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## Book Review

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# Reviving Roosevelt's Commitment to Our Constitution's General Welfare

by Nancy Spannaus

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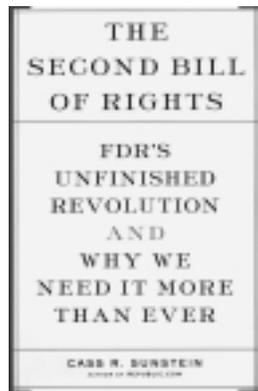
### **The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever**

by Cass R. Sunstein  
New York: Basic Books, 2004  
294 pages, hardcover, \$25

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There are several reasons for recommending this new book by Chicago law professor Cass Sunstein. The first, and most important, is that it will be the first introduction most Americans will get to a remarkable speech, and conception, by President Franklin Delano Roosevelt, called the "Second Bill of Rights." The second is the brilliant way in which Sunstein pulls the legal rug out from under the "don't tax me" zealots of *laissez faire*. The third is the historical review which Sunstein provides of the influence which FDR's "second bill" had, especially internationally.

For dealing with all these questions in a readable manner, Professor Sunstein deserves our appreciation. What is disappointing, is that he chooses to treat the "second bill" as a list of positive law demands, rather than acknowledging the fact that they flow coherently from the *principled* commitment of the U.S. Constitution (in its Preamble and elsewhere) to the idea of the *General Welfare*. Thus, when he could be arguing effectively for the mandate which Congress has to implement this Constitutional commitment, he is instead trying to figure out how and whether the courts could enforce the economic rights which FDR enumerates, and thus ends up with something less than a clarion call for providing these urgently



needed rights today.

Yet, the overall thesis is refreshing, and timely. President Franklin Delano Roosevelt did carry out a revolution against the counterrevolution which had been undertaken against the American System in the decades after President McKinley's death, and that revolution in thinking—back toward the Federal government taking responsibility for the welfare of the population—is desperately needed today. As Dr. Sunstein points out, today's free-marketeers have virtually wiped out many of the measures which FDR put into effect, and the elimination of these measures has increased the insecurity of our nation. A restoration of FDR's approach should be at the top of our agenda today.

### **The Second Bill of Rights**

When FDR gave his State of the Union address on Jan. 11, 1944, he was already looking forward to the end of the war, both in terms of international relations and the situation at home. "It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known," he said. This meant, he went on, that the guarantee of political rights, such as those enshrined in the Bill of Rights, had to be expanded into the economic sphere. "Necessitous men are not free men," he stated.

President Roosevelt went on: "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." He then 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 that 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, sickness, accident, and unemployment;
- The right to a good education.

He then asked the Congress “to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so.”

Sunstein says that Congress, in fact, never did respond. The GI Bill, which gave aid in obtaining an education and housing to returning servicemen, was the closest thing to legislation providing these rights. While Sunstein doesn’t mention it, the Hill-Burton legislation on health care was also effectively an echo of FDR’s idea that medical care was a right, and parity pricing of farm goods continued to be a part of the nation’s agricultural policy for some decades to come.

But the concept that all Americans had these economic rights did not take hold in the United States. Much of the rest of the book is devoted to why.

## The Role of Government

One of the most valuable arguments that Sunstein musters against those who fought against Roosevelt’s entire economic recovery program—including the Economic Bill of Rights—is his demolishing of the myth of *laissez faire*. FDR, like Lyndon LaRouche and leading Democrats today, asserted, in the Hamiltonian tradition, that the sovereign government had responsibility for the economy of the nation, through its establishment of policies of credit, taxation, regulation, and trade. Citizens needed government intervention to protect them from the monopolies and cartels which were throwing them into penury, Roosevelt argued. Government is their tool, not their enemy.

Then, as today, Wall Street and its supporters and dupes disagreed. They insisted that any interference with the so-called free market, meant that they were having money stolen from them—their money. They argued the inviolability of the “freedom of contract,” even when one of the contracting parties was hardly free at all. Echoes of George Bush’s screeds about cutting taxes today.

There is one major problem with the Wall Street argument, Sunstein asserts: It’s just not based on reality! In support of this, he cites the school of “legal realism,” which argues that there is no such thing as the free market, and that the only reason that so-called private enterprise, or property owners, can expect to enjoy the fruits of their endeavors is that they have rights created by the government. So, the question is not whether the government has a “right” to interfere with an



*President Roosevelt delivered the speech containing his Economic Bill of Rights through a fireside chat in January 1944. Franklin D. Roosevelt Library.*

individual’s property—through taxation or otherwise—but what kind of laws the government is going to make to regulate property relations.

Sunstein summarizes the point as follows: “No one really opposes government intervention. 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.”

Throughout the course of his Presidency, President Roosevelt won this argument about the government role, and significantly shifted the philosophy of government interference. This was especially evident in the knock-down, drag-out fight over Social Security and unemployment insurance, which tools of Wall Street argued were an unfair imposition on the companies which would have to contribute to them. FDR, however, won the nation to his idea that it was the responsibility of government to ensure that people were supported in conditions of adversity, such as unemployment and old age, and that the opposition of those whom he called “economic royalists” should be overridden for the benefit of the “common man.”

One of the major weapons which the Wall Street crowd used to try to defeat Roosevelt’s programs, of course, were the courts, ultimately the Supreme Court of the United States. They argued that since rights to security (such as old age insurance) were not explicitly spelled out in the U.S. Constitution, and since they were an imposition of government on the relationship between a company and its employee, through taxation, that Roosevelt’s measures were unconstitutional. Ultimately, the Supreme Court found in Roosevelt’s favor (see below).

## Continuing Battle

But, as those involved with fighting the Conservative Revolution and the fascist economic policies of the Bush Administration today know, Roosevelt's victory was not guaranteed to be a lasting one. In fact, Sunstein argues, the Economic Bill of Rights appears to have had a more lasting legacy through the United Nations—where it is virtually quoted in the Universal Declaration of Human Rights. With the United Nations putting forward these rights, they were then picked up broadly in constitutions which were written in the former colonies that gained nationhood after the end of World War II, as well as in constitutions of the socialist and communist countries.

Sunstein attempts to answer the question as to why the United States itself did not embrace the economic rights which FDR had said should be part of national security. He argues that some of them *have* become part of American cultural expectations—particularly the freedom from monopoly and the right to an education—but that others have clearly not.

But the reality is, that there had been an aggressive fight to include rights such as those in the Economic Bill of Rights into enforceable parts of the U.S. Constitution, Sunstein argues. He reviews certain crucial legal decisions on matters of welfare and housing, which occurred from the 1940s to the 1960s, which saw the government striking down laws that discriminated against the poor. This, of course, was a period in which the right to state-supported legal counsel for the indigent, and certain welfare rights protections, were established in Supreme Court decisions.

The problem came politically, with what Sunstein rightly calls the “counterrevolution” that followed Nixon's election in 1968. Nixon's appointees stopped the trend in the direction of recognizing social and economic rights, he argued, and although some of the rights remain, they have come under increasing attack.

## What Should Be Done?

Professor Sunstein is seeking to solve a problem in this book: What can be done in order to introduce Roosevelt's idea of social justice into the ruling political culture and constitutional order of the United States? Thus, his last section is devoted to exploring legal means by which this can be done. Rather than amending the Constitution to include an additional Economic Bill of Rights, Sunstein believes that the Bill should become a guiding philosophy in the sense of the Declaration of Independence, something which he calls a “constitutive commitment.”

But he believes that even this concept demands that he deal with the question of the enforceability of these rights, through the courts. To take up this issue, Sunstein deals with a series of legal precedents, and presents “models” of judicial treatment of such economic rights, dwelling in particular length on cases in South Africa, and Eastern Europe.

It is at this point that I believe Professor Sunstein makes

the issue much too technical and obscure. What is required to solve the problem, as part of an effective political fight, is to take a different approach to the legitimacy of the Economic Bill. These rights, evolutionary as they might be, should be understood as coming under the *principle of the General Welfare*, which is a prominent and unchanging part of our Constitution, both its Preamble and its enumerated powers. Once defined as a matter of *principled Constitutional law*, these rights can and should be enacted into law, through appropriate legislative measures.

## The Principle of the General Welfare

Amazingly, in my view, Professor Sunstein does not put a spotlight on the General Welfare principle; it does not even appear in the book's index, nor does it serve as an organizing concept in his discussion of Roosevelt's program, which he prefers to describe as a “pragmatic” adaptation to the horrendous conditions which were dominant when FDR came into office. Yet there is plenty of evidence that FDR himself saw his Constitutional justification for the New Deal, as well as followup measures such as the Economic Bill of Rights, in the General Welfare clause.

As he was beginning his second Presidential term in 1937, FDR was in a pitched battle with, among other institutions, the Supreme Court over many of his New Deal measures. In his inaugural address, he bore in on the crucial Constitutional issues at stake, issues which would define the very nature of our republic. He said:

“We of the Republic sensed the truth that democratic government has innate capacity to protect its people against disasters once considered inevitable, to solve problems once considered unsolvable. . . . We refused to leave the problems of our common welfare to be solved by the winds of chance and the hurricanes of disaster. . . .

“This year marks the 150th anniversary of the Constitutional Convention which made us a nation. At that Convention our forefathers found the way out of the chaos which followed the Revolutionary War; they created a strong government with powers of united action sufficient then and now to solve problems utterly beyond individual or local solution. A century and a half ago they established the Federal Government in order to promote the General Welfare and secure the blessings of liberty to the American people.

“Today we invoke those same powers of government to achieve the same objectives.”

Two weeks later, determined to find a way to overcome the obstructions placed in his path by the reactionary Supreme Court Justices who were blocking every effort of the Federal government to address the crisis, FDR proposed his plan to reform the Supreme Court.

Roosevelt took his case against the Supreme Court directly to the people, in a Fireside Chat on March 9, 1937. He warned that there was a danger of another 1929 crash, and said that national measures were necessary to prevent this



*While FDR's Works Progress Administration provided useful work for the millions of unemployed, the President sought to ensure a more permanent solution by insisting that Congress guarantee all citizens the right to a "remunerative job" if they wanted it.*

and to complete the recovery program, and that these were measures that only the national government could undertake.

FDR urged the people to re-read the Constitution, saying that, "Like the Bible, it ought to be read again and again."

"It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original thirteen states tried to operate after the Revolution, showed the need of a national government with power enough to handle national problems," the President told the nation.

"In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the General Welfare," Roosevelt said, adding that the powers given to Congress could be best described as being "all the powers needed to meet each and every problem which then had a national character and could not be met by merely local action.

"But the framers went further," FDR continued. "Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and General Welfare of the United States.'"

That was the underlying purpose of the patriots who wrote the Constitution, Roosevelt went on, "to create a national government with national power, intended, as they said, 'to form a more perfect union . . . for ourselves and our posterity.'"

As it ended up, FDR's political pressure succeeded in getting the Justices of the Supreme Court to yield. In two landmark decisions in 1937, the court ruled as Constitutional the unemployment tax and compensation provisions of the

Social Security Act, and old-age benefits provisions of the Social Security Act. In the second case, *Helvering v. Davis*, Justice Benjamin Cardozo expressly adopted the view of Alexander Hamilton of the General Welfare power, as opposed to that of James Madison.

"The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison," Cardozo wrote. He said that in response to the nationwide calamity that began in 1929, Congress had enacted various measures conducive to the General Welfare, including old-age benefits and unemployment compensation. Only a national, not a state, power can serve the interests of all, Cardozo declared.

### **A New FDR?**

Professor Sunstein can be excused for having his doubts that the Supreme Court Justices of today might actually return to the interpretation of the Constitution which Justices like Cardozo and Louis Brandeis put forward in the 1930s. Justices Antonin Scalia and William Rehnquist look like virtual Neanderthals, by contrast.

But the array on the Supreme Court when FDR took office, was hardly more encouraging. What changed the balance of power, and permitted FDR to push through his program, was his assertion of leadership in that time of crisis, and the confidence within the population which that leadership engendered. It is such leadership within the office of the Presidency which is needed today, in order to once again put the principle of the General Welfare at the center of our national policy. From the reassertion of that principle, will come the potential for Congress to do its job, in enacting all the essential parts of an Economic Bill of Rights.