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### A Constitutional Welfare State

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## A Constitutional Welfare State

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*Greg Weiner*

WHEN REPRESENTATIVE PAUL RYAN unveiled his long-awaited anti-poverty agenda as part of his “Better Way” initiative last June, he expressed what were, to conservatives, familiar misgivings about the welfare state. It was expensive. It was bureaucratically complex. It had failed to conquer poverty. Yet the report also took as a given that “repairing the nation’s safety net” in order to “cure poverty and prevent it” was the responsibility of the federal government. In a significant sense, one could say Franklin Roosevelt had won: Even conservatives were arguing about the best way to fulfill the national government’s responsibility for the material well-being of the populace, but not about whether it bore that responsibility in the first place. Yet, at least theoretically, many conservatives would revolt at hearing the idea so starkly expressed. That tension between theoretical concerns about the welfare state and, in practice, an acceptance—even embrace—of its broad contours and basic premises haunts conservative attitudes toward the New Deal and its legacy.

The tension is nowhere thicker than in constitutional theory. Orthodox constitutionalists almost universally agree that the New Deal derailed the regime the framers designed in Philadelphia in 1787. The eruption of legislative activity in Roosevelt’s first 100 days in office—eventually blessed by the Supreme Court in the equally furious outbreak of judicial activity beginning with *West Coast Hotel v. Parrish* in 1937—is widely assumed to form a partition separating a long period of limited national government from one of concentrated central authority.

Yet for all the hand-wringing, it is not only the policy arrangements of the New Deal, such as Social Security, that are going unchallenged. The constitutional ones are, too. The period’s judicial pillars stand

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basically undisturbed to this day. *Wickard v. Filburn* is notorious among conservatives for having stretched the commerce clause so far that it allowed the federal government to regulate the wheat a farmer grew for his own family's consumption, on the grounds that he would otherwise have bought it in the interstate market. Yet even the conservative justices who dissented with such force from *NFIB v. Sebelius*'s upholding of the Affordable Care Act accused the law of exceeding *Wickard*'s framework. They declined to question the framework itself.

This persistent tension lies partly in a confusion of two elements of the New Deal that are often treated as interchangeable but that can, in fact, be separated: its administrative and ameliorative premises. The administrative premises deal with the regulatory authority over details of the economy that the New Deal and later efforts sought to concentrate in the executive branch of government. The ameliorative premises are subsidies that help relieve economic distress or social-insurance programs that help protect individuals against the sharp edges of economic life. It was the administrative, not the ameliorative, elements of the New Deal that deranged the Philadelphia regime—the set of constitutional and political arrangements the framers enacted in 1787.

Of course, both the administrative and ameliorative parts of the New Deal can be either defended or disputed. Each of them affects the size and scope of government. But the administrative parts are the ones that change the Constitution's *character* by altering the balance of powers both within the national government and between the national and state governments. Ameliorative government—government that seeks to assure a basic level of economic sufficiency for its people—can, to be sure, bleed into administrative government. This happens when the state attempts not just to relieve poverty but to eradicate it by reaching into individuals' lives and dictating the details. But the latter was the aspiration of the Great Society, not the New Deal. The New Deal's programs of economic relief were vastly simpler and more transparent than those of the Great Society.

Nothing about ameliorative government inherently necessitates administrative government. If these elements of the New Deal can be detached from each other, there will still be arguments over anti-poverty policy and social insurance. But there might be broader acceptance of the constitutional legitimacy of the New Deal legacies that everyone accepts on policy grounds. Such a constitutional *détente* would be based

on core principles that would make a welfare state compatible with the Philadelphia regime. Constitutionally, a welfare state must be general: provided across the board rather than to favored individuals or regions. It must be simple: both transparent and visible to the public. And, finally, it must be based on a preference, but not a dogma, for local government. Agreement on these points can forge a constitutional consensus that leaves the vital question of generosity open to ongoing policy dispute.

#### THE NEW DEALS

Historians speak of at least two New Deals. The first consisted of the spate of administrative authority concentrated in the national government in Roosevelt's "first 100 days" legislation. It included regulatory laws like the Agricultural Adjustment Act and the National Industrial Recovery Act, both of which gave the executive branch a sweeping array of new economic powers, as well as Keynesian-inspired measures like the Public Works Administration and the Civilian Conservation Corps.

Broadly speaking, the First New Deal encapsulated the New Deal's administrative premises. It would be too much to say the First New Deal sought a fully planned economy, but it certainly welcomed a larger role for public planning. The executive branch was given the authority to dictate prices of commodities, levels of wages and prices, amounts of production, and, in the case of the agricultural law, even rates of taxation. Initially, the Supreme Court invalidated these new powers in cases like 1935's *Schechter Poultry Corporation v. United States*. But, starting in 1937, the Court began clearing the way for many of them in *West Coast Hotel v. Parrish* and never looked back.

These new regulatory powers arguably did derange, in the literal sense, the Constitution. They meant that legislative and executive authority, and often judicial too, were wielded by a single hand—what Madison had called "the very definition of tyranny" in Federalist No. 47. Moreover, they inserted the national government into the daily life of the nation for the first time. There may be much to commend this regulatory authority. The point here is that it transformed the constitutional regime not just by *expanding* the authority of the national government, but by *concentrating* it in the executive branch in violation of the principle of separation of powers.

The ameliorative principles of the New Deal were different. Originating in the so-called Second New Deal, they were unveiled in

President Roosevelt's January 1935 State of the Union address, in which he called for moving from "recovery" to "reform," taking the shape of three priorities: the "security of a livelihood," to be achieved through a major jobs program; the "security against the major hazards and vicissitudes of life," pursued through old-age and unemployment insurance and a national system of welfare relief; and "the security of decent homes." The second of these, the apparatus of social insurance, laid the ameliorative foundations of the New Deal regime: Social Security, unemployment insurance, and Aid to Dependent Children (later AFDC).

Arthur Schlesinger described a conscious decision, in deference to conservative congressional opposition as well as judicial obstacles to economic planning, to utilize the taxing and spending power rather than the regulatory powers of the national government in the Second New Deal. Walter Lippmann thus distinguished between a "Directed" and a "Compensated" Economy. This "Compensated Economy," which allowed free markets to operate but insured individuals against what Roosevelt had called the market's "hazards and vicissitudes," formed the New Deal's ameliorative core.

#### CONSTITUTIONAL AUTHORITIES

The question is whether such a welfare state is compatible with the Philadelphia Constitution's limitation of congressional powers to the 18 enumerated in Article I. A familiar tale holds that, at the peak of judicial hostility to the New Deal, Labor Secretary Frances Perkins confided her concern about the courts' reception of the forthcoming Social Security bill to Justice Harlan Fiske Stone. Accounts of his reaction vary. According to one, he replied, "The spending power, my dear, the spending power is all you need." The other version casts his reply in terms of the "taxing" power: "You can do anything under the taxing power." The distinction matters, and the roots of the dispute run far deeper than the New Deal.

The debate over the nature of the national government's authority to tax and spend reaches back at least to Hamilton and Madison. Congress's first enumerated power in Article I, Section 8, of the Constitution reads as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The question of whether this clause indicates either a power to tax and spend distinct

from the enumerated powers that follow—or whether the spending power was limited by the subsequent enumerated powers—remained a point of controversy from the founding period to the New Deal. According to one side of the argument, Congress possessed sweeping powers to tax for the general welfare *and* to spend for the general welfare; these were substantive, additional grants of power *beyond* the remaining enumerated powers. On the other side, the reference to “providing for” the common defense and general welfare—the spending prong of the clause—merely indicated the purpose of taxation; consequently, the enumeration of powers that followed *limited* the spending power. Both sides, however, emphasized the generality of spending as a constitutional limitation.

Since social insurance in the New Deal model would find its clearest constitutional authority in this “general welfare” clause, the issue requires careful attention. Does the general welfare clause give Congress an additional power to tax and spend to meet the country’s needs, or must an authority for economic relief be found elsewhere in the enumerated powers?

Gordon Lloyd observes in his edition of Madison’s *Debates in the Federal Convention of 1787* that “common defence and general welfare” first appears in the deliberations of the Philadelphia convention in the August 21<sup>st</sup> Report of the Committee of 11 as a qualification of the power to incur debts: They could be incurred only for the *common* defense and *general* welfare rather than for particular or local purposes. Generality was unquestionably a minimal requirement of the constitutionality of taxing and spending; it was one argument made, for example, against federal relief for the Savannah fire of 1796. Representative John Nicholas of Virginia thus complained in the debate on relief for the fire that “[if] the general welfare was to be extended (as it had been insinuated it ought) to objects of charity, it was undefined indeed.”

This much—that spending must be general rather than particular—was uncontroversial. But was this the *only* limitation on the spending power? Hamilton argued as much in his opinion on the constitutionality of the National Bank:

Congress can be considered as under only one restriction which does not apply to other governments—they cannot rightfully apply the money they raise to any purpose merely or purely local.

But, with this exception, they have as large a discretion in relation to the application of money as any Legislature whatever. The constitutional *test* of a right application must always be, whether it be for a purpose of *general* or *local* nature. If the former, there can be no want of constitutional power.

Similarly, in his *Report on Manufactures*, Hamilton described the spending power as sweeping:

[T]he power to *raise money* is *plenary*, and *indefinite*; and the objects to which it may be *appropriated* are no less comprehensive, than the payment of the public debts and the providing for the common defence and “*general Welfare*.” The terms “*general Welfare*” were doubtless intended to signify more than was expressed or imported in those which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision. The phrase is as comprehensive as any that could have been used.

Madison objected vehemently to this interpretation. He surely wished he could have unmasked Hamilton as his partner in writing the Federalist Papers, for Federalist No. 41—one of Madison’s numbers—had dismissed concerns about the general-welfare clause on the grounds that the subsequent enumeration limited it: “[W]hat color can the objection have, when a specification of the objects alluded to by these general terms, immediately follows, and is not even separated by a longer pause than a semicolon?” Debating about the Bank in the First Congress, he persisted in this analysis: “No argument could be drawn from the terms ‘common defence, and general welfare.’ The power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined.”

In other words, an authority not otherwise specified in Article I, Section 8, could not be considered as part of the “general welfare” for purposes of the taxing and spending power. Madison continued to press this point as late as 1817 when, in his last act as president, he vetoed an internal-improvements bill. Authorizing local improvements under the general-welfare clause would render, as Madison wrote,

the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of Legislation instead of the defined and limited one hitherto understood to belong to them, the terms “common defense and general welfare” embracing every object and act within the purview of a legislative trust.

Justice Joseph Story’s *Commentaries* entered this debate on Hamilton’s side, concluding, based on the grammar of the clause as well as the settled practice of the national government, that the “common” defense and “general” welfare—and not the enumerated powers—were the only limit on the spending authority. The government could appropriate funds “to any purposes, or in any manner, conducive to those ends.”

This debate remained judicially unresolved until 1936’s *United States v. Butler*. Significantly, the decision was issued by a conservative Supreme Court that was still striking down the New Deal—including in this case, which overturned the Agricultural Adjustment Act. But in the course of doing so, Justice Owen Roberts—who would later provide the “switch in time that saved nine” in *West Coast Hotel*—established for the first time the judicial doctrine that the only limit on the taxing and spending power was the requirement of generality. He cited Story as the relevant authority, writing:

While . . . the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of §8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

In *Helvering v. Davis*, Justice Benjamin Cardozo, upholding Social Security, further clarified that the judgment of whether an exercise of the welfare power was general or particular was up to Congress unless its “choice [was] clearly wrong.” Taken together, this is the general taxing and spending authority under which Chief Justice John Roberts would, three-quarters of a century later, find the individual mandate of the Affordable Care Act constitutional in *NFIB v. Sebelius*: “Put simply,

Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate.”

Clearly there is room for reasonable debate between the Hamiltonian and Madisonian positions. But it seems equally clear that the Hamiltonian reading is a faithful one with theoretical roots and sustained practice. Would, then, a Hamiltonian reading license social insurance on the model of Social Security, unemployment compensation, or welfare benefits? Put otherwise, does such an approach tax and spend for the *general* rather than the *particular* welfare?

Unquestionably such a regime would have exceeded Hamilton’s imagination. But it is probably more general and less particular than the industrial inducements he proposed in the *Report on Manufactures*. Moreover, today’s economic benefits are general insofar as they are available to all and hence insure the population as a whole against Roosevelt’s “hazards and vicissitudes” of life. Even those who do not receive financial benefits from these programs nonetheless benefit because social insurance is in place. The knowledge that individuals are insured against the worst economic outcomes gives, or at least *can* give, policymakers the confidence to step out of the way of more aggressive economic growth. It gives individuals the confidence to take economic risks. It provides peace of mind in the same way other forms of insurance do.

This is not to say all programs of social insurance are fiscally prudent or demographically sustainable. Nor is it to say Hamilton would have endorsed them. It is merely to say they are compatible in principle with a reasonable Hamiltonian reading of the general welfare clause. But certain criteria must be met if such programs are to comport more broadly with the tenor of the regime to which the framers agreed in Philadelphia in 1787.

#### CONSTITUTIONAL PREMISES

The first criterion a constitutional welfare state must meet, as authorities from Hamilton to Story to Roberts have already indicated, is generality: It must apply broadly, not to favored regions, groups, or individuals. This does not mean, again, that everyone must receive benefits. The point, rather, is that benefits should be provided according to the principle of social insurance and allotted by broad formulas rather than being targeted to favored classes. Social Security is the classic example. While the program taxes all workers for the benefit of a defined class

of recipients, all taxpayers anticipate joining that class. Programs like unemployment insurance or welfare benefits operate on a similar principle: They provide benefits to groups that all taxpayers could reasonably anticipate joining, including because of adverse circumstances beyond their control.

However, the national approach to economic relief shifted between the New Deal and the Great Society, with Lyndon Johnson's War on Poverty assuming a more ambitious and, with it, more detailed posture. In *The End of Liberalism*, Theodore Lowi describes a deliberate rejection of the strategy of alleviating poverty—the New Deal approach—in favor of a strategy of eliminating it. He thus distinguishes between “old” and “new” welfare, with Social Security typifying the “old” strain and the Community Action Programs of the 1960s—based on grants to community organizations rather than formulas for aid available to families that met certain criteria—epitomizing the newer kind. (One enduring result of this approach is the more than 80 anti-poverty programs that Speaker Ryan's report observed lingering even 20 years after welfare reform.)

Poverty could have been alleviated merely by making old welfare more generous, Lowi notes. But he summarizes the contrary disposition of the new poverty warriors: “Alleviation was for sissies.” Irving Kristol's principles of neoconservatism similarly accepted the idea of a welfare state but rejected the bureaucratization and paternalism of its Great Society variant. Daniel Patrick Moynihan, too, distinguished between the generality of New Deal liberalism and the Great Society's ambition to micromanage society. As Moynihan often emphasized, the New Deal involved government in what it did best—collecting revenue and cutting checks—and to stunning success. Social Security, for example, rapidly transformed the poorest demographic cohort of the population into the wealthiest.

This simplicity is the next criterion a welfare state must meet to comport with the Constitution. George Carey has emphasized that Federalist No. 10 seems to presume “a low-key or relatively passive government”:

If it were otherwise, the problems of controlling the effects of faction would go well beyond those canvassed by Madison. A positive government would, more likely than not, serve to arouse the people; and, to the extent that it became the mechanism through which interests, factious or not, could achieve differential and

avored treatment, it would increasingly become the object of capture or domination. Scarcely any interest could avoid being drawn into this political vortex.

Another way of pursuing the same line of argument is that Madison seems to presume a relatively simple or transparent regime that can be controlled by ordinary political processes. This is implicit in Federalist No. 10's claim that minority factions will be "unable to execute and mask [their] violence under the forms of the Constitution." These groups will instead, Madison writes, be defeated by "regular vote." But what he calls this "republican principle" only operates if the public can exert basic control, rooted in essential familiarity with the policies and processes of government.

Excessively complicated and detailed programs turn positive government into uncontrollable government. If government does an infinite variety of small things, votes cannot be interpreted to make a statement on any one of them, even if—as seems unlikely—the average voter can be aware of them in the first place. Indeed, since voters can cast only one ballot per election while public officials must make hundreds if not thousands of decisions, politicians unavoidably get a free pass on most issues. This makes the influence of special interests on those affairs cost-free as well. Crucially, corruption is neither necessary nor adequate to explain this phenomenon. The better explanation is government's seepage into ever-smaller nooks and crannies of the economy and society in an effort to tease smaller and smaller perfections out of both. Special interests lobby where, and because, government operates.

That is ineradicable; the problem arises when it becomes invisible, either because government regulates in so many areas that voters cannot impose accountability, or because it does so in administrative agencies beyond public influence or view. The First New Deal's administrative apparatus and its regulatory descendants have for this reason become breeding grounds for minority factions. These factions try to influence the distribution of small economic advantages because government determines the distribution of small economic advantages. Dry up the breeding ground—in other words, make fewer detailed decisions—and the special-interest influence dries up as well.

It is consequently government's shrinkage—in the size of what it discretely undertakes, not its aggregate scope—rather than its overall growth that places it beyond the republican controls the founders

envisioned. The problem is not government's size but rather its complexity. That is a problem of the administrative rather than the ameliorative aspects of the New Deal.

The old-age benefit of Social Security is a massive program but a simple one. It does not attract corruption: One is either retirement age or one is not, and benefits are set by objective criteria. Simplicity may partly explain the appeal to some conservatives of approaches to economic relief like a guaranteed income: Rather than detailing the terms of relief, or attempting to micromanage individuals' lives, they would expand the principle of social insurance to income generally. Proposals to replace the panoply of health-care programs, including the immensely complex Affordable Care Act, with subsidies for purchases of insurance on the private market operate on a similar principle. In both cases, conservatives and liberals can still argue about the appropriate level of generosity, but there may be room for consensus on what form best comports with the Philadelphia regime. In any event, regardless of the program, there is no inherent reason a positive state that undertakes a small number of transparent and simple efforts toward economic relief—even if very large ones—cannot square itself with the founding.

Finally, the Constitution prefers that government be as local as possible, what Catholic social teaching would later call “subsidiarity,” the ethical principle that a problem should be addressed by the competent social institution closest to the individual. As Thomas West notes, it is a myth that relief efforts at the time of the founding were purely charitable as opposed to public. Government did play a role, it simply did so parsimoniously to avoid dependence and locally in order to maintain face-to-face connections based on genuine knowledge of individuals' varying needs. In his *Notes on the State of Virginia*, Jefferson reports that “all our states” had laws providing for maintenance of the poor—including paying stipends to farmers for boarding them and establishing workhouses with compulsory labor for “vagabonds”—such that “from Savannah to Portsmouth you will seldom meet a beggar.”

However, this preference for locality is just that—a preference. It is not a dogma. It is prudential, not constitutional. Federalist No. 45 explicitly declines to elevate federalism to sacramental status:

Was, then, the American Revolution effected, was the American confederacy formed, was the precious blood of thousands spilt,

and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States . . . might enjoy a certain extent of power?

Similarly, Federalist No. 46 characterizes the level of government at which a given activity will be undertaken as something to be sorted out based on voters' perceptions of competence. "[T]he people," Madison writes there, "ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."

Such passages do not undermine the framers' commitment to federalism. They do, however, suggest it was more of a prudential preference than an inflexible abstraction. Put otherwise, the framers were willing to undertake national efforts when circumstances warranted them. If contemporary macroeconomic conditions warrant a national safety net—say, to facilitate mobility or to prevent a "race to the bottom" between localities—nothing about the principle of federalism or, for that matter, subsidiarity inherently inhibits it.

Aid to Families with Dependent Children represented a hybrid model by which the federal government guaranteed benefits that varied by state. The current program—Temporary Assistance to Needy Families—continues a federal financial commitment but with more state flexibility: still a partnership, but not a guarantee. People can disagree. They do. Creative compromises, such as federal benefits with local experimentation, can be struck. But these are prudential questions, not constitutional ones.

#### CONSTITUTIONAL AMELIORATION

Ameliorative government as expressed in the Second New Deal more or less complies with these criteria—generality, simplicity, and, insofar as its solutions are necessarily national, locality. However, if the foregoing analysis is persuasive, it also suggests the constitutional status of the New Deal depends on severing its administrative from its ameliorative elements. Put another way, the relevant issue is less the scope of government (which the ameliorative state expands) than the structure of government (which the administrative state deranges).

The founders provided a basis for such a distinction. Federalist No. 31 draws it: "[A]ll observations founded upon the danger of usurpation

ought to be referred to the composition and structure of the government, not to the nature and extent of its powers.” That is, a government that is properly balanced internally—that distributes powers *between* branches rather than concentrating them—can be trusted with the powers it needs. This separation of powers was the reason Federalist No. 84 could say the Constitution was itself a Bill of Rights.

The administrative state is fundamentally hostile to the separation of powers, and it is consequently the combination of administrative and ameliorative government that threatens the Philadelphia regime, not the welfare state itself. Curbing the administrative state does not, to be sure, mean abandoning necessary regulations in areas from the environment to financial markets. But faithfulness to the Constitution does require subjecting them to the separation of powers.

Perhaps most clearly, to the extent fewer regulations mean more risk but fewer administrative burdens also mean more growth, the presence of an underlying welfare state would make that gamble rational. Severing the administrative and ameliorative premises of the New Deal thus represents a bargain: The individual accepts more fluctuation—more “creative destruction,” in Schumpeter’s phrase—with its attendant risks, on the knowledge that he is insured against it.

Conversely, the proper balancing of powers may also make the centralization of authority, to the degree it is genuinely necessary, less threatening than orthodox constitutionalists have generally supposed it to be. That is, the danger to constitutionalism is not merely the extent to which authority is concentrated *at* the national level of government, but the extent to which it is concentrated *within* the national level. The dispersal of power makes an otherwise necessary allocation of power to the national government safer.

A constitutionalist’s version of the New Deal—or a New Dealer’s constitutionalism—then, would consist of a program of simply constructed social insurance rooted in the general-welfare clause and a regulatory apparatus that is both closely tailored to actual needs and subject to the separation of powers. To this, Hamilton might not object. Nor, for that matter, might Madison.

#### MADISON’S METABOLISM

Thus far, this analysis has grounded a constitutional image of the New Deal in a Hamiltonian reading of the general-welfare clause. But there

is another foundation on which to erect it: Madison's theory of constitutional change. Explaining his 1815 decision to regard the Second Bank of the United States as constitutional after years of arguing the opposite, Madison elaborated a theory of measured constitutional change — what I have elsewhere called “a living constitution with a slow metabolism” — whereby that which persistent, generational majorities have regarded as constitutional through all three branches of government must be regarded as such, even by those who disagree.

While Madison vetoed the bank on prudential grounds, his message to Congress said he felt further constitutional disputation was precluded “by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes of a concurrence of the general will of the nation.”

The time horizon to which Madison referred — over which the constitutional consensus he alleged had supposedly endured — was roughly a single generation. At least three generations have passed — more than a third of American constitutional history — since the New Deal, and arguably with far less ongoing disputation than the bank received. That is not to say the New Deal has been ratified in all its particulars; on the contrary, the analysis above suggests citizens could scarcely have been aware of, much less have consented to, all the details. It is instead to say the basic idea that the government has a prominent role to play in economic security is broadly unchallenged.

If persistent practice and understanding can render even a mistaken understanding of our founding as constitutional, it would seem that moment has arrived with respect to the welfare state. Quite arguably, in the particular task of alleviating distress if not of transforming society — which was never the Second New Deal's goal — it has worked. The task now is not to unravel ameliorative government, which no one in the mainstream of politics seeks, but rather to render it constitutional. That begins with understanding its distinction from administrative government, and the constitutional possibility of embracing one without accepting the other.