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## The End of an Idea

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# The End of an Idea

Progressive constitutionalism is a dead end

By Alan J. Meese & Nate B. Oman

Last week, Elena Kagan told senators on the Judiciary Committee that she did not know the meaning of the term “legal progressive.” Fortunately, in a *New York Times Magazine* article last week, Harvard law professor Noah Feldman provides Ms. Kagan and the senators a detailed articulation of a progressive vision of constitutional law and thus a précis of what may be at stake as the Senate considers the nomination of Ms. Kagan. In particular, Professor Feldman argues that the individual-rights agenda that has defined the constitutional Left is largely exhausted and that future constitutional battles will involve confrontation between the market and the state. He in effect urges the constitutional Left to recover its forgotten roots in the New Deal and the progressive movement. Without such a liberal resurgence, Feldman fears, a conservative Supreme Court could stand in the way of benevolent regulation of the market.

We certainly agree with Feldman that progressive constitutional thought is intellectually exhausted. Indeed, it has been intellectually exhausted for some time. Feldman is also probably right that the biggest legal battles in the future will be about market regulation. But we think he is mistaken about how those battles will and should unfold.

First, despite claims by various leftish professors of constitutional law, there is no well-articulated strand of pro-market constitutional activism on the Court right now. Indeed, the Court’s most “conservative” justices have repeatedly mocked the doctrine of “substantive due process,” which the Court once employed on occasion to protect economic liberties from undue state interference. We also think it is highly unlikely that the Court will constitutionalize debates over health-care reform, financial regulation, or programs designed to reduce carbon emissions.

To be sure, there is something about wearing black robes and sitting in that marble

building that can give people a God complex. Maybe Chief Justice Roberts and his merry band will decide that they are going to save the republic from Sarbanes-Oxley and Barney Frank, but we doubt it. Even the Rehnquist Court's much-ballyhooed federalism decisions repeatedly acknowledged that Congress can regulate commercial activity, no matter how local, so long as the overall category of regulated activity has a non-trivial impact on interstate commerce. Indeed, no regulation of commercial activity, local or otherwise, has fallen prey to judicial review at the Supreme Court for more than 70 years. Just five years ago, the Court even went so far as to sustain a congressional ban on the mere possession of home-grown marijuana intended for medicinal purposes valid under state law.

It's hard to imagine the Roberts Court, with its bare 5–4 conservative majority, interfering with Congress's efforts to regulate, say, multi-national investment banks or companies traded on the New York Stock Exchange. In addition, it is by no means clear there will be a great deal of dramatic legislation for the Court to consider. A political backlash against perceived overreaching by the national government is already brewing. While we don't think that this response will devastate President Obama or his Democratic allies, it may well prevent Washington from embarking on any additional ambitious regulatory projects in the foreseeable future.

Not only do we disagree with Feldman's assessment of the current constitutional landscape, we also believe that his take on the history of progressive constitutionalism is off base — mistaken in a way that should undermine anyone's enthusiasm for the sort of progressive agenda he advocates. The irony is that, for all his calls for new thinking, Feldman's take on the economic history of progressive constitutionalism is, like that of many other progressives, badly dated. To be precise, Feldman's analysis rests on two incorrect claims about the relationship between constitutional law and economic regulation before and during the New Deal.

First, Feldman errs when he suggests that *Lochner*-era justices were supine agents of business interests and thus reflexively opposed regulation that furthered the interests of consumers and powerless workers. In point of fact, even during the height of the *Lochner* era, the Court, to the chagrin of some libertarians, upheld most state and federal regulation of economic activity. As a result, the main impediment to such regulation, even during this period, was less constitutional law than ordinary politics.

Moreover, many of the regulations the Court did strike down were attempts by incumbent businesses and workers to shield themselves against competition from new market entrants, hardly the sort of legislation a pro-consumer and pro-worker progressive should endorse.

For example, in some such cases the Court struck down purportedly progressive laws that in fact severely disadvantaged racial minorities, sometimes by explicit design. It is also noteworthy that the most notorious case from this period — *Lochner v. New York* — invalidated a law that burdened a small immigrant-run business by placing *Lochner* and other entrepreneurs at a competitive disadvantage vis-a-vis larger firms barely affected by the law. It turns out that big business and big labor cope quite well with big regulation, which they often come to support as a means of protecting themselves from competition. Indeed, *West Coast Hotels v. Parrish*, a key decision in the progressive canon, which effectively overruled *Lochner* in 1937, sustained as constitutional a minimum-wage law that did not apply to men, thereby pricing many women out of the labor market. The modern Court would properly ban such legislation as rank sex discrimination.

The second problem with Feldman's narrative is his valorization of FDR and the "progressive constitutionalism" that affirmed the vast, post-1937 expansion of federal regulatory power. As Feldman tells the story, FDR's 1932 election heralded the rejection of corporate fascism and socialism in favor of what he calls "liberalism" and "regulated capitalism." Feldman also tells us that FDR had to wait patiently before appointing the progressive Supreme Court justices who would validate his efforts to preserve capitalism by reining it in.

The actual record is quite different, and FDR's New Deal was anything but liberal. Indeed, the centerpiece of FDR's economic recovery plan, the National Industrial Recovery Act, replaced Herbert Hoover's relatively aggressive antitrust enforcement with a national policy of state-encouraged cartelization, complete with immunity from the antitrust laws, analogous to that in place in fascist Europe. More than 500 industries eagerly proposed "codes of fair competition" that harmed consumers by fixing prices, and also disadvantaged small entrepreneurs, minorities, and others on the margins of economic life. The same was true of the Agricultural Adjustment Act and regulation of the coal industry. Progressive hero John Maynard Keynes even warned FDR that the

NIRA would slow recovery by mandating inflexible wages and prices, and thus interfering with the process of macroeconomic adjustment. Indeed, FDR's policy of "bold experimentation now, get permission later," which Feldman holds up as an example of what we need today, created so much legal uncertainty that businesses held back on investment. Keynes made this point at the time, declaring in exasperation that FDR should either nationalize the utilities or leave them alone, but in any event should stop chasing them in a different direction every week.

Recent empirical work confirms the suspicion by Keynes and others that the NIRA and similar policies combined to slow recovery and destroy wealth. Thus, the "activist" Supreme Court did consumers and workers a great favor when, in *Schechter Poultry*, it unanimously struck down the NIRA, thereby helping clear the way for economic recovery. One can only imagine the additional economic misery that would have resulted had the Court validated the sort of all-encompassing regulatory authority that FDR and other progressives were seeking to wield.

The reader who did not know better might conclude from Feldman's narrative that coercive interference in the free market inevitably protects helpless workers and consumers, enhancing public welfare. The actual historical record suggests otherwise. Feldman's errors are not simply academic; the mistakes and errors in his account point to the very substantial risks posed by the sort of Leviathan that progressives seek to empower by molding the Constitution in their own ideological image. If, as Feldman would have us believe, the modern conflict between conservative and progressive constitutional visions is a rerun of the debates during the *Lochner* and New Deal eras, then Americans would do well to learn and incorporate the real lessons of economic history instead of being misled by the self-serving liberal lore that pits heroic progressives protecting the poor and the weak against conservative judges protecting such abstractions as private property and the free market. Property rights, after all, are exercised by individuals who, via voluntary cooperation in free markets, create the very wealth that progressives are so anxious to redistribute.

Ultimately Feldman is mistaken about the relationship between government and the market. He sees the market as an external force that threatens to overwhelm democracy and create economic catastrophe if left to its own devices. For example, Feldman treats the financial crisis as a straightforward failure of unregulated capitalism. We believe

this view is simplistic at best and in many ways just wrong. The primary cause of the financial crisis is the pervasive way in which government affirmatively acted to create perverse incentives through loose monetary policy (set by the Fed, not the market) and massive moral hazard problems created by implicit and explicit government guarantees of major financial institutions. It isn't that we have a market that spontaneously created a huge problem independent of government policy, which taxpayers then had to clean up. Rather, misguided government policy created the crisis.

Hence, we ultimately agree with Feldman that there are huge dangers when concentrations of capital manipulate the political system. Feldman thinks that the problem is that the market is prone to titanic bouts of irrationality from which the state must protect us. He fears politically powerful businesses and an allied Supreme Court will prevent benign regulators from acting. We think that the politically powerful businesses have already in large measure captured the none-too-benign regulators and it is this pathology of government policy — rather than the irrationality of the market — that caused the financial crisis.

One final note: Feldman's essay exemplifies a longstanding disconnect between many progressive scholars of constitutional law, on the one hand, and basic principles of political economy and economic history, on the other. Indeed, many of the progressive constitutional thinkers that Feldman is calling to the breach seem — at some deep level — uninterested in markets and how they function. Feldman views the financial crisis through the lens of constitutional law, as though legal doctrine were itself capable of interpreting and evaluating what are at bottom economic phenomena. Likewise, the understanding of the market that he presents is based on a historical narrative crafted by constitutional lawyers rather than economists. This is, we think, ultimately a very bad way of thinking about market regulation. We can only hope that Elena Kagan rejects this faith-based approach in favor of one based on evidence, experience, and economic logic.

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