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Liberals in Exile

By Michael S. Greve

Liberals who have long sought progressive constitutional interpretation now call for judicial restraint, hoping to protect liberal precedents by warning that conservative judges seek to restore a traditional understanding of the Constitution.

Liberal interest groups and intellectuals and their house organs (such as the *New York Times*) are warning of an impending return to a reactionary "Constitution in Exile." The laughable warning serves to distract from the liberals' own agenda, which is not at all laughable. They, not conservatives, are nurturing a radical Constitution in the wings. Alas, it is Europe's.

The latest contribution to the "exile" genre is an article by George Washington University law professor Jeffrey Rosen in *The New York Times Magazine* on April 17. According to Rosen, a conservative "Constitution in Exile movement" contends that the true Constitution—that of the era of *Lochner v. New York* (1905)—went into exile in 1937, when the Supreme Court acceded to the New Deal.

Under this exiled Constitution, core programs of the regulatory state—Social Security, the Clean Water Act, the Federal Reserve, just for starters—are unconstitutional. The "movement" seeks to resurrect the old Constitution, and federal courts must play a leading role. The movement has garnered many adherents on appellate courts and may be only a few Supreme Court appointments from total victory, according to Rosen.

The movement that Rosen alleges to have identified is represented by, among others, Chief Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit, who apparently coined the phrase in a 1995 book review; University of Chicago professor Richard Epstein; Chip Mellor of the Institute for Justice, a libertarian public interest law firm; and the author of this commentary, who, until his recent outing, toiled in cherished anonymity as a scholar at the American Enterprise Institute.

No Secret Plan

Everybody, chill. Libertarians are notoriously incapable of planning a lunch. With the lone and arguable exception of Justice Clarence Thomas, all sitting justices have time and again reaffirmed New Deal precedents and shunned opportunities to limit their reach. The Rehnquist Court's federalism "revolution"—the principal target of liberal wrath—consists of margin-nibbling decisions that no ordinary American has heard of, and recent (and, probably, forthcoming) decisions strongly signal an abandonment of that effort. At the same time, the supposedly conservative Court has cranked out an amazing array of newfangled rights, especially on sexual mores.

In short, I despair of our supposed plans for toppling the New Deal. And in truth, there is no Constitution in Exile movement. Google the phrase, run it through Lexis-Nexis, search far and wide: no conservative or libertarian activist,

Michael S. Greve is the John G. Searle Scholar at AEI. A version of this article appeared in the *Legal Times* on May 2, 2005.

theorist, or judge has used the term since its casual mention in 1995 (and few have ever heard of it).

The propagation of the Napoleonic moniker is the assiduous work of liberal theorists—prominently, University of Chicago professor Cass Sunstein and Yale professor Bruce Ackerman.

No serious scholar—least of all Sunstein and Ackerman—disputes that the Constitution, as interpreted by the Supreme Court, did radically change its meaning in 1937 or thereabouts. It is the exile metaphor that does the work, by suggesting that the original thing ought to be brought back from its juridical Elba by judicial fiat.

In intimating that this is the conservative program, liberal propagandists rope in unlikely suspects. Rosen's article tags former attorney general Edwin Meese III, who has a long history of denouncing judicial activism. Sunstein has pinned the charge on Justice Antonin Scalia, who has rejected Epstein's theories on using judicial activism to promote economic liberty with the vehemence he usually brings to bear against the Supreme Court's snazzy new rights inventions. A recent Ackerman article in the *London Review of Books* identifies as a leading Constitution-in-Exilist legal scholar Robert Bork, who has proposed an end to judicial review of just about any kind—not exactly a recipe for restoring an exiled constitution by judicial decree.

For good measure, the Reverend Jesse Jackson and People for the American Way's Ralph Neas have charged the entire Federalist Society with trying to restore the exiled Constitution.

A Constitution in Exile adherent, it turns out, is anybody the Left does not like.

The Real Targets

The real targets are the administration's judicial nominees. The goal is to paint them as extremists, so far out of mainstream thought as to make them completely unthinkable candidates for the federal bench.

In Rosen's *New York Times* piece, Sunstein, a die-hard liberal, is permitted to identify himself as a "moderate" and then to "explain" the Constitution in Exile agenda. Not surprisingly, my fellow "movement" colleagues and I—none of whom have the slightest influence on the nomination process—end up sounding horridly extreme. Any judge or nominee for whom we might have a kind word—for any reason—is tainted by association. The manifest point of the exercise is to supply talking points for the Democratic members of the Senate Judiciary Committee.

Beyond nomination pre-emption, the larger purpose is to tackle the liberals' intractable problem: in an era when the federal courts are not theirs, their best move is to insist on judicial restraint. But they cannot commit to that program without casting doubt on their own legacy, especially *Roe v. Wade* (1973)—liberalism's most sacred commitment.

In the face of that dilemma, "progressives" (as liberals now call themselves) have adopted a two-pronged strategy.

First, under the auspices of the American Constitution Society and Yale Law School and led by Sunstein and Ackerman, they have launched the "Constitution in 2020" initiative (at which time, presumably, they will again own the courts).

Leading liberal theorists have extolled progressive "shadow Constitutions." University of Maryland government professor Mark Graber has argued that progressive Constitutions in Exile (oops!) should be "judged by their capacity to be vehicles to bring down the incumbent center-right regime," which "must be overthrown for progressives to realize their ideals in practice."

Graber is not officially associated with the American Constitution Society project, and holding progressives to his pronouncements is like holding conservatives to those of House Majority Leader Tom DeLay (R-Tex.): both are completely over the top. But Graber is right in observing that progressives are constitutionally committed to a Constitution in Exile. The real thing is never as good as it could be made by some imaginative judges.

Second, pending a liberal return to power, the logical progressive choice is to protect liberal precedents, to denounce the slightest move backward as anti-democratic "activism" and an incipient return to an ancien régime, and to give succor to judges who build on liberal precedents even in a conservative age.

Progressives wail about attacks on "democracy" when the Supreme Court endeavors to reimpose some constitutional limitations on Congress (for example, in invalidating one version of the Gun-Free School Zones Act, which was promptly reenacted in a marginally different form). Somehow these worries do not apply to the judicial invention of newfangled rights that constrain legislatures at all levels. Instead, liberals praise what Sunstein, in his important book *One Case at a Time*, has called "judicial minimalism"—the minimalism displayed in Supreme Court decisions that permit state institutions

to administer racial quotas in thin disguise (*Grutter v. Bollinger*, 2003), bar state anti-sodomy laws (*Lawrence v. Texas*, 2003), prohibit the death penalty for juveniles (*Roper v. Simmons*, 2005), and, above all, protect the sanctity of abortion on demand.

Unable to rely on the kind of judicial imperialism personified by their icon, the late Justice William Brennan Jr., progressives must now improvise. But their "constitutionalism" is not without parallel. In fact, it looks uncannily like Europe's.

La Constitution

The proposed European Constitution, signed in 2004 and now awaiting ratification by member states of the European Union, spans 448 articles, including social-democratic rights to warm progressive hearts—"respect for his or her physical and mental integrity," "access to preventive health care," and "continuing education." Voters in the various EU countries may get to vote on the monstrosity, or they may not, for fear that they might reject it.

Consistent with past European practice, such as adoption of the Maastricht Treaty to cement the European Union, those who do get to vote will probably be obliged to do so until they approve. A no vote, French President Jacques Chirac has threatened, means the end of Europe.

What a yes vote means is not exactly clear. Despite its stupendous length, the constitution leaves crucial questions—including taxing and military authorities—for a later day. A constitution, European officials say, is a "process." No backsliding from the accumulated mistakes, ever-forward movement toward ever-closer union. We will tell you later what it means and where it will end.

This breed of constitutionalism differs from that of the American Founders, who confronted elected state conventions with an up-or-down choice on a Constitution of clearly defined powers and restrictions.

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But candor is not an option for modern liberals. A progressive Constitution, they know, cannot be brought in from the cold by judicial imposition—and not by democratic decision, either. Progressives must therefore sidle into it just as the European elites are bamboozling the old continent into a European Constitution—with lip service to democracy but without its substance, with aspirations instead of rules, with scaremongering about the consequences of reconsidering past commitments, and without acknowledging any real limits.

Take *Lawrence v. Texas*. It means that anti-sodomy laws are out. Does it also mean that homosexual marriage is a constitutional command? We will let you know, dear voters, when we think you are ready. In the interim, we will deny that *Lawrence* means anything beyond its "minimalist" holding.

For this program, liberals need a foil—an enemy whose democratic commitment can be made to look as opportunistic as their own and who can be accused of sneaking in a reactionary Constitution the way they want to sneak in a "progressive" one. That this enemy is invented does not bother them.