

## Introduction

### *A Living Thing: The Progressive Challenge to the American Constitutional Order*

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One of the most interesting, important, and talked about intellectual and political movements of recent times has been the criticism – from both scholarly and populist sources – of the “progressive” intellectual synthesis that has dominated many American political, philosophical, historical, and policy circles over much of the past century. This volume brings together the leading scholars who laid the groundwork for this movement.

Together, the contributors define the nature and intellectual origins of the progressive synthesis, and the unique challenges it poses to the American constitutional order. They offer the reader intelligent guidance on the nature of our Founders’ republic and the manner in which progressives of various stripes have sought to challenge it. In the course of so doing, they offer unique insights into the place of the idea of progress in American thought and public life, and the enduring impact of the Progressive era – including the pivotal election of 1912 – on contemporary political ideas and practices. They also offer a trusty guide to the nature and significance of the recent scholarship and public opinion that have arisen in opposition to the progressive vision of America.

Part I of this volume – on contested constitutionalism and the election of 1912 – clarifies the nature and extent of progressive claims by laying them out in the concrete circumstances of American politics. When Woodrow Wilson, on the campaign trail, deemed government a “living thing . . . accountable to Darwin, not to Newton,” he was encapsulating for political purposes a complex set of philosophical arguments and presuppositions. They are arguments and presuppositions that continue to inform our understanding of the nature, purpose, and scope of

government. And they present challenges to the American constitutional order that are indeed very much alive in the twenty-first century.

William Schambra opens this volume by showing the enduring significance of the questions raised by the election of 1912, and in particular the conflict between Theodore Roosevelt and William Howard Taft. He begins by suggesting that today's Tea Party movement is a populism that is constitutional – rather than populist simply. In this, the Tea Partiers are unlike the earlier populists, insofar as they have a genuine concern for proper constitutional constraint on democratic will. Their wrestling with the problem of democracy and its relationship to the Constitution is, Schambra suggests, a first step toward recovering the Constitution from the progressive opprobrium beneath which it has labored for more than a century.

Schambra points out that contemporary debates over the limits of democracy echo the arguments between Taft and Roosevelt in the run-up to the uproarious Republican convention and general election of 1912. That contest saw TR pointing to the democratic deficits of the Constitution. The key shift in TR's rhetoric was his move from a progressive legislative agenda to a progressive constitutional agenda. The radicalism of his proposals to deal with those perceived deficits drove Republicans such as Elihu Root and Henry Cabot Lodge – who had been long-time backers of TR – into the Taft camp. In the end, Root agreed with Taft that the result of the convention was more important than the election itself, because it settled the critical question of 1912, that is, whether the Republican Party should be seized by and carried over to populism. Examining presidential elections a century and more later, both scholarly and populist constitutionalists can therefore look to 1912 for guidance.

Sidney M. Milkis picks up the argument by considering a competing legacy of the 1912 election. Milkis reminds us of the dispute between Madison and Jefferson over whether the Constitution should be protected from passionate factionalism. Milkis points us to the fact that Jefferson's position has been vindicated in the progressive notion of a "living Constitution," one that each generation might define. In particular, the election of 1912 challenged voters to rethink the deepest meaning of their Constitution, and such rethinking was showcased in the debate among four impressive candidates: Roosevelt, Taft, Eugene Debs, and Woodrow Wilson. The election of 1912 was in effect the rare presidential contest that verged on engaging political philosophy in the full sense. The campaign was in many ways an argument over James Madison and

*Introduction*

3

*The Federalist*, and whether the checks and balances of the Founders' Constitution would survive. The progressive promise to remake the Constitution from a lawyer's document, supported by the veneration of the people, into a living constitution – and a platform for bold and persistent experimentation – resonated widely. In the words of TR in the 1912 campaign, "The people themselves must be the ultimate makers of their own Constitution." With this election died the conservatism of Taft, to be supplanted by contemporary conservatives' commitment to a strong executive and mass democracy.

Part II of this volume – on the political philosophy of progressivism – opens with James W. Ceaser's nuanced tracing of the manner and extent of the progressives' rejection of the Founders' natural rights doctrine. Ceaser argues that progressives generally condemned efforts to overthrow the government by action outside of established law, favoring instead democratic methods of social change. Yet at the same time they made clear their plans to alter the basic character of the political and economic system and to discard the theoretical foundation of natural rights philosophy that underlay it. Their immediate target was the Constitution itself. Embracing the Enlightenment's scientific project, they used that project in a new way – as a tool to attack the Founders' constitutionalism and its principled foundation.

In the next chapter, Wilfred M. McClay limns the philosophical roots of contemporary progressivism by examining the thought of one of its greatest exponents, John Dewey. For Dewey, science, education, art, and all other creative human activities find their ultimate meaning when harnessed to the great project of democracy. Dewey argued there was no tension between scientific expertise and democratic sentiment. Science, in his account, was nothing more than an exemplification of the process by which intelligence might be socialized. It thus becomes the key source of disinterested authority in a democratic society. Education, the central task of civilized life, is properly understood as nothing more than a formal name for the process of adaptation, the process by which experience, in the form of the full findings of science as well as other less systematic forms of human inquiry, is incorporated into the individual's pattern of habits, ideas, perceptions, and emotions. With educational institutions working properly, all the chronic frictions that bedevil modern social life will, in Dewey's scheme, be harmonized, so that the interests of the individual, as well as those of the "public," will be fully expressed and realized.

Though Dewey, like other progressives, had high ambitions for social science, he was equally adamant that experts not become a clerisy or self-

vaunting aristocracy, and that even the most recondite social knowledge must be “indissolubly wedded to the act of full and moving communication.” By the time Dewey published *The Public and Its Problems* in 1927, however, the general notion of a “public interest” – so central to progressive thought – was crumbling under a concentrated assault by younger skeptics and realists; and, as McClay notes, it has never regained the plausibility it had 100 years ago. In our own day, on issue after issue, from climate change to constitutional law, the tension between science and democracy, between accredited experts and *vox populi*, remains. It has proved to be a tension that Dewey’s brand of progressivism could not resolve.

Part III of this volume – on the political theory of the progressive state – opens with John Marini showing how progressive philosophy and ideology laid the groundwork for the modern administrative state. The argument of progressives, and then contemporary liberals, was that the modern state – and unlimited national power – were the inevitable consequences of the progress of certain economic and social forces unleashed by modernity. That argument disguised the fundamentally political, and consciously anti-constitutional, character of progressive reforms. In the progressive dispensation, all “natural” laws are reduced to physical or biological laws, and government cannot be limited by fixed moral truth.

In the following chapter Ronald J. Pestritto extends Marini’s analysis by making the case that a particularly fervent strain of social gospel Christianity helped birth modern progressivism and the administrative state. Pestritto notes that strong attachment to religious faith is associated more with progressivism’s contemporary critics than its friends, so it is not uncommonly assumed that liberal political ideology, and earlier progressivism in particular, was accompanied by atheism or antireligious animus. In the case of America’s original progressives, however, that was far from the truth. Early progressivism adopted a rhetoric that might seem at home among members of today’s Christian right.

James Stoner in turn builds on Pestritto’s analysis by showing the influence of Catholic social thought on our understanding of the modern state. The harmony of sentiment between Fr. John Ryan – the most influential member of the Catholic clergy when it came to early twentieth-century social policy – and Richard Ely – the great progressive economist – provides the intellectual framework through which Catholicism and progressivism can be understood in their mutual quest for social solidarity through economic policy. Like the Protestantism Pestritto described,

*Introduction*

5

Catholicism was turned against democratic capitalism in the quest for a more rational, scientific state. The roots of the modern welfare state can thus be said to predate the middle part of the twentieth century.

The fourth part of this volume, on the progressive presidency, opens with Jean M. Yarbrough's meditations on the development of Teddy Roosevelt's political thought. And she notes explicitly a recurring theme of this volume: historians have spilled too much ink on the practical policy positions of progressives, and not enough on political philosophy. She points to the influence of progressive intellectual leader Herbert Croly in TR's summoning of the nation to a "New Nationalism," whose purpose was to move Americans beyond the pursuit of private, materialistic goals. According to both TR and Croly, democracy could only be achieved through the vigorous exercise of national power, whereby the central government would become less the enforcer of neutral rules and more a driver of social growth. Croly offered TR the intellectual framework by which he could better grasp and articulate his own intuitions and inclinations. Croly in effect deepened TR's understanding of himself, and emboldened him to further action and argument. TR's "New Nationalism" planted the axiom that government, and not the individual, was the source, and therefore the arbiter, of all property rights.

Following on Yarbrough's elucidation of Roosevelt's progressivism, Johnathan O'Neill reminds us of the important but largely forgotten role of William Howard Taft in maintaining a constitutional presidency. Taft viewed with alarm the beginning of the modern presidency in Roosevelt's "stewardship" theory – a kind of routinization of prerogative – holding that the president legally could do whatever the needs of the people demanded. Unsited though he was for modern mass democracy, Taft robustly exercised executive power while retaining a more constitutionally sound vision of the presidency than that of the progressives. On matters ranging from the party system, to centralized budgeting and cabinet control, to the Ballinger-Pinchot affair, Taft displayed a commitment to executive leadership, but also to a sober republican and constitutionalist conception of such leadership that remained rooted in consent and the separation of powers.

Alas, as Charles R. Kesler argues in the next chapter, Taft's sobriety was overcome decisively by Woodrow Wilson's comprehensive articulation of a new, historically situated conception of being itself. In Wilson's thought, and to some extent his practice, organic, progressive growth would replace nature as the central category and aspiration of the American political order. Sovereign authority would reside in the people,

albeit the people properly understood – in the historical context in which their wishes could be made manifest. No eighteenth-century anachronism like separation of powers could be allowed to stand in the way of popular sovereignty. Tyranny of the majority being permanently foreclosed by the progress of history, the job of statesmen is to keep the ship of state moving ever forward down the river of history, by intelligently reading and then guiding popular will. Such piloting is a job for the one – or at most the few – rather than the many. Statesmanship devolves to leadership informed by ever-shifting historical consciousness, understood as the product and the working out of the tensions between social organism and environment. It requires a sympathetic insight into the heart of the people. The unchanging natural order argued for in the Declaration of Independence is Wilson's real enemy: the Constitution is merely the place where the battle is joined.

The fifth and final part of this volume – on the Supreme Court, Congress, and the future of the Constitution – examines not only the relationship of progressivism to the judicial and legislative branches, but the long-term outlook for the progressive synthesis in an age when progressive thinkers and political actors no longer view the presidency as the primary driver of history, due largely to the very real limits imposed by the Founders' Constitution. Each chapter, like progressivism itself, looks forward.

My contribution, on the Supreme Court, examines the philosophical and jurisprudential underpinnings that support contemporary understandings of a living Constitution. I trace the origins and implications of those understandings in the social Darwinism and pragmatism that is so visible in early progressive jurisprudence. My claim is that the federal judicial branch – thanks largely to Oliver Wendell Holmes and Louis Brandeis – has adopted, more than any other branch of government, a progressive view of the Constitution. This view holds that the Constitution must be interpreted in light of an outlook that insists on the historically situated, contingent, and organic nature of the state, society, and human person. According to this theory, our place in history determines the meaning of our Constitution more than its text, tradition, logic, or structure, and it is the Court's role to keep updating our fundamental law accordingly.

This historicist approach to the Constitution has been embraced by judicial appointees of different presidents from different decades, Democrat and Republican, "liberal" and "conservative." A major revolution in American political thought was necessary to bring such a diverse

*Introduction*

7

cast of characters to the same view of the Constitution. It is a revolution that, by its nature, cannot end. The age-old question of “what works” has been divorced from a sense of constitutional restraint, which has been replaced by an organic conception of a state unlimited in principle, whose growth and development must be oriented to buttress contemporary understandings of democracy and the choosing self. Our constitutional jurisprudence therefore seems destined to depart more and more from the constitutional moorings established by the Founders, and from the ideals of the rule of law—that is, the application of authoritative norms, consensually and publicly adopted, having as their end the protection of natural rights.

In the final chapter, Eric Claey's notes that as the scholarship critical of progressive political theorists and actors has burgeoned, political practice has done far less to confront the legacy of progressivism. He suggests that only now is the revisionist scholarship being put to use in concrete efforts to restore the Founders' natural-rights constitutionalism. In particular, he dilates on the “Regulations from the Executive In Need of Scrutiny” Act, and its attempt to revive pre-progressive constitutionalism in a practical and prudent manner. The Act diminishes the legal power of executive branch agencies to make policy independent from Congress, thus restoring proper authority to constitutionally designated officers, and reducing the overall growth of the administrative state. Offering a law professor's insights into non-delegation, the chapter reaches back to the political science of *The Federalist* and its conception of separation of powers in support of natural rights.

As we stand just beyond the 100th anniversary of the election of 1912, intelligent citizens and scholars cannot help but be moved by the arguments herein to reconsider the nature of their constitutional republic – from its natural-rights philosophical premises to the competing theories of progressive history that have in many ways supplanted them. As progressive history came to replace nature as the fundamental ordering idea of American politics, so it laid the groundwork for the contemporary embrace of the “living constitution” that replaced the Founders' formal, fixed Constitution. The reverberations of this movement are still being felt on matters as diverse as the size and scope of government, fiscal policy, constitutional interpretation, and the overall political and cultural drift of the nation. The arguments contained in this volume provide a thoughtful framework for continued deliberations over such weighty regime questions.