). We can imagine hard intermediate cases and the definition leaves ambiguities; but the prohibition on racial discrimination in employment, the antitrust laws, and some kind of social security program are evident examples—and so too, I think, with a ban on the nationalization of industries and on federal taxes above a certain rate (e.g., Kennedy-era levels). Any nation will have some constitutive commitments that some reasonable people will reject; and reasonable people sometimes get those commitments to change

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distinction between natural and positive rights, this passage in Madison's notes is also significant evidence that the rights "*retained* by the people" to which the Ninth Amendment refers are natural liberty rights, rather than positive rights. Another vital piece of evidence is a draft of a bill of rights written by Representative Roger Sherman who served with Madison on the House select committee to draft a bill of rights. Sherman's proposed second amendment begins: "The people have certain *natural rights* which are *retained* by them when they enter into Society . . ." *Roger Sherman's Draft of a Bill of Rights*, in BARNETT, *RIGHTS RETAINED*, app. A, at 351 (emphasis added). For other evidence that "retained rights" was a reference to natural rights and that "natural rights" meant liberty rights, see BARNETT, *supra* note 74, at 54-60.

over time.

In the sense in which FDR meant his Second Bill to contain “rights”: He was not much of a theorist (Trotsky famously criticized him for just that reason: “Your President abhors ‘systems’ and ‘generalities’”<sup>77</sup>), and he saw (positive, in the sense of legally protected) rights as instruments for protecting the most important human interests. Randy asks whether the Second Bill should be seen as protecting “natural rights.”<sup>78</sup> To say the least, the natural rights tradition has multiple strands; a good contemporary version is elaborated by Amartya Sen.<sup>79</sup> A possible position: if we believe that human beings have certain rights by virtue of their humanity, it is plausible to say that those rights include a decent chance to achieve well-being by their own rights and also a minimal level of security if, for one or another reason (e.g., disability, illness, atrocious luck), that chance is not enough. Roosevelt’s focus was on decent opportunities and minimal security, and while his Second Bill of Rights was an innovation, he can claim clear antecedents in Montesquieu, Blackstone, and even Madison.

*Randy Barnett, June 25, 2004, at 12:49 p.m.:*

#### V. WHY DO “CONSTITUTIVE COMMITMENTS” MATTER?

I believe that Cass is describing a very real social phenomenon. There surely are, and have always been, some positions or “norms” that are sufficiently “beyond the mainstream” as to disqualify someone from national office. These norms are “effectively binding”<sup>80</sup> in the sense that one publicly disavows them at one’s peril. While these norms remain stable over time, they can also be contested and eventually supplanted. All this sounds perfectly reasonable and plausible as a description of social norms, but I am still left wondering:

- (a) In what sense is such a norm accurately described as a “commitment”;
- (b) In what sense is such a norm “constitutive”;
- (c) What argumentative purpose is served by invoking the concept

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77. Leon Trotsky, *If America Should Go Communist*, LIBERTY, Mar. 23, 1935, available at [http://www.socialistviewpoint.org/sept\\_01/sept\\_01\\_12.html](http://www.socialistviewpoint.org/sept_01/sept_01_12.html).

78. See *supra* Part III.

79. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

80. See *supra* Part IV.

of “constitutive commitment”? That is, what does it add to otherwise familiar normative or descriptive claims about rights, law, justice, etc.?

Clarifying these three matters would go a long way to helping me better understand the normative and/or descriptive claim Cass is making about the Second Bill of Rights.

*Cass Sunstein (guest-blogging), June 26, 2004, at 11:34 a.m.:*

## VI. FDR'S INCOMPLETE SUCCESS

With or without written constitutions, all nations have constitutive commitments, some codified in some form, others just widely understood as such. Randy Barnett asks, rightly, the sense in which these are “commitments” and “constitutive.”<sup>81</sup> They are commitments in the sense that they are taken (politically, that is) to be binding, and not to be subject to change with the political winds. The United States is firmly committed to some kind of social security program, in a way that it is not committed to particular appropriations, or the Toxic Substances Control Act, or Head Start, or Americorps, or the Superfund statute. These commitments are “constitutive” in the sense that they help define, and hence constitute, the nation’s self-understanding. The self-understanding of the United States would not allow it to accept a proposal to nationalize the automobile industry or to repeal the laws forbidding racial discrimination by private employers. (If you do not like these examples, choose your own; there are many other possibilities.)

The idea of constitutive commitments does not serve an argumentative purpose, so far as I can tell, but it might help illuminate a nation’s political and even legal culture as it changes over time. It might also help clarify what particular debates are really about. In 1970, the Aid to Families with Dependent Children (AFDC) program lacked constitutional status, but it was a constitutive commitment, and some judicial decisions appeared to be influenced by that fact (the decisions involved statutory interpretation, not constitutional law). By 1990, the AFDC program was a mere policy. Changes in the other direction are also common; the Americans with Disabilities Act (ADA) has probably moved, in a short time, into the category of the constitutive commitment (not its particular provisions, but the general idea).

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81. *See supra* Parts III, V.

FDR wanted the Second Bill of Rights to stand as a constitutive commitment. While it would be wrong to say he failed, he did not really succeed. The nation is committed, at least in principle, to some of the rights he listed (e.g., the right to free from domination by monopolies) but not to others (including my least favorite, the farmers' rights provision, which fits uneasily with the right to be free from domination by monopolies).

Thanks much to Eugene for the forum, and to emailers for the many excellent comments, criticisms, and suggestions; I've learned a lot.

## VII. CONSTITUTIVE COMMITMENTS DO NOT MATTER, BUT IF THEY DO . . .

*Randy E. Barnett*

The online exchange between my friend Cass Sunstein and me reveals a wonderful feature of blogging that largely does not exist in academic discourse. The normal exchange in a faculty workshop, for example, would be for an author like Cass to present a paper, and then be subjected to questions from the professors in attendance. I might get in the queue and ask the first of my questions above in a very truncated fashion, and Cass would respond. In some circumstances I might be permitted a follow up but it would be considered rude to extend the dialogue between us any farther. Even in normal law review publications, I might be permitted a comment on Cass's original essay, to which he would be given the opportunity to respond. That would be the end of the dialogue.

But by undertaking to blog, Cass implicitly committed himself to answering a series of questions that might be put to him. Perhaps "commitment" is not the right term, but provided my questions were fair and appropriate, any failure on his part to respond would have been taken by the audience as an abdication of his self-assumed duty to engage in the discourse of the blog. And Cass proceeded to uphold his commitment until his time as guest blogger ran out.

As a result, I believe we learned something that we otherwise might never have known about his provocative Essay, which summarizes the thesis of his provocative new book.<sup>82</sup> What we learned is that constitutive

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82. See generally SUNSTEIN, *supra* note 1.

commitments do not matter. Ok, well that may be a bit hyperbolic. What I mean is that, as further explained by Cass in our exchange, a constitutive comment is purely descriptive of a kind of general attitude in the body politic. I think the questioning also made clear how difficult it is to understand the nature of this attitude so that it can be detected by purely descriptive techniques. Whether or not they can be accurately identified, however, this attitude appears to have no normative bite. The existence of a constitutive commitment adds nothing to normative discourse over what our basic political commitments ought to be, which is what normal political discourse is all about.

In his final blog entry, Cass writes, tellingly I think: “The idea of constitutive commitments does not serve an argumentative purpose, so far as I can tell, but it might help illuminate a nation’s political and even legal culture as it changes over time.”<sup>83</sup> And so it might. What it will not do is add anything to normative discourse over what rights people have that are worthy of government respect. The assertion of a constitutive commitment amounts to the very conventional claim that “. . . *and lots of people agree with me!*” Of course, having lots of people agree with one’s position may add some plausibility to one’s normative claims. Sometimes such a claim establishes a baseline of agreement between members of a conversation that enables them to move on to other more contested matters. (“We both agree about X, so what we must really be disagreeing about is Y.”). But such a claim does next to nothing to resolve any normative challenge to the descriptive claim being made by the speaker. It is largely bootstrapping.

Suppose I deny that there is a natural right to a decent home, by which I mean that one person has no enforceable moral claim on another person, or group of persons, to provide him with a house. Classical natural rights thinkers distinguished between “perfect rights” which ought to be enforceable and “imperfect rights” which entail unenforceable moral duties. By denying that there is a perfect right to a house, I would not be denying that some persons could decide to give a portion of their property to others so that they may afford a house. Likewise, a government program could be created to provide housing by means of tax dollars (unless taxation itself is theft, in which case such a program would be unjust for that reason). The denial of the alleged “right” to a home would be denying only that, in the absence of government, one person can demand that another person be compelled to labor for him to build him a house. What policies government chooses to adopt, even in the absence of an enforceable moral claim, is another matter.

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83. *See supra* Part VI.

Supposing that it is possible to identify the constitutive commitments of an entire society of 280 million diverse persons and that it matters what these commitments may be, the particular constitutive commitments emphasized by Cass are highly contestable. First, the exact content of the alleged commitment is contestable—for example, is a commitment to an enforceable or “perfect right” of the poor to the assistance of others, or a commitment to voluntarily honor an unenforceable duty or “imperfect right” to provide assistance to those in need by means of a voluntary public program? As a purely descriptive matter, it seems that it is the latter, not the former, that has “real foundations in our history,”<sup>84</sup> but who can be sure? And how could this interpretive dispute about unwritten constitutive commitments ever be settled? That is the point of my doubts about the uncertain conditions of what makes a commitment constitutive and how we would know one if it existed.

Second, assuming there are such things as constitutive commitments, it is not at all clear that ours today are the same as those in Roosevelt’s day. In the 1940s, the idea of a national welfare state had great appeal among intellectuals. It promised a more effective means to achieve the liberal ends of individual well-being. Then it was tried. Remember “The Great Society” with its “War on Poverty” and “Urban Renewal,” which was initiated during the Johnson Administration and greatly expanded by Richard Nixon (who also added the “War on Drugs” to the program)? Did poverty end? Were cities restored to their previous greatness? Was illicit drug use eradicated? Well, no. The underclass expanded as more people came to rely on government benefits as “entitlements.” The inner cities grew more impoverished and dangerous. Government housing projects were erected and fell into the control of gangs and thugs, and are now being demolished. Government schools declined precipitously. Stagflation hit the national economy. The War on Drugs has fueled inner city street gangs and international terrorist organizations, and undermined democracy in Third World countries.<sup>85</sup>

All these pernicious effects of implementing something like Roosevelt’s Second Bill of Rights are the reasons why “welfare state” is now an epithet rather than a noble goal. Why courts in the 1980s backed

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84. See *supra* Part I.

85. While Cass may object to the War on Drugs being added to the Second Bill of Rights, it appears to be as much an unquestioned political stance—and hence a constitutive commitment—as any other item on Roosevelt’s list. For an introduction to the perniciousness of this governmental policy, see generally Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L. J. 2593 (1994).

away from imposing these policies as constitutional rights. Why Ronald Reagan was elected in 1980. Why Republicans took control of the House of Representatives in 1994, ending 50 years of Democratic dominance. Why all three branches of government are now controlled by Republicans. Why European social welfare states, all built on Rooseveltian foundations, are in grave economic crisis, with intractably high unemployment and obligations to pay for social programs outstripping the ability to tax those who work.

In short, our real world experience since the 1940s undermined any “constitutive commitment” that may have existed to a Second Bill of Rights in a manner that no academic argument ever could. But academic arguments explaining theoretically why Roosevelt’s approach leads to disastrous consequences have also boomed since his speech, beginning with the explosive popularity of F.A. Hayek’s *The Road to Serfdom* in 1949.<sup>86</sup> If forced to choose whether the vision of Roosevelt or of Hayek is ascendant, I think clearly it is the latter. How could Cass prove me wrong?

Does a rejection of the Second Bill of Rights entail a return to a ruthless, Social Darwinist, atomistic individualism? No. First, because ruthless, Social Darwinist, atomistic individualism was always a straw man against which Progressives loved to tilt. Classical liberals committed to private property rights and freedom of contract as the twin engines of liberty and prosperity never justified their commitment on grounds of atomistic individualism. Rather, from before Adam Smith they justified these fundamental rights on the ground that human beings were highly both dependent on each other and vulnerable. Properly defined property rights served to protect the individual from the more powerful group, and freedom of contact provided the most effective means of obtaining the support of others.<sup>87</sup> In a crucial passage of his *Lectures on Jurisprudence*,<sup>88</sup> Adam Smith wrote:

Man continually standing in need of the assistance of others, must fall upon some means to procure their help. This he does not merely by coaxing and courting; he does not expect it unless he can turn it to your

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86. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

87. For a more comprehensive defense of the classical liberal natural rights of several property, freedom of contract, first possession, restitution, and self defense as necessary to address the pervasive social problems of knowledge, interest and power, see generally RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

88. ADAM SMITH, *LECTURES ON JURISPRUDENCE* (R.L. Meek et al. eds., 1978).

advantage or make it appear to be so. Mere love is not sufficient for it, till he applies in some way to your self love. A bargain does this in the easiest manner.<sup>89</sup>

As for Social Darwinism, at one time it was a very popular “scientific” theory among all the intelligentsia including, most notably, Progressives themselves.<sup>90</sup> But that is a story for another day.

Nor were classical liberals somehow confused, as Cass seems to think,<sup>91</sup> about the need for government to “positively” enforce properly defined natural rights of property and contract, when they opposed governmental interference with these rights. Indeed, the purpose for making claims of perfect rights is as much to justify government protection of these rights as it is to deny government the power to interfere with their proper exercise. That the first duty of government is the equal protection of properly defined rights was always at the heart of the Lockean justification of government itself.<sup>92</sup> That government is thought to be needed to enforce properly defined rights, therefore, provides no support whatsoever for extending governmental enforcement to rights claims that themselves interfere with properly defined rights.

So what then are our “constitutive commitments” today? Today more than any time since the nineteenth century, American culture is committed to rights of private property and freedom of contract. It is against this intellectual tide that Cass Sunstein makes his plea, asserting Rooseveltian constitutive commitments as a sort of rear guard action. But this American commitment to property and contract is tempered by the age-old classical liberal concern with the welfare of those who slip between the cracks—the group that used to be called the “deserving poor.”

True, today most still accept the Progressive proposition that government rather than private institutions should assist these people. Nevertheless, most also complain that the nondeserving poor are assisted as well as those who deserve aid, a complaint that led to historic welfare reforms in the 1990s. I believe both the deserving poor and the greater society would be better served if more of this well-motivated assistance

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89. *Id.* at 347-48 (Glasgow Univ. Lecture, Tuesday, Mar. 29, 1763).

90. See, for example, *Buck v. Bell*, 274 U.S. 200 (1927) in which the Progressive hero, Justice Oliver Wendell Holmes, Jr., wrote that “[t]hree generations of imbeciles are enough.” *Id.* at 207.

91. See *supra* Part I.

92. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-20 (1991).

were channeled through private competitive institutions, as it once was.<sup>93</sup> Time will tell whether we will move farther in this direction or be frozen in place.

But the proof of the pudding is in the eating. To the extent it matters, Roosevelt's Second Bill of Rights was abandoned as a constitutive commitment—if it was ever truly adopted—by the bitter taste of the Great Society. If increased reliance on the voluntary duty of beneficence is allowed by the political establishment to be tried and it proves to work better in practice than government welfare programs, as theory says that it should, then such an approach is likely to expand. The principal obstacle to discovering who is correct as a practical matter is the effective obstruction of these reforms by reactionaries in academia, the media and public sector unions who call themselves, ironically, "Progressives." In the end, individual liberty is the one continuous constitutive commitment of the American polity. Only time will tell whether the best means to that end is Roosevelt's or Hayek's. I know on whom my bet would be placed.

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93. See generally DAVID T. BEITO, *FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890-1967* (2000).

