

"Imagining a Liberal Court"

By Noah Feldman

Published: June 21, 2010

I. The Crisis

After decades of stagnation, progressive constitutional thought is reaching a crisis point. Consider that the two great “liberal” justices who retired from the Supreme Court most recently — David Souter in the spring of 2009 and John Paul Stevens a year later — were conservatives. Not only were both appointed by Republican presidents, but both also subscribed loosely to the adage “If it ain’t broke, don’t fix it.” With a handful of exceptions, neither favored identifying new constitutional rights where none existed before. Their status as liberals came from the fact that, as the court on which they served tilted to the right, they held their ground as moderate Republicans, consistently voting to sustain the constitutional rights that were discovered by the Supreme Court before they were on it. To be sure, without their votes, the liberal constitutional legacy of the period stretching roughly from *Brown v. Board of Education* in 1954 to *Roe v. Wade* in 1973 would have been reversed. But Souter and Stevens were not independent forces for progressive change in American life.

To a great extent, the crisis of liberal thought on the Supreme Court is a result of liberalism’s success. From the time that Franklin Roosevelt’s appointees came to form a majority on the Supreme Court until the appointees of Richard Nixon and Ronald Reagan came to predominate, liberal constitutional thinking had two major objectives — both of which it largely achieved. First, it sought to give bite to the 14th Amendment’s promise to extend to all persons the equal protection of laws. The *Brown* decision voiding racial segregation in schools as unconstitutional was the most famous piece of the court’s push for equality. The same ideal was also encompassed in holdings that demanded “one person, one vote” and — more controversially — that upheld affirmative action as consistent with the values of the Constitution.

Second, the liberal Supreme Court interpreted the constitutional promise of liberty as a guarantee of individual autonomy — the freedom to make important life decisions without government interference, especially in the realms of sex and reproduction. *Roe v. Wade* was the culmination of this movement toward personal liberty. The court took the rubric of a right to privacy that it found in what it called the “penumbras, formed by emanations” of various constitutional amendments and extended the right from marital contraception to abortion. Although the court has never embraced a right to die, it has in recent years, through Justice Anthony Kennedy,

spoken of “the right to define one’s own concept of existence, of meaning, of the universe and of the mystery of human life.”

Since *Roe*, the majority of the most-pitched battles in the Supreme Court have concerned whether the liberal visions of equality and liberty should be reined in. Much of the time, as with the court’s compromise rulings on affirmative action and partial-birth abortion, the result has been uneasy deadlock and indecisive squabbling. The most prominent exception is the issue of gay rights, which the court came late to embracing in *Lawrence v. Texas* in 2003 and which — through the same-sex marriage question — remains in the court’s future. It is not too much to say that its resolution (one way or the other) will be the last act of the liberal constitutional revolution.

No new progressive constitutional vision, meanwhile, has emerged from within the court. The only two Democratic appointments in the 42 years between Thurgood Marshall in 1967 and Sonia Sotomayor in 2009, Justices Ruth Bader Ginsburg and Stephen Breyer, reflect this reality. Ginsburg’s distinguished career as a lawyer in the women’s rights movement before she went on the bench embodied the drive for equality; but as a justice, she has striven, mostly successfully, to preserve what she won as a Supreme Court advocate. Breyer’s own pre-judicial reputation was made as part of a bipartisan, technocratic movement for cautious deregulation; on the court, he has been centrist and pragmatic, voting to preserve the liberal legacy while also showing a willingness to compromise on a case-by-case basis. Neither Sotomayor nor the current nominee to the court, Elena Kagan, has articulated a new progressive constitutional vision, either.

Why does the absence of this vision constitute a crisis for liberals? The answer is that new and pressing constitutional issues and problems loom on the horizon — and they cannot be easily solved or resolved using the now-familiar frameworks of liberty and equality. These problems cluster around the current economic situation, which has revealed the extraordinary power of capital markets and business corporations in shaping the structure and actions of our government. The great economic and political challenges of our present decade — salvaging and fixing financial institutions, delivering health care, protecting the environment — have major constitutional dimensions. They require us to determine the limits of government power and the extent to which the state can impinge on collective and individual freedoms. Progressive constitutional thinkers, so skilled in arguing about social and civil rights, are out of practice in addressing such structural economic questions.

More alarming is the fact that, over the past couple of decades, evident gains from deregulation have made many lawyers — progressive and conservative alike — too complacent about deferring to the markets on which our economy depends. That markets work well in so many

contexts has strengthened the traditional conservative argument about the constitutional duty to respect private economic transactions — even in the minds of many liberals. Civil libertarian commitments, meanwhile, have become increasingly absolutist, leading some liberals to favor extending basic rights to corporations, not just to individuals. The American Civil Liberties Union, for example, has long urged the Supreme Court to treat corporations just like individuals when it comes to political speech.

To address these challenges, progressive constitutional thought must discover (or rediscover) a core set of beliefs about the right relationship between government, the individual and the powerful corporate entities that operate under the umbrella of the market. Reregulation, embraced by the Obama administration to address a range of serious economic and environmental dangers, demands its own set of constitutional explorations and explanations. A truly progressive constitutional project needs to go beyond simply upholding regulations challenged in court. It demands that the Supreme Court and other bodies acknowledge the government's responsibility to protect our democracy from the harmful side effects of all-powerful markets.

II. THE PAST AND FUTURE OF A LIBERAL COURT

To understand today's jurisprudential crisis, it helps to recognize that liberal constitutional thought is not a single settled body of doctrine but rather a set of ideas that has evolved in response to political, social and economic challenges. Today, for instance, judicial activism is a constitutional approach mostly associated with liberals, while judicial restraint is a constitutional theory most often connected to conservatism. But liberal constitutional thought did not begin with the activist-judicial expansion of equality and liberty as its main goal. It started, rather, with a near-absolute commitment to judicial restraint.

The story begins in the years after the Civil War, as the United States industrialized. By the late 19th century, political progressives had identified a great threat to American democracy in the overwhelming capacity of business to dominate the lives of individuals and the functioning of government. Their answer was to regulate the new industries and labor markets, in the hope of cleaning up business practices, serving consumers and getting workers decent wages for reasonable hours of work. But an activist Supreme Court blocked the way. In a string of cases that, with ebbs and flows, lasted from 1905 into the 1930s, the court overturned progressive laws. Its philosophy was based on a libertarian reading of the Constitution, one that emphasized inalienable rights and treated property as being inseparable from liberty.

The case that gave its name to this constitutional era was *Lochner v. New York* (1905). Joseph Lochner, a baker in Utica, N.Y., employed a bakery worker for more than the 60 hours a week allowed by a progressive New York law. The Supreme Court vindicated Lochner by striking down the New York law as an unconstitutional violation of the liberty of contract — a right that it found in the due-process clause of the 14th Amendment. Progressive critics of the Supreme Court argued that it was overstepping its bounds, engaging in judicial activism by mandating an economic philosophy that served the interests of business. Dissenting from the Lochner decision, Justice Oliver Wendell Holmes Jr. wrote that “a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire.”

With the election of F. D. R. in 1932, the progressive critique of the Supreme Court in the Lochner era merged with what was coming to be called “liberalism” — the rejection of socialism and corporatist fascism in favor of regulated market capitalism. F. D. R. threatened to pack the court with justices who would stand aside, exercise judicial restraint and allow Congress and the president to enact laws reflecting the popular will. After a full four-year term in which no justice retired, F. D. R. got the chance to start appointing justices. Beginning in 1937, he appointed eight associate justices and elevated another to chief justice. In the main, these justices took the bench as staunch supporters of the liberal constitutional ideal of judicial restraint. “Activism” to them was a dirty word — a cover for justices’ imposing their own preferences without constitutional warrant.

Then a funny thing happened. Little by little, the liberal majority began to realize that it had the capacity to protect minority rights and to expand individual freedom. Its members maintained the liberal constitutional orthodoxy that the court should not impose a single economic vision in the name of the Constitution. But when it came to equality and individual liberty, most of the liberal justices slowly moved away from judicial restraint, actively protecting religious and racial minorities and defending civil liberties.

The liberal justices and their academic followers labored mightily to explain why activism in support of equality and individual liberty was consistent with the Constitution while activism in protecting the liberty of contract was not. Their efforts demanded creativity and generated much of modern constitutional thought. Justice Hugo Black, for example, came up with the theory of constitutional originalism to explain the difference: equality and individual liberty, he argued, were consonant with the text of the Constitution and the intention of its framers, but corporations should not be protected under the meaning of the word “person” in the 14th Amendment. (For Black, originalism was a liberal theory, not the conservative one it would become decades later

in the hands of Justices Antonin Scalia and Clarence Thomas.) Others, including Justice William O. Douglas, were less troubled by the abandonment of judicial restraint. For Douglas, trained as a legal realist to notice power more than principle, the court's inevitably political character justified the choice to interpret the Constitution in terms of liberty. Justice William Brennan echoed this perspective. He would ask his new law clerks what was the most important rule of constitutional law, then answer by holding up five outstretched fingers to signify the number of votes needed to form a majority of the court.

Among scholars, too, the effort to reconcile the new liberal activism with the liberal tradition of judicial restraint bore fruit. The legal scholar John Hart Ely sought to solve the dilemma by arguing that the underlying purpose of the Constitution was to facilitate political participation; equality and individual liberty served this goal, he maintained, while property protection did not. The lawyer-philosopher Ronald Dworkin offered a theory in which fidelity to constitutional tradition must be joined to moral judgment about the right results. His view, designed to explain how judges should think about the law generally, salvaged the consciences of liberals who believed that blocking economic regulation was morally mistaken while enhancing equality and individual liberty was morally desirable.

Today, constitutional progressives still say that the courts should defer to economic regulation by the government. But the ideal of judicial restraint has been undercut by the selective and opportunistic way in which liberals and conservatives alike have invoked it. And conservatives have once again mastered the art of depicting corporate interests in terms of individual liberties. What is needed, therefore, is an argument about why regulating markets is, from a constitutional perspective, desirable to enhance the constitutional values of self-government and individual liberty.

III. A RETURN TO PROGRESSIVISM

The liberal constitutional vision in the years before World War II was an inseparable part of the liberal ideal of the right relationship between the government and business, especially the financial markets. Liberals argued that the capitalist system could not survive its internal or external threats unless it was tempered and constrained by government regulation. The point of that regulation was not to subvert the market but to save it. One job of the Constitution, on this view, was to allow the government to protect its citizens and itself from the market's tendency to dominate everything that came into its path. F. D. R.'s supporters did not see the court as the primary government institution for regulating the market, but they did say that the court must implement the regulatory objectives chosen by the president, Congress and the administrative agencies. In contrast, constitutional conservatives at the time argued that the job of the court was

to act as a check on government in its efforts to regulate the markets — to protect private property against its erosion and to preserve capitalism against the threat of socialism.

The fundamental difference, then, between constitutional liberals and constitutional conservatives was on the question of whom they feared most. Liberals feared that, unregulated, business and markets might destroy both themselves and republican government. Conservatives shared the liberals' fear about the fate of republican government, worrying that, unfettered, regulation might destroy private property, the market and capitalism itself. Both sides contended that the Constitution ought to be interpreted in the light of their substantive views about the dangers to a system of democratic capitalism that both sides equally embraced.

Today, we are moving toward a contemporary version of this debate between liberals and conservatives about what we need to fear most — an overreaching state or unconstrained market forces. The positions in this debate today are not identical to what they were three-quarters of a century ago, but there are important similarities. Progressives today view regulation as the necessary response to the market failures that led to the present economic crisis. Many conservatives fear that taking regulation too far will cripple the possibilities of economic recovery and long-term growth. These differences are not only shaping the leading political debates of our day, but framed in terms of constitutional rights like free speech and due process, will also determine the outcomes of important constitutional challenges to legislative and regulatory reforms. And progressive constitutional thought, in its current form, may not always be adequate to produce the desired progressive outcomes.

IV.FREEDOM OF SPEECH

The recent Supreme Court case that most vividly captures this division between liberals and conservatives has to do with the constitutional rights of corporations — and with their role in influencing the government. The case, Citizens United v. Federal Election Commission, was the subject of President Obama's in-person criticism of the Supreme Court during his State of the Union speech in January, when his comments elicited the response “That’s not true” from Justice Samuel Alito. The case has received more attention than any First Amendment case in two decades — and with good reason.

At the heart of the case was a provision of the Bipartisan Campaign Reform Act of 2002 that prohibited corporations and unions from using general treasury funds to pay for a radio or television broadcast that refers to a candidate in the immediate run-up to an election. Citizens United was a nonprofit corporation that made an unflattering documentary about Hillary Clinton and sought to show it during the 2008 primary season. The Supreme Court, in a highly

contentious 5-to-4 decision, held that the First Amendment barred the government from limiting independent corporate expenditures. The decision overruled a 1990 precedent to the contrary. According to a dissent written by Justice Stevens (and echoed by President Obama in his remarks), the opinion also overturned more than a century of precedent treating corporations and individuals differently for purposes of free speech.

On the level of partisan politics, it is easy to see why the decision might have divided Democrats from Republicans. In general, the Republican Party identifies itself as pro-business and thus would most likely benefit from a new constitutional rule that allows corporations to make independent expenditures during political campaigns. Democrats correspondingly might prefer limits on corporate campaign expenditure. Yet the principles involved went well beyond ordinary partisanship — to the core question of how government and business should interact.

Justice Kennedy, who wrote the majority opinion, has proved to be a powerful advocate of individual liberty (including in cases establishing the right to private homosexual conduct and the rights of Guantánamo detainees). But he remains staunchly conservative in his understanding of the role of corporations as bulwarks against government. His central argument in the *Citizens United* case was that the right to speak freely cannot vary based on the identity of the speaker. An individual who speaks is maintaining his independence vis-à-vis the state; and so, by extension, is a corporation, because corporations are nothing more than collections of individuals organized to achieve some greater end. According to this view, civil society is made up not just of civic groups like the N.A.A.C.P. or the N.R.A., but also of for-profit corporations. To deny them the right to speak freely is to allow government to pick and choose which kinds of speech it wants to allow and hence to distort the free marketplace of ideas.

Kennedy has a point: corporate speech often shades into the realm of the expressive, whether the message is creative or political. Thus a progressive approach to corporate speech cannot simply try to demarcate different kinds of expression. The progressive argument must go deeper, to the institutional reality of the effects that corporate money can have on our entire democratic system, elections included. Supreme Court doctrine has historically tried to capture a version of this concern by asserting that the government has a legitimate interest in “anticorruption” — the idea being that money from corporations can produce the appearance of a quid pro quo from elected officials. The court has also sometimes spoken of an “antidistortion” value — the concern that corporations will have a disproportionate effect on elections by providing more money than individuals can. Justice Souter, quoted by Justice Stevens in his *Citizens United* dissent, referred to these interests collectively as demonstrating a concern for “democratic integrity” — a concern that may in some circumstances outweigh the constitutional value of unfettered speech.

But these polite, high-sounding terms do not go far enough. Couched in abstract language, they reflect the liberals' discomfort with stating bluntly that money talks. A truly progressive jurisprudence would go further in its legal reasoning, acknowledging that the for-profit corporation, man's most-advanced technology for making and concentrating wealth, creates unique risks for the structure of democratic government. It is true that corporate political speech is still speech, as Justice Kennedy and the A.C.L.U. alike have insisted. But that speech serves different ends than individual speech. Organized to use all lawful means to generate profit, corporations have the means and opportunity to try to capture the operation of government to serve this objective. Campaign-spending lets them do it directly. That is why Congress must be able to limit the effects of corporate speech during elections. It is a matter of defending democracy against the risk that business interests will come to dominate government decision-making — an interest that derives from the constitutional commitment to republican government.

V.DUE PROCESS

The renewed battle lines between constitutional progressives and conservatives are not restricted to the First Amendment: the constitutional debate about business regulation is also becoming increasingly salient. This term, for example, the Supreme Court took up the constitutionality of the Public Company Accounting Oversight Board, created by the Sarbanes-Oxley Act to review accounting practices. Similar challenges will certainly be brought to the new financial regulations proposed by the Obama administration. The council of regulators that is supposed to identify risk and deal with emergencies will be challenged as unconstitutional, as will the design of the consumer-credit-protection entity that is expected to be housed somewhere in the Federal Reserve.

Wherever possible, conservatives claim that legislation aimed at regulating business actually infringes on the constitutional rights of individuals. Indeed, the very authority of the government to resolve the affairs of large financial corporations — the heart of the new financial-reform legislation — will very likely be challenged as a violation of the due-process rights of those firms and their shareholders. Thus will the aim to stymie structural change be framed in terms of individual freedom. It will be up to progressives to explain why this view is mistaken — and why limiting corporate rights is justified.

The grave difficulty that must be met by a new progressive constitutional approach can so far be sensed most readily not in court cases but in the government's actions and justifications connected with the bailout of financial institutions. The now-canonical A.I.G. bailout serves as a useful example. In saving the insurance giant, the government (under the Bush administration) famously paid A.I.G. counterparties, including Goldman Sachs, 100 cents on the dollar for

insurance contracts that they had taken out with the firm. Critics wondered loudly why the government didn't renegotiate the debts and demand that the counterparties settle at a discount. Then, while in control of A.I.G. (this time under the Obama administration), the government's managers allowed A.I.G. to pay out the bonuses it owed employees under their employment contracts — again inviting the criticism that a private acquirer would have renegotiated and paid out less, or nothing.

The public explanation for these decisions — given after the fact by Lawrence Summers, Obama's chief economic adviser — was that the rule of law required paying up. "We are a country of law," Summers told George Stephanopoulos in a television interview. "There are contracts. The government cannot just abrogate contracts." The government, Summers suggested, lacked the authority "under law" to do anything other than pay in full or force A.I.G. into bankruptcy. Summers's argument implied that some legal source, perhaps the Constitution, barred the government from impairing the obligation of contracts.

But the law is not so definitive. The government could have set conditions on the loans it made to A.I.G., as the recently released Congressional Oversight Report on the A.I.G. bailout explains. And that is not all. Pressed with dire economic necessity, the government has historically had the authority to go further and actually abrogate contracts. When Roosevelt became president in March 1933, he immediately suspended all banking operations in the country for four days. Then, relying on emergency legislation that retroactively validated the banking holiday, he used an executive order to demand that privately held gold be turned in to the government (with the government determining its worth). Finally, after a joint resolution of Congress, Roosevelt ordered the repudiation of private and public contracts denominated in gold — contracts designed specifically to get around the danger of government repudiation. The Supreme Court grumbled but essentially upheld his decision. The markets responded positively.

A progressive constitutional vision would acknowledge what seems relatively obvious in the A.I.G. case: the danger is not that risk-taking financial actors will lose when contracts are repudiated, but that taxpayers will lose if they are not. There was no constitutional obligation on the government to make itself weaker than A.I.G. itself would have been under the circumstances. Even if the government did not have clear statutory authority to reorganize A.I.G. summarily and repudiate some of its obligations overnight, it could have relied on the precedent of the 1930s. Faced with an emergency situation that was arguably less pressing, Roosevelt simply ordered the steps necessary, sought Congressional validation and dared anyone injured to sue after the fact. At a minimum, the government could have threatened A.I.G.'s counterparties and executives with the possibility of such emergency measures. It is not as if President Obama

had specific statutory authority on June 16 to compel BP to set aside \$20 billion to cover the costs of the Gulf oil disaster — his demand was backed by the weight of his office and the direness of the emergency.

Why did the progressive economists and lawyers of 2008-9 not act as F. D. R. would have acted? Surely neither the Bush nor the Obama administrations intended consciously to act in the interests of bankers rather than those of the public. But under the logic of the bailout, the markets were in charge, and the overarching aim of the government was to propitiate them to avoid disaster. Even under these conditions, a progressive constitutional vision should focus on government's duty to protect the public — not the bankers who needed to be bailed out in the first place. A bailout had to happen; but the way it was done did not have to be shaped by the strange goal of protecting the “rights” of the corporate actors whose shirts were being saved.

For constitutional conservatives, the most worrisome feature of the Troubled Asset Relief Program was the possibility that government funds would come with strings attached, leading to government control of financial institutions akin to the control the government now has over General Motors. They were concerned that government control in the private sector would compromise the independence of the business community, weakening its capacity to stand against government — a danger that exists in socialist systems. For constitutional progressives, the fear associated with the TARP funds should be almost exactly the opposite: that the bailout reflected and enhanced a system in which the government serves the markets, not the taxpayers. Under today's economic conditions, the risk of corporations being subordinated to government interests seems faint indeed. The danger of the government's operating to serve the interests of the corporations in which it has acquired a stake seems remarkably serious. Constitutional decisions made against this backdrop — whether by courts or by other government actors — should recognize that the government may take the steps necessary to achieve the best economic outcomes without being tender about the property rights of market actors who have taken on (and hedged) risk in the hope of high return.

VI.BEYOND RESTRAINT

It is unfortunate that constitutional law is now once again facing the severe challenge of dealing with the astonishing strengths and risks associated with our version of capitalism. We are all better off when economic crisis is averted and wealth increases. Constitutional law, for its part, is purer and more morally uplifting when it is focused on liberty and equality.

But these issues will not go away. The health care reform, President Obama's biggest legislative accomplishment thus far, has already been challenged by 20 states as an unconstitutional

infringement on individual liberties and states' rights. We can expect constitutional challenges to any Congressional attempt to plug the holes left by the Citizens United decision. More broadly, the Tea Party movement finds its roots in deep skepticism about the legitimacy of government action — an impulse that will issue eventually in legal and constitutional battles.

The Constitution can fulfill its function only if it enables us to adjust to the most basic problems that the world throws at us. Our democracy — including free speech, elections, civic organizations and the rest of its assorted components — has never existed independent of our economy. Absent crisis, it is hard to muster the concentration or the will to make our constitutional system accept this reality and deal with it. So long as the markets continued to deliver the immense gains of recent decades, the chances of regulating the markets' effect on the democratic system were slim indeed.

Now the moment has arrived for progressive constitutional thought to return to its origins — and to improve on them. Judicial restraint is once again needed. But it must be justified in terms of the underlying goal of preserving our democratic system against the threat of control by market actors. Corporate rights should not be confused with individual rights. Our success or failure will not be felt right away — but it will have consequences for generations to come.

Noah Feldman, a contributing writer, is a professor at Harvard Law School. His new book, "Scorpions: The Battles and Triumphs of F.D.R.'s Great Supreme Court Justices," will be published in the fall.

A version of this article appeared in print on June 27, 2010, on page MM38 of the Sunday Magazine.