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SOME SECOND THOUGHTS ON PROGRESSIVISM AND RIGHTS

By Eldon J. Eisenach

Twenty years ago I wrote my first paper on the Progressives, in which I argued that the Progressives did not take rights seriously.[1] Most of my research and writing on the Progressives since then has extended and deepened that initial argument. In this essay, I want to summarize the main reasons why I held that position and to introduce some second thoughts on those reasons. I conclude with some reflections on contemporary American discourse on constitutionalism and rights.

I. First Thoughts

The overriding reason that Progressives were so often dismissive of rights claims and arguments is that they wanted to create a *national* democracy and they saw a rigid adherence to the prevailing norms of the U.S. Constitution standing in the way. Political philosopher Herbert Croly (1869–1930) was the most forceful advocate of this tension and what might follow from it.

> Public opinion can no longer be hypnotized and scared into accepting the traditional constitutionalism, as the final word in politics. . . .
>
> The Law in the shape of the Federal Constitution really came to be a monarchy of the Word. . . . The Constitution was really king. Once the kingdom of the Word had been ordained, it was almost as seditious to question the Word as it was to plot against the kingdom. A monarch exists to be obeyed. In the United States, as in other monarchies, unquestioning obedience was erected into the highest of political virtues.[2]

Croly admits that, like European monarchy, American constitutionalism initially served educative political purposes. "The monarchy of the Constitution satisfied the current needs and the contemporary conscience of the American nation. . . . It instructed the American people during their collective childhood. It trained them during their collective youth. With

[1] Eldon J. Eisenach, "Why the Progressives Didn't Take Rights Seriously," Unpublished paper, Conference for the Study of Political Thought, Yale University, 1991.
[2] Herbert Croly, *Progressive Democracy* (New York: Macmillan, 1914), 25–26, 44, 131.

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its assistance the American people have become a nation."[3] This age has now passed. Democracy and the monarchy of the Constitution are now in conflict, and the monarchy must give way.

> The ideal of individual justice is being supplemented by the ideal of social justice. . . . Now the tendency is to conceive the social welfare, not as an end which cannot be left to the happy harmonizing of individual interests, but as an end which must be consciously willed by society and efficiently realized. Society, that is, has become a moral ideal, not independent of the individual but supplementary to him, an ideal which must be pursued less by regulating individual excesses than by the active conscious encouragement of socializing tendencies and purposes.[4]

Standing behind this anti-constitutionalist argument was the growing prestige of the social sciences, especially sociology and political economy, shaped by American academics who studied in Germany after the Civil War.[5] These academics came to dominate the political and moral spirits of the rapidly growing research universities. And, as sons and daughters of evangelical Protestant republicans, they also helped inform a Social Gospel Christianity that was, like the social sciences, embedded in an evolutionary and historicist worldview. It was this heady mixture that came to dominate not only American universities and churches, but also "public intellectuals" in higher journalism, charity and charitable foundations, the Women's Movement, and the professions. Governmental bureaucracies and regulatory bodies, created and expanded by Progressive political reforms, later gave these values some measure of permanent coercive public power.

[3] Ibid., 145–46.

[4] Ibid., 148–49. Charles Beard's textbook that dominated collegiate instruction in American politics from its inception in 1910 through the 1930s made this same historical argument in the 1928 edition: "No longer do statesmen spend weary days over finely spun theories about strict and liberal interpretations of the Constitution, about the sovereignty and reserved rights of states. . . . It is true that there are still debates on such themes as federal encroachments on local liberties, and that admonitory volumes on 'federal' usurpation come from the press. It is true also that conservative judges, dismayed at the radical policies reflected in new statutes, federal and state, sometimes set them aside in the name of strict interpretation. But one has only to compare the social and economic legislation of the last decade with that of the closing years of the nineteenth century, for instance, to understand how deep is the change in the minds of those who have occasion to examine and interpret the Constitution bequeathed to them by the Fathers. Imagine Jefferson . . . reading Roosevelt's autobiography affirming the doctrine that the President of the United States can do anything for the welfare of the people which is not forbidden by the Constitution! Imagine Chief Justice Taney . . . called upon to uphold a state law fixing the hours of all factory labor. . . . Imagine James Monroe . . . called upon to sign bills appropriating federal money for roads, education, public health . . . and other social purposes! . . . Why multiply examples?" Charles Beard, *American Government and Politics* (New York: Macmillan, 1928), 100–101.

[5] Eldon J. Eisenach, *The Lost Promise of Progressivism* (Lawrence, KS: The University Press of Kansas, 1994), chaps. 1–3.

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The leading ideas and political values behind Croly's argument about the conflict between democracy and constitutionalism are easily summarized. The new industrial economy of the United States and the leading countries of Europe has socialized and made interdependent most human activities; our individual fates are increasingly bound up with the actions of countless unseen others leading to consequences we experience but do not understand. Indeed, everyday activities, economic, social, and political, are increasingly undertaken within complex organizations, often national in scope, and whose leadership is often distant, autonomous, and self-perpetuating.

In Croly's analysis, we are under the control of "bosses" in industry, finance, labor, and politics. The clashes of interest, always a part of politics, now take place between these organizations on a national stage. In this hierarchical organizational environment, effective political and moral agency requires the construction of new national associations in order for the average person to be seen and heard. In the words of the Progressive Party Platform of 1912:

> Political parties exist to secure responsible government and to execute the will of the people.
>
> From these great tasks both of the old parties have turned aside. Instead of instruments to promote the general welfare, they have become the tools of corrupt interests which use them partially to serve their selfish purposes. Behind the ostensible government sits enthroned an invisible government owing no allegiance and acknowledging no responsibility to the people.
>
> To destroy this invisible government, to dissolve the unholy alliance between corrupt business and corrupt politics is the first task of the statesmanship of the day. . . .
>
> Unhampered by tradition, uncorrupted by power, undismayed by the magnitude of the task, the new party offers self as the instrument of the people to sweep away old abuses, to build a new and nobler commonwealth.[6]

While the Progressive Party did not achieve electoral victory, two decades of earlier activities by reform organizations and social movements had already forced the two major parties both to confront the issues it raised and to adopt many of its reform ideas. By 1912, Progressive insights and ideas (with the exception of the South) permeated national political culture.[7]

[6] Quoted from Eldon J. Eisenach, ed., *The Social and Political Thought of American Progressivism* (Indianapolis: Hackett, 2006), 274.

[7] Benjamin Parke De Witt, *The Progressive Movement* (New York: Macmillan, 1915); Walter Weyl, *The New Democracy* (New York, Macmillan, 1912); Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose our Current Unrest* [1914] (Englewood Cliffs, NJ: Prentice-Hall, 1961); and Croly, *Progressive Democracy,* all assume this ideological victory.

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Institutionally, the clearest way to express this transformation is to say that, at the turn of the last century, the American national regime of "courts and parties" was increasingly discredited and partially replaced by a new regime dominated by national interest groups, political executives, and an administrative apparatus.[8] Each in their own ways, courts and parties reinforced constitutional norms and constitutional ways of thinking. Courts and the common law removed many economic issues from state and national legislative purview; locality- and state-dominated parties and patronage systems reinforced states rights and local jurisdictions, preventing national reforms. The perverse result was that parties prevented national reforms for the public welfare while courts gutted state exercise of traditional "police powers" to address new economic conditions. This post-Civil War pincer movement of party machines and newly assertive courts left our effective governing ideas *more* liberal and laissez faire than before the war. The national government of the nineteenth century, except for the momentous exception of the Civil War, largely acted "out of sight"[9] and was, by default, limited and "liberal" because it so rarely interfered with or coerced, individuals. State governments, however, which had always governed individual lives thickly and intrusively,[10] were now forbidden to act to protect the general welfare through regulation of the new industrial economy. And, even if states were permitted to act, their jurisdictional reach and limited viewpoint often made such regulation counterproductive and even parasitic.

The Progressive response was to attack both courts and parties through appeals to "direct democracy." As an ideal and in its earliest manifestations, its first object of attack was political party machinery and practices. Mandated primary elections, legislative initiative and referenda, recall of elected officials, civil service rules, and regulation of campaign contributions, all hit party organization where it lived, in its domination over elections from the precinct upwards. Another measure, direct election of U.S. senators, attacked party dictation of the composition of the upper house that had so much power in foreign policy and in presidential executive and judicial appointments. Women's suffrage was also part of antiparty politics because women symbolized consensual, disinterested, and community caring values.

Hostility to political parties was part of a much larger critique of prevailing politics. Opposition to party became opposition to constitutional understandings of representative government that the party system so

[8] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982).

[9] Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); William J. Novak, "The Myth of the 'Weak' American State" *American Historical Review* 113 (2008): 752–72.

[10] William J. Novak, *The People's Welfare: Law and Regulation and Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

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strongly reinforced. The more populist elements in Progressivism supported not only the recall of state judges but the overturning, by legislative initiative and popular referenda, of state court decisions regarding social provision and industrial regulation. While Theodore Roosevelt (1858–1919) was a late convert to many of these ideas and proposals, direct democracy and the centrality of executive leadership became the leitmotif of the campaign. And such was the enthusiasm generated by these ideas, that the 1912 campaign launched a serious national debate about the Constitution, the modern presidency, centralized administration, and the role of political parties in elections and governance.[11]

Ideas of direct democracy have deep cultural and religious roots in America, making the Progressive Party something of a religious crusade.[12] An obvious source is the antinomian and millenarian strains in reformed Protestantism—from John Winthrop's (1587/8–1649) contrast of "mere justice" with the higher "law of the gospel" enforced by ties of brotherhood and love, and William Penn's (1644–1718) dismissal of governmental forms in his 1682 Pennsylvania "Frame of Government"—to prominent Social Gospel preachers such as Samuel Batten (1859–1925) and George Herron (1862–1925). Batten held that party organizations and court legalisms were barriers to righteousness because they encouraged selfishness and social division. The political party "stands between the people and the government and makes a fully democratic government impossible. . . . A good partisan cannot be a good citizen."[13] George Herron added that, until political life is emancipated "from merely individual theories of freedom, it cannot see the divine social kingdom."[14]

The link between partisanship, individualism, and selfishness received philosophical expression as well. In his college text book, *Ethics,* John Dewey (1859–1952) first outlined the requisites for responsible citizenship and then excoriated "the 'machines' of political parties, with their hierarchical gradation of bosses from national to ward rulers, bosses who are in close touch with great business interests at one extreme and with those who pander to the vices of the community . . . at the other."[15] In an 1888 essay, Dewey condemned a theory of democracy premised on isolated individuals and aggregate majorities:

> To define democracy simply as . . . sovereignty chopped up into mince meat, is to define it as an abrogation of society. . . . When so

[11] Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Politics* (Lawrence, KS: University Press of Kansas, 2009).

[12] Robert M. Crunden, *Ministers of Reform: The Progressives' Achievement in American Civilization 1889–1920* (Urbana: University of Illinois Press, 1984), chap. 7.

[13] Samuel Zane Batten, *The Christian State: The State, Democracy and Christianity* (Philadelphia: Griffith and Rowland Press, 1909), 239–40.

[14] George Herron, *The Christian Society* (Chicago: Fleming H. Revell, 1894), 110.

[15] John Dewey and James Tufts, *Ethics* (New York: Henry Holt, 1908), 478.

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> defined, it may be easily shown to be instable to the last degree, and so difficult that a common will must be manufactured—if not by means of a contract, then by means of a combined action of the firm of Party and Corruption.[16]

The new social sciences gave these arguments scientific standing. Sociologist Charles Horton Cooly (1864–1929) condemned American constitutional and legal formalism as the primary source of our moral and political failings:

> Formalism goes very naturally with sensuality, avarice, [and] selfish ambition . . . because the merely formal institution does not enlist and discipline the soul of the individual, but takes hold of him by the outside. . . . In so far as it is true of our time that the larger interests of society are not impressed upon the individual, so that his private impulses cooperate with the public good, it is a time of moral disintegration.[17]

Cooley's social psychology was seconded by sociologists and political economists. All condemned merely individualistic and negative liberties and saw both legalism and partisanship as the cause of moral and political vices.[18] Social justice required a higher citizenship and higher citizenship required the destruction of party machinery and the weakening of the domination of our political life by lawyers and courts. In their stead, a morally uplifting "public opinion" would be able to emerge, calling citizens to opt for a non-aggregative and substantive national good.

This call was clearly heard with the incredibly rapid formation of the Progressive Party. Starting from a breakaway faction of the Republican Party, within less than a year it recruited candidates for many major state and federal offices and mounted a national campaign that outpolled the Republican Party. This was possible because a large complex of institutions and associations (earlier termed "the benevolent empire") *already existed* within which this type of citizenship was honored. Of particular importance were the magazines *Outlook* (Theodore Roosevelt served on its editorial board) and *Independent*, both of which began as liberal evangelical Protestant church publications. Similarly, *Survey*, the publication of

[16] John Dewey, "The Ethics of Democracy" (1888), *The Early Works, 1882–1898,* vol. 1 (Carbondale, IL: Southern Illinois University Press, 1969), 231.

[17] Charles Cooley, *Social Organization: A Study of the Larger Mind* (New York: Scribner, 1909), 349 and 351.

[18] See discussions of Albion Small and Simon Patten in Eldon J. Eisenach, "Progressivism as a National Narrative in Biblical-Hegelian Time," in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds. *Liberalism: Old and New* (New York: Cambridge University Press, 2007), 55–83.

the National Conference of Charities and Correction, an umbrella organization for settlement houses and social workers, was a major source of Progressive Party mobilization.[19]

Public opinion—what Tocqueville had termed "the principle of the sovereignty of the people"[20]—not parties and elections, not courts and constitutions, was to be the primary source of legitimate political authority. Led by moral, intellectual, and professional vanguards, public opinion, unlike elections and law, is able to penetrate not only all major social institutions, imbuing them with a common will, but to structure the very identities and self-understandings of democratic citizens. In Dewey's words,

> Society and the individual are really organic to each other . . . the individual is society concentrated. . . . The organism must have its spiritual organs; having a common will, it must express it. . . . In democracy . . . the governors and the governed are not two classes, but two aspects of the same fact—the fact of the possession by society of a unified and articulate will. It means that government is the organ of society, and *is as comprehensive as society.*[21]

Thirty years later, what was implicit in Dewey was made explicit by Mary Follett (1868–1933) in *The New State:*

> The old idea of natural rights postulated the particularist individual; we know now that no such person exists. . . . As an understanding of the group process abolishes "individual rights," so it gives us a true definition of liberty. . . . We see that to obey the group which we have helped to make and of which we are an integral part is to be free because we are then obeying ourself. Ideally the state is such a group, actually it is not, but it depends upon us to make it more and more so. The state must be no external authority which restrains and regulates me, *but it must be myself acting as the state in every smallest detail of life.*[22]

Supported by the matrix of institutions and associations carrying these messages, the Progressive Party was to be the party to end parties, the

[19] Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Politics;* Eisenach, *The Lost Promise of Progressivism,* 11–16. Simon Patten, a political economist at the Wharton school, coined the term "social work" to mark out one of the central tasks of modern government and administration. See Simon Patten, *The New Basis of Civilization* (New York: Macmillan, 1907), 201–220.

[20] Alexis de Tocqueville, *Democracy in America,* trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), I, I, 4, p. 53.

[21] Dewey, "The Ethics of Democracy, 237–39, *passim.* Emphasis added.

[22] Mary Parker Follett, *The New American State: Group Organization in the Solution of Popular Government* (New York: Longmans, Green, 1918), 137–38. Emphasis added.

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expression of enlightened public opinion expressed through mechanisms of direct democracy. Although the Progressive Party failed in the election of 1912, Progressive ideas triumphed in the larger culture of national organizations and institutions, in higher education and mainstream Protestant churches, in higher journalism and philanthropy—soon to be joined by management of large publicly held national business corporations, in money-center financial institutions, and in labor unions. Thanks to President Wilson's post-election shift to moderately Progressive reforms, parts of the national bureaucracy and most of the regulatory apparatus institutionalized some Progressive values as well.

Here one might draw what seem to be unproblematic conclusions about Progressivism and rights. Thanks to German historicism/romanticism, liberal Christian theology, and theories of Progressive social and moral evolution encoded in the new social sciences, the era of big government dawned while the space of individual liberty fell into the shadows. The rule of law and the supremacy of legislatures were increasingly replaced by bureaucratic administrators writing the actual rules that govern us under cover of legislative delegation. The engine of big government was executive power and rule by experts responsive to an elite "consensus" embodied in themselves and in those who dominate large and powerful national institutions which, in turn, were recipients of governmental resources and prestige. Enlightenment ideals of natural rights and individual liberty were replaced by theories of social progress and social justice defined as the redistribution of material resources and security against joblessness, disease, and hunger. In the meantime, the "living" Constitution, rewritten by the victory of progressive ideals, became a flexible source of legitimacy for every act of an ever-expanding government.

II. Second Thoughts

These conclusions, if not commonplace, are prominent among today's conservative intellectuals and constitute the core narrative that helped power the rise of conservatism in American political life since the 1980s. Moreover, as if to confirm this narrative, as "liberal" became an increasingly discredited term, the political left in America reappropriated the earlier term "Progressive." This story, however, contains two flaws. First (and both left and right seem to accept this), it assumes an almost seamless transition from "progressivism" to "liberalism," both historically and ideologically.[23] Second, the proof of this transition is the claim that Progressives (1890s–1920s) and liberals (1930s–1980s) were equally advocates of "big government" both in terms of increasing governmental regulation and in an ever-larger appropriation of national wealth.

[23] See, for example, Edward A. Stettner, *Shaping Modern Liberalism: Herbert Croly and Progressive Thought* (Lawrence, KS: University Press of Kansas, 1993).

I want to challenge that argument on a series of fronts. The first begins with the Progressives' understanding of the distinction between a "government" and a "state." Although these terms are often used interchangeably (Americans, it seems, are incapable of grasping European "state theory"), Progressive academics and intellectuals had a much clearer (if not always clearly expressed) understanding of the difference. This is entirely understandable in the political context that they confronted. Given the almost mindless and party-driven *expansion* of municipal, state, and national governments in the Gilded Age (federal revenues increased 400 percent between 1878 and 1908; Civil War pensions came to absorb over 40 percent of the national budget),[24] the earliest critics, in both academia and in the new nonpartisan press, equated this rapid governmental expansion with dominance of government by party machines. Parties lived by buying voters through jobs, favors, franchises, subsidies, tariff protections, and pensions. Thus, aside from corruption, one of the strongest condemnations of party government was its gross inefficiencies and waste. It was difficult for Progressives (and earlier Mugwumps) to see *any* relationship between this governmental expansion and the larger public interest, between "big government" and "strong state." Their response was to locate ideas of public interest, common good, and virtuous citizenship within an enlarged conception of the state.

One way to sort out this government/state distinction is to reflect on the difference between the formal institutions of governments in America at all levels—their respective constitutional powers, resources, and policies—and the authority of the American "state" conceived as the combination of *all effectively governing institutions*—whether nominally "public" or "private"—that pursue common ends and purposes.[25] In this view, one can see that at some periods of American history we have had ostensibly small and presumptively weak "governments" but an authoritative and powerful "state." At other times our national government has been big and intrusive but unable to generate enough authority from the "state" to address commonly recognized problems and concerns. Gilded Age politics (1876–1896) is the outstanding example of the latter.[26] An obvious example of the former is the Northwest Ordinance of 1787, passed under the Articles of Confederation, that forbade slavery in the federally administered territories. Under one of

[24] For examples, see Eisenach, *Lost Promise of Progressivism*, 150–56.

[25] Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 22–24, use the term "plenary authority" to argue that all sites of political change already possess such generalized authority, whatever its source. This is to counter the common misperception that the growth of government is the same as an increase in authority. Thus, "America in the nineteenth century was no less fully governed than America in the twentieth; more of some forms of authority indicates less of others" (23).

[26] Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Harvard University Press, 1977).

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the constitutionally weakest forms of national government imaginable, a whole sector of the continent was declared free of slavery. In the 1850s, under the aegis of the much more robust United States Constitution, the power to forbid slavery in the territories was so seriously contested that secession and civil war followed.

Thus, combinations of "big government/weak state" and "small government/strong state" require modes of explanation that lie quite outside political theory expressed as constitutional law and powers, bills of rights, and the whole universe of language embedded in individual rights and formal governing powers. Cryptically put, "not all political institutions are governmental," and yet they exercise governing power.[27] The rise of election-based, mass political parties in the 1830s is the most prominent example of a governing institution that was not governmental. The term "party government" did not mean government *of* party but government *by* party. A new vocabulary of governance was created and institutionalized with the rise of party, a vocabulary far removed from constitutional and other "theory" discourse. Its governing ideas and mobilizing ideologies crossed not only political jurisdictions decreed by constitutional federalism, but across the divide between public institutions and private associations and institutions, whether economic, religious, racial, or cultural. Partisan identity, like religious identity, was passed through the family over many generations. In short, parties became part of the effective, authoritative "state" without which no formal political institutions could have governed democratically. Part of the Progressive reform project was to displace party as a powerful part of the *state;* clearly they did not want to simply replace it with an ever-larger set of *governments.* Cryptically put, they did not want to weaken parties to strengthen or enlarge *governments,* but to strengthen the *state* grounded in popular sovereignty. In short, they wanted to reinstate an understanding of democracy first articulated by Alexis de Tocqueville (1805–1859):

> There are countries where a power in a way external to the social body acts on it and forces it to march on a certain track.
>
> There are others where force is divided, placed at once in society and outside it. Nothing like this is seen in the United States; there society acts *by itself and on itself.* Power exists only within its bosom; almost no one is encountered who dares to conceive and above all to express the idea of seeking it elsewhere. . . . [O]ne can say that they govern themselves, so weak and restricted is the part left to the administration, so much does the latter feel its popular origin and obey the power from which it emanates. The people reign over the American political world as God over the universe. They are the

[27] Orren and Skowronek, *Search for American Political Development,* 84.

> cause and the end of things; everything comes out of them and every thing is absorbed into them.[28]

Thus, when Dewey held that "government" and society are coterminous, and Mary Follett maintained that one must act "as the state" in every aspect of life, neither were advocating that external and formal laws backed by public coercion regulate all social and personal actions. Indeed, they usually meant the exact opposite—they wanted public-regarding democratic values to inform the family, the neighborhood, schooling, social and business relationships, and, finally, politics. Democratic citizenship and a free society require no less. For them, democracy was a way of life, not a set of public institutions and procedures.

If the "state" lost its common grounding, becoming a scene of warring wills—if, in Dewey's terms, "the public" became eclipsed by powerful self-regarding institutions—then the state must be restored. And if the state thus conceived was not powerful enough to direct all of its various "governments/administrations," good citizens must try to achieve democratic purposes in what governments they can, as well as in other institutions and groups: in school boards, universities, charitable societies, churches, and families. This is what Jane Addams (1860–1935) meant when she called her (private, voluntary) settlement house, "an experiment in social democracy." In a 1901 lecture at Berkeley, Arthur Hadley (1856–1930), a political economist and President of Yale University, equated authentic public opinion with popular sovereignty and the state. Like Jean-Jacques Rousseau's concept of the general will (but keeping all representative institutions), public opinion constitutes individuals into one sovereign people,

> represented by a common public sentiment which includes all good men, minorities as well as majorities, who support the government not as a selfish means for promotion of their own interest, but as a common heritage which they accept as loyal members of a body politic, in a spirit which makes them ready to bear its burdens as well as to enjoy its benefits.[29]

[28] Tocqueville, *Democracy in America,* I, I, 4, p. 55. Emphasis added. And see Dana Villa, *Public Freedom* (Princeton: Princeton University Press, 2008), chap. 2, on Tocqueville's "decentered public sphere" in his conception of civil society. Like the argument here regarding the Progressives, Villa holds that, while Tocqueville (like Hegel), "saw individualism (or 'atomism') as premised on a faulty idea of freedom as independence . . . [they both] upheld individual rights as the basis of a distinctively 'modern' form of liberty. . . . [E]ach saw the right of 'subjective' freedom as central to . . . the 'rational' state and any morally defensible democracy" (50–51).

[29] Arthur Twining Hadley, *The Relations between Freedom and Responsibility in the Evolution of Democratic Government* (New Haven: Yale University Press, 1903), 139–40.

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The re-founding of America by President Abraham Lincoln (1809–1865) and the Civil War was, for the Progressives, just such a reinstatement of popular sovereignty as the democratic "state." The northern victory, however, was not the product of "big government" (though the national government grew beyond all previous bounds) but of a new political party that *became, for a time, the "state"*—the people/nation—noncoercively embracing women and children, churches, schools, and social clubs, and generating new associations and new organs of public opinion. Only this reassertion of "the principle of the sovereignty of the people" made possible the abolition of slavery and the victory of democracy. Lincoln and the Republican party-as-state were, for the Progressives, the symbol of their hopes for the restoration of democracy and the renewal of the national covenant made in the Declaration of Independence.[30]

The events preceding American entry into the Great War in Europe presented just such an opportunity for a renaissance of popular will. When, in 1916–1917, calls for national "preparedness" were heard, the voices almost uniformly came from Progressives who heard the distinct echoes of their abolitionist forbearers. Much of this preparedness and political mobilization took place independently of the bureaucratic instruments of the national government, ranging from the draft (fewer than one thousand federal officials) to war finance (Liberty Bond sales), to food supply and rationing. This explosion of hypervoluntarism, this sudden "state" expansion, exceeded the Progressives' highest expectations.[31]

Once war was declared, however, it rapidly spilled over into forms of social coercion and popular vigilantism that frightened many Progressives and cast doubt on their democratic hopes. As these passions became expressed in official governmental repression and censorship, these same Progressives stood at the forefront in defense of individual rights. Progressive academics were the founding members in 1915 of the American Association of University Professors (AAUP) that quickly established a committee on academic freedom. Once the war had ended and Wilson-Palmer launched the "red scare," Progressives were prominent in the founding in 1920 of the American Civil Liberties Union (ACLU), just as, eleven years earlier in 1909, Progressive leaders were prominent founders of the National Association for the Advancement of Colored People (NAACP) in response to the lynching of Negroes. In short, despite their disparagement of "rights" talk and constitutionalist language in the areas

[30] For examples, see Eisenach, ed., *The Social and Political Thought of American Progressivism*, chap. 1.

[31] See John E. McClymer, *War and Welfare: Social Engineering in America, 1890–1925* (Westport, CT: Greenwood Press, 1980); Ronald Schaffer, *America in the Great War: The Rise of the War Welfare State* (New York: Oxford University Press, 1991); Stephen Vaughn, *Holding Fast the Inner Lines: Democracy, Nationalism, and the Committee on Public Information* (Chapel Hill: University of North Carolina Press, 1980); Neil A. Wynn, *From Progressivism to Prosperity: World War I and American Society* (New York: Holmes & Meier, 1986).

of economic regulation and social welfare, free speech and civil liberties were assumed to be prerequisites for the formation of democratic public opinion. In one of the first American textbooks in sociology, Franklin Giddings (1855–1931) maintained that, in a democratic society, public opinion (he termed it "the social mind") "can exist only where men are in continual communication, and where they are free to express their real minds, without fear or constraint."[32]

American legal culture was changed as well. While it is correct to be reminded that it was Progressive intellectuals and reformers who undermined prevailing legal and constitutional principles in the name of "sociological jurisprudence" we must also remember that, in the larger legal and judicial community, first amendment jurisprudence hardly existed. Wilson's Espionage (1917) and Sedition (1918) Acts were barely challenged in law schools, the upper bar, and the courts, while states either mandated or permitted egregious violations of political speech. Thus, far from *undermining* a previously strong commitment to First Amendment freedoms, Progressive law professors and judges often led the way in its twentieth-century development.[33] Moreover, as Roscoe Pound (1870–1964) noted in his earliest articles,[34] state governments had, from the 1880s onward, increasingly created administrative bodies that robbed both courts and the rule of law of their authority. Pound, Dean of Harvard Law School (1916–1936) and father of sociological jurisprudence, argued from the start that federal and state courts must *regain* their authority against administrative and "expert" rule that rested on ad hoc decisions. Pound had always been an opponent of administrative discretion (he called it "justice without law"), even as he admitted that when courts failed to rule in accordance with prevailing moral ideals—he cites the prerogative origins of equity law in England—legislators and executives will necessarily undermine judicial authority and, thus, the protections of liberty. He began his 1907 critique of "executive justice" by quoting Montesquieu (1689–1755) from *Federalist No. 78* on separation of powers. Contrary to the New Dealers vilification of Pound as a late apostate to Progressive principles, Pound's opposition to New Deal delegation of power to administrative rule was there from the start. In short, he was sacrificed on the myth that New Deal measures fulfilled Progressive intellectual and philosophical values, a necessary myth, perhaps, given the paucity of articulate intellectual/ideological foundations for New Deal reforms. This myth still prevails.

[32] Franklin H. Giddings, *Elements of Sociology* (New York: Macmillan, 1898), 156–57, and see 324–29 on equality and rights.

[33] David M. Rabban, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997), chaps. 6–7; on Dewey's changing position on civil liberties, see 335–41.

[34] Roscoe Pound, "Executive Justice," *American Law Register* 46 (1907): 137–46; *The Organization of the Courts* (Philadelphia: The Law Association of Philadelphia, 1913).

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The second part of my second thoughts on Progressives and rights is related to the first, the charge that Progressives were centralizing "statists." As argued above, to equate "big government" with "statism," only makes sense if one rejects the Progressive understanding of "state," in the same way that one might [mistakenly] equate "nationalism" with "nationalization," and equate both with the appropriation of social and economic institutions by the central government.[35] While the acceptance of this Progressive understanding does not necessarily exonerate them from undermining principles of constitutionalism encoding ideals of federalism and limited government, there are many other indices of Progressive fears of large, centralized government. While they supported national laws of incorporation and regulation of large economic organizations (trusts, money center banks, national labor unions), they clearly differentiated themselves from the ideology of state socialism. One indirect indicator is their international associations and colleagues. In Europe generally, their primary affinities were with moderate social democrats,[36] those who later led the fight against the rise of fascism and revolutionary socialism/syndicalism. In England, they tended to have stronger and more enduring relationships with "pluralists" who distrusted central planning and "statism" than with Fabian Socialists who trusted such reforms.[37]

But here, another form of "statism" is charged against the Progressives: that of a statist form of "corporatism," especially as it was first expressed in Mussolini's Italy.[38] While most Progressive political economists were favorably disposed toward American forms of "welfare capitalism" that developed in America in the 1920s, so was Herbert Hoover (1874–1964), one of its main proponents when he was Secretary of Commerce.[39] And, like English pluralists, they certainly favored privately held but nationally regulated corporations to state ownership. Indeed, when Woodrow Wilson, by decree, created the War Industries Board, a politically-coordinated triumvirate of business, labor, and finance for industrial war planning, Progressives assumed it was a temporary

[35] Thus, the Whig statement of principles reads: "We wish, fully and entirely, TO NATIONALIZE THE INSTITUTIONS OF OUR LAND AND TO IDENTIFY OURSELVES WITH OUR COUNTRY; to become a single great people, separate and distinct in national character, political interest, social and civil affinities from any and all other nations, kindred and people on earth" (*American Republican*, 7 November, 1844).

[36] James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought* (New York: Oxford University Press, 1986).

[37] Marc Stears, *Progressives, Pluralists, and the Problems of the State: Ideologies of Reform in the United States and Britain, 1896–1926* (New York: Oxford University Press, 2004).

[38] John Diggins, *Mussolini and Fascism: the View from America* (Princeton: Princeton University Press, 1972); Jonah Goldberg, *Liberal Fascism: The Secret History of the American Left from Mussolini to the Politics of Meaning* (New York: Doubleday, 2008).

[39] Stuart D. Brandes, *American Welfare Capitalism, 1880–1940* (Chicago: University of Chicago Press, 1976); Alfred Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge: Harvard University Press, 1990); Olivier Zunz, *Making America Corporate, 1870–1920* (Chicago: University of Chicago Press, 1990).

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war measure not unlike the federal takeover of the railroads. The dominant model that many Progressives helped to create and sustain was the National Civic Federation, a voluntary body of labor, business, and public (but not governmental) representatives to inform and mediate industrial conflicts and to propose moderate sets of regulatory reform. This American form of "corporatism"[40] was far removed from both European syndicalism and corporatist fascism. For Progressive political and social economists of the period, large national institutions must be held to the same high standards of citizenship as demanded of individual citizens: "private business is a public trust" whether it is in the form of simple property and small business ownership or large labor unions and semi-public corporations.[41]

While these ideological commitments do not settle the issue of Progressive adherence to "liberal statism," other contextual evidence tends to support the second thoughts voiced here. Foremost is a book, published in 1928, that has recently received renewed attention: *The Pragmatic Revolt in Politics; Syndicalism, Fascism, and the Constitutional State.* Written by William Yandell Elliott (1896–1979), a political theorist at Harvard, it meticulously explores the philosophical and intellectual sources of the attacks on the liberal-constitutional state by communist syndicalism and corporatist fascism. Aside from fairly extensive discussion of William James (a favorite of Mussolini but a minor influence on Progressivism and the Social Gospel) and John Dewey, Elliott leaves the entire moral, religious, and social scientific edifice of American Progressivism untouched.

And well he might. American political understanding is thoroughly grounded in *popular* sovereignty. Elliott's commitment to national constitutional sovereignty as the guarantor of rights puts him at one remove from that understanding, closer perhaps to Alexander Hamilton (1755/57–1804), or Francis Lieber (1798 or 1800–1872), or Samuel Huntington (1927–2008).[42] When Jefferson said that our "republicanism"—our commitment to liberty—is "not in our Constitution certainly, but merely in the spirit of our people,"[43] he voiced a principle of American political identity that

[40] R. Jeffrey Lustig, *Corporate Liberalism: the Origins of Modern American Political Theory* (Berkeley: University of California Press, 1982); James Weinstein, *The Corporate Ideal in the Liberal State: 1900–1918* (Boston: Beacon Press, 1968).

[41] For early expressions of these values, see Albion Small, "The State and Semi-Public Corporations," *American Journal of Sociology* 1 (1895): 398–410 and "Private Business Is a Public Trust," *American Journal of Sociology* 1 (1895): 276–89; and Henry Carter Adams, *Relation of the State to Industrial Action and Economics and Jurisprudence* [1887], ed. Joseph Dorfman (New York: Columbia University Press, 1954).

[42] Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981). Also at Harvard, Huntington (1927–2008) warned of populist "creedal passions" grounded in democratic ideals that periodically sweep across American politics and threaten national constitutional sovereignty and the rule of law. Both Elliott and Huntington were active in shaping national security policy.

[43] Thomas Jefferson, *The Writings of Thomas Jefferson,* vol. 10, Paul Leicester Ford, ed. (New York: G. P. Putnam's Sons, 1899), 39.

is as foundational as Lincoln's government of, by, and for the people. Croly, Dewey, and, indeed, the entire "course of American democratic thought"[44] rest squarely on a democratic faith in the sovereignty of the people.

In the era after World War I, when Progressivism as an effective political movement had disintegrated, both Croly and Dewey explored new meanings of "the people" through categories of faith and briefly showed interest in the rise of antiliberal faiths that were empowering social and political movements in postwar Europe.[45] Neither Croly nor Dewey, however, could imagine a theory of politics for America that started with the premise of the sovereignty of the national government and its administrative apparatus. This was not because they were proto-syndicalists, corporatists, or soft fascists, but simply because they were American. In America, effective political argument that begins with national constitutional sovereignty is politically powerless unless grounded in a prior democratic faith in popular sovereignty. In Lincoln's words, "The Union is older than the constitution." In *Promise of American Life,* Croly explicitly recognized this profound difference from Europe, this American "exceptionalism."[46] His ideal was to *reconstitute* the proper relationship between the people and its constitutional frameworks. This required a revolution in thought and opinion and not a revolution in law and government. In Dewey's terms, the "public" must be reconstituted before its problems can be addressed. And, when the Progressive Party, in a national election, failed in this reconstitution, other sources in American life were explored to achieve and make effective a democratic "common faith."[47]

III. Contemporary Argument

In 1928, Charles Beard's (1874–1948) textbook on American politics stated: "No longer do statesmen spend weary days over finely spun theories about strict and liberal interpretations of the Constitution . . ."[48] Boy, has he been proved wrong! He, like so many Progressives and New Dealers, thought that political discourse would henceforth be dominated by talk about the best, most effective, policies to achieve substantive ends agreed upon, not about pre-political rights and constitutional jurisdictions. And, so long as the "liberal establishment" dominated the national government from World War II through the 1970s, Beard was right. After

[44] Ralph H. Gabriel, *Course of American Democratic Thought* (New York: Roland Press, 1956).

[45] Discussed in Kloppenberg, *Uncertain Victory,* 349–94.

[46] Herbert Croly, *The Promise of American Life* (New York: Macmillan, 1909), chaps. 8 and 9.

[47] John Dewey, *The Public and Its Problems* (1927), *The Later Works, 1925–1953,* vol. 2 (Carbondale: Southern Illinois University Press, 1990) and *A Common Faith* (New Haven: Yale University Press, 1934); and see Melvin L. Rogers, *The Undiscovered Dewey: Religion, Morality and the Ethos of Democracy* (New York: Columbia University Press, 2008).

[48] See note 3 above.

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World War II, social scientists declared an "end of ideology," to be replaced by the mediation and conciliation of concrete group interests. To examine why the Progressives and New Dealers eventually proved to be so wrong and why we now experience an explosion of rights talk and constitutionalist argument, we must examine how and why the liberal establishment failed, both politically and ideologically, and how this failure gave rise to contemporary arguments about rights.

Contemporary political discourse originated in a critique of the ideology and practices of a bipartisan "liberal establishment," created by the New Deal electoral alignment (1932–36) and the older Republican-Progressive institutions and practices that had remained in power in the 1920s—especially with the onset of World War II and its Cold War aftermath. This establishment rested on Democratic Party majorities in Congress and relatively nonpartisan executive and bipartisan congressional leadership regarding foreign and defense policy, macroeconomic and international economic policy, and the major national institutions supportive of those policies.[49]

The liberal establishment increasingly justified its rule in "nonideological" terms by appealing to purportedly objective and "value-free" procedures and practices. Stemming from the New Deal electoral coalition and the partial reinstatement of more traditional models of party government, political scientists shaped what was termed an "empirical theory of democracy" that came to be called "interest group pluralism," a generalization covering the whole regime that previously was meant to describe legislative politics under strong party rule. Within a commonly accepted set of "rules of the game" (the closest this theory came to Constitutional ideas and a concept of the people), interest group elites and governmental actors, using the many available points of access to policymaking, asserted, defended, and bargained their interests. The "state" as a complex of coercive governing institutions was pictured as a "black box" in which proposed policy "inputs" were processed into official "outputs" as decisions and laws.[50] The New Deal and its aftermath was described as "practical," "experimental," and result oriented because its policies were created in response to the real interests and needs of the people as expressed through interest groups and elections and not through ideological political parties or philosophical debate.[51]

The "Progressive" side of the regime ideology accepted this model of legitimacy, but added two elements to it. The first is that those who

[49] David Plotke, *Building a New Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* (New York: Cambridge University Press, 1996), on how and why this alliance was necessary to effectively govern.

[50] David Ciepley, *Liberalism in the Shadow of Totalitarianism* (Cambridge: Harvard University Press, 2007).

[51] Daniel J Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953); Arthur Meier Schlessinger, *The Vital Center: the Politics of Freedom* (Boston: Houghton Mifflin, 1949).

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governed both their own institutions (labor, finance, industry, education, public bureaucracies, the national media, legislatures, and so on) and participated in national governance, necessarily internalized liberal democratic values and were their most articulate defenders against antidemocratic and proto-totalitarian "mass" movements—movements that had plunged Europe into chaos and war. Higher courts, needed to interpret laws and adjudicate conflicts, justified their own power in these same value-free terms. "Neutral procedures" became the mantra of the courts; and so long as they adhered to this principle, their decisions were both legitimate and just. Here, too, the Constitution was more a vague background condition than an explicit guide to adjudication, serving largely as a warrant for procedural neutrality.[52]

Needless to say, given the political turmoil and the social, political, and ideological movements beginning in the 1960s, this set of rationalizations soon came under vigorous attack. These attacks shaped the formation of alternative legitimating ideas by both left and right that now dominate our political and ideological discourse.

The democratic left charged that the liberal establishment excluded many important groups and interests in policymaking. As a party lacking any substantive ideas of public good (except re-election), the Democrats strengthened and rewarded the party's major voting blocs, blocs that systematically prevented new voices and interests from being heard, especially those of the poor, women, and African-Americans. The left saw Great Society programs as a promising way that the government could include these interests and, while doing so, act as a patronage party in the act of rebuilding its disintegrating New Deal coalition by adding new constituents and dependents. But the left's understanding of the extension/expansion of "rights" was that of group rights on the model of all interest groups. This was not a very deep critique of the liberal establishment. The Democratic Party quickly (if sometimes painfully) acceded to these demands, as did leadership in the dominant institutions of the liberal establishment: universities, business corporations, foundations, and, less enthusiastically, labor unions.

In sum, the establishment's response to the new left critique was capitulation to a new liberal ideology of *rights expansion as social, economic, and political inclusion.* Universities, charitable foundations, liberal churches, and much of the national media came to admit that they had been complicit in continuing racism and sexism, supportive of an illiberal foreign policy, tolerant of the national security state, and driven by self-serving motives of riches and power. And their new policy was gradually to replace the leadership of these institutions and to alter their rhetorical style (and some policies) with what later became known as "multiculturalism" and political correctness. But this ideological capitulation was more

[52] Ciepley, *Liberalism in the Shadow of Totalitarianism,* chaps. 15–16.

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of a minor revision than a revolution in thought or deed: interest group pluralism was given a much broader warrant to include noneconomic and "tacit" interests and whose inclusion in the polity required more explicit democratic credentials under the rubric of "expansion of rights."[53] Commitment to this expansion was the test of regime legitimacy.[54]

The left critique could be accommodated without significantly restructuring major national institutional powers and their legitimating ideas, because, in the words of Richard Lind, multiculturalism in all of its forms required an "overclass" of standing leadership to define, guide and adjudicate the group inclusions.[55] And as the center of liberal policy initiatives shifted from the presidency and congress to the courts, philosophers quickly developed a "court" philosophy of egalitarian rights expansion to legitimate court initiatives and activism.[56] In all its dimensions, the ideology from the left that replaced that of the liberal establishment is best known as "rights talk." Lacking in this discourse was any coherent notion of "people" and any clear discussion of civic and constitutional values that might serve to justify (or to limit) an ever-expanding list of rights and entitlement claims in terms of a common good. And without the earlier political limits imposed by the Progressive/liberal Republicans and Southern Democrats required for governance, the Democratic Party, exemplified by Franklin Roosevelt's national-planning brain trust and Lyndon Johnson's Great Society programs, might have become an engine of almost unlimited central government expansion. Lacking constitutional limits, in theory at least the national government could create an ever-expanding set of dependents, including state and local governments, public education, agriculture, and social welfare. What first stood in the way were its allies in governance and then the inability of the Democratic Party, without the South, to win national elections. The ideological challenge from the new right was gaining ever-larger numbers of adherents.

[53] For a time, the term "entitlements" was used to distinguish welfare from civil and political rights. This term was, for obvious reasons, soon dropped.

[54] The federal courts contributed to this new set of legitimating ideas by seeing itself as the special guardian of voices and interests that lacked electoral power or lacked enough respect in the larger culture to be given a fair say in the larger polity. See Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (Englewood Cliffs, NJ: Prentice-Hall, 1966); and Ciepley, *Liberalism in the Shadow of Totalitarianism,* chap. 14.

[55] Michael Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* (New York: Free Press, 1995). An excellent example of justifying "overclass" rule as the extension of rights is Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003).

[56] John Rawls's *Political Liberalism* (New York: Columbia University Press, 1993) and Ronald Dworkin's *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) seem particularly designed for courts and for hierarchical administrative and bureaucratic bodies rather than for legislators or electorates. The intended audience for Gutmann, *Identity in Democracy,* is precisely these leaders. Following a liberal colonial model of indirect rule, only after the larger society and electorate are properly educated in the leaders' democratic values can they be entrusted with self-government.

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The response of the liberal establishment to a critique from the right, beginning in the 1970s, was, if not simply dismissive, muted and defensive. Every critique from conservatives regarding crime, public order, family breakdown, demoralizing welfare policies, and other social issues, was met with a flurry of denials and rationalization, especially by the social sciences, and charges of racism and threats to civil liberties by liberal elites. But with every electoral defeat, and the fiscal crisis and inflation under President Carter, this response became less and less effective, while support for Great Society social programs and its justifying principles grew increasingly demoralized (this was the time when liberals began to call themselves Progressives). The conservative emphasis on what came to be called "social issues" also included court decisions, especially those on abortion rights and sexual practices. Together, the ground was laid for an ideologically conservative renaissance.

Before addressing how this critique from the right became productive of an alternative set of legitimating ideas—of authoritative ideals for national governance—two other elements of the dual attack on the liberal establishment must be considered. The first was an attack on the prevailing regulatory regime of the liberal establishment. Typically, regulatory policy was dominated by insiders—called "iron triangles"—consisting of Congressional Committees, the regulatory bureaucracy, and the interest regulated (e.g., airlines, railroads). Beginning in the 1970s, "deregulation" was pursued by both Democratic and Republican administrations. Deregulation appealed to the right both on libertarian grounds of market efficiency and on Constitutional grounds of limited government and the strengthening of the institutions of civil society. Its appeal to the left was that breaking up policy triangles provided an opening for more inclusive sets of interests, either through ordinary market mechanisms (especially consumer interests) or through new patterns of "public" regulation (e.g., workplace safety, environmental and consumer protection, fair employment practices) that extended more rights to those previously excluded. The conservatives came to benefit more from their justification of deregulation than did the liberals because it accorded so well with a renewed emphasis on Constitutional limitations to federal power.

The other common ground was a direct attack on the philosophical basis of "interest group pluralism" as the primary ideological justification of this governing regime. By the 1980s, interest group pluralism was thoroughly discredited both as a viable description of liberal democracy and as a fountain of legitimacy for American national politics. Both sets of critics insisted that an "empirical" theory of democracy contained no substantive norms for public life. Both sought to replace this product of "value-free" social science with more philosophically oriented theories of rights, however differently they came to view the sources and meanings of those rights. Consistent with a "black box" image of government, the

assumption of interest group pluralism was that rights, however understood, are the *product* of policy—a series of changing "outputs," not a stable *foundation*.[57] Both left and right critics rejected this understanding.

An indicator of this common ground was the favorable reception accorded by both sets of critics to Theodore Lowi's *End of Liberalism* (1969). But what kind of rights theory is to succeed the end of the ruling ideas of the liberal establishment? Lowi suggested a vaguely constitutionalist ideal of "juridical democracy" that had surface appeal to both sides. This solution, however, depended upon how both constitutionalism and the Constitution were to be understood. Here enters the contemporary debate between advocates of the "living" versus the "original" Constitution and the reintroduction of natural rights.

IV. Conclusion

The contemporary debate over "living" and "original" constitutionalism cannot be explored here[58] but some features of that debate should be pointed out—features that echo both my first and second thoughts on Progressivism and rights. Given the ways in which both "rights talk" and neoconstitutionalism privilege the courts, both politically and epistemologically, both left and right projects seem initially to favor courts more than more democratic political institutions. This implicit bias not only undermines more accessible and open institutions of political democracy, especially elections, it privileges more elite forms of discourse quite removed from the rhetoric by and through which civic agency is empowered and political mobilization takes place. This weakness is especially true of the left, not only because liberalism was more entrenched in the courts, but because the leading lights of rights talk are in law schools and university philosophy departments rather than in "think tanks" that addressed the larger public more directly. And even as elections changed the ideological makeup of the federal courts, robbing liberal intellectuals and law school professors of its natural constituency, this language of public discourse seems ill-adapted for a more popular audience.[59] And

[57] Except for a rough set of "rules of the game" to encourage bargaining and compromise, standard college textbooks in American government in this period put the discussion of rights at the *end* of the text, not at the start. The theoretical basis for this placement is found in Robert Dahl, *Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956) and *Pluralist Democracy in the United States* (Chicago: Rand McNally, 1967); and David Truman, *The Governmental Process* (New York: Knopf, 1951).

[58] Ken I. Kersch, "Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review,* 1955–1980, *Studies in American Political Development* 25 (April, 2011) 86–116.

[59] Mary Ann Glendon, *Rights Talk: The Impoverishment of American Political Discourse* (New York: Free Press, 1991) and Michael Sandel, *Democracy's Discontent: America In Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996).

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while liberal rights talk seems open to invocations of gender, sexual, and racial identities, it seems especially hostile to strong religious and moral commitments—commitments that are shared across the multicultural landscape and evoke strong patriotic sentiments.

So, one might ask, what would John Dewey think? Given today's liberal commitment to a "living Constitution" as rights extensions, without a coherent electorate with common ends, Dewey might argue that this "living" Constitution lacks vitality and organic unity, sustained largely by judicial power and its decidedly elite constituencies. For all of Dewey's commitment to a pragmatic and experiential constitutionalism, he would reject this solution as lacking a "public." And surely, the Democratic Party as a coalition of disparate interests (African-Americans, public employees, teachers, trial lawyers) to be placated and rewarded, cannot serve as a living model of such a public in the way that the Republican Party did under Lincoln and the way the Progressive Party attempted, and partially succeeded, in doing in the early twentieth century. And what would Dewey make of John Rawls or Ronald Dworkin and their many followers? He might argue that their theories of public discourse productive of an "empire of law" exist on a plane outside and above the discourse through which American citizens integrate their personal experience and their public lives. Modern liberals, especially when they lose elections, reject much popular discourse as "false consciousness" (or what people in Kansas think) lacking the philosophical coherence of liberal rights talk even as that talk sacrifices political coherence and popular appeal. The more fundamental issue is how and by whom liberal rights talk and rights extensions might be *authorized*? The two most obvious answers, the "sovereign" power of the federal courts or a "sovereign" numerical political majority would clearly fail Dewey's test. So, too, would the truth claims of academic political philosophers.

But what about the legitimating ideas that emerged from the right-wing critique of the liberal establishment? The Republican Party has always been a more effective vehicle to create and sustain an ideologically coherent public if only because its core constituency has always been more homogeneous (as was the Whig Party before them). As ardent nationalists and patriots who have generally been suspicious of "big government," they have the potential to serve as the electoral source for restoring some sense of popular sovereignty and a democratic public. The first source of this restoration has been a renewed stress on the Constitution as the primary expression of the will of the whole people. But this possibility has been undermined by an ofttimes foolhardy commitment to "original intent" (as if the Constitution were a mere super-majoritarian contract) that not only robs the Constitution of Lincoln's covenantal understanding of the Constitution as future projects and unfulfilled promises, but tends to subordinate a larger political and theoretical discourse to wrangles

among constitutional lawyers.[60] This neoformalism (like an inerrant and bibliocentric Protestantism) is a barrier to reading the Constitution in ways that speak to the lived experiences of a democratic citizenry. The greatest constitutional achievement of Lincoln and the Republican Party was the abolition of slavery and the guaranty of national citizenship through the Thirteenth and Fourteenth Amendments. In particular, to ignore the transformative effect of the Fourteenth Amendment and the enormous *moral* expansion of the "unwritten" Constitution through common-law court decisions robs conservative constitutional theory of an organic connection to America's most powerful documents in our narrative of freedom, second only to the Declaration of Independence and the Bill of Rights.

Originalism as a constitutional hermeneutic serves better as a critique of an entrenched judicial and congressional liberalism than as a guide to conservative governance. So, too, is a more recent corollary to this neoconstitutionalism, that of new theory of a "unitary executive." This strong Hamiltonian reading of exclusive presidential power over the entire executive branch was useful to *thwart* the remnants of entrenched liberalism in Congress and the national bureaucracy. Under its mantle, earlier Progressive (public opinion) and New Deal (electoral majority) justifications for expansions of executive and bureaucratic power were effectively challenged.[61] But to discredit these extraconstitutional justifications for executive/bureaucratic power expansion is not the same as giving presidential power a clear constitutional sanction for what looks suspiciously like something approaching a constitutional monarchy. Moreover, the theory of a unitary executive seems to suggest a theory of the sovereignty of the national Constitution, not the sovereignty of the American people. This theory of the presidency will prove especially troublesome if both Congress and the federal courts become under the sway of originalist constitutional values and anchor *their* authority in the constitution as well.

There is an additional feature of constitutional originalism that does, however, provide a source for a public philosophy of sufficient prestige and power to become a basis for a reconstituted public and the restoration of popular sovereignty. This feature is the connection of the Constitution to a philosophy of natural rights. At first blush (and for most contemporary intellectuals), such a connection would only further discredit an originalist understanding of the Constitution as authoritative

[60] Steven Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008). This might be forgiven in the 1980s when Republican/conservative presidents confronted both Congress and the courts dominated by liberals.

[61] Stephen Skowronek, "The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive." *Harvard Law Review* 122 (2009): 2070–2103.

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for today. Natural rights philosophy, a theory of man and society born of the revolutionary Enlightenment and shaped in opposition to prevailing orthodox Christian understandings of politics, should hardly appeal to contemporary American intellectual culture, whether left or right. Shouldn't post-modern left and libertarian right intellectuals join hands with evangelical Protestants and traditionalist Catholics in rejecting this naive product of Deism and natural religion? But they do not, and for good reason. Whatever its philosophical and (anti)religious origins, the ideal of pre-political and pre-constitutional natural rights has strong affinities across a wide range of contemporary values and common memories. To reject natural law is to undermine closely held *moral* values across today's political spectrum: to defend human rights and dignity without some conception of natural rights is morally incoherent. While these affinities might be undercut by an articulate and purely *philosophical* defense of natural rights, they are strengthened and reinforced by defending natural rights as part of an American *moral narrative* of freedom and equality.

As part of a moral narrative, but *not* as a foundational philosophy, the idea of natural rights connects the Declaration of Independence, the Articles of Confederation, the Constitution, the Bill of Rights and the Thirteenth and Fourteenth Amendments to popular sovereignty. This same moral narrative incorporates popular religion and the "sacred violence" and sacrifice of our wars, giving body, strength, and purpose to the thin and abstract "Creator" evoked in our public documents. Read in this way, natural rights are not so much a philosophical foundation for liberal individualism as the main items of a common faith binding together a national community of moral equals. While Progressives and New Dealers would never countenance natural rights as a *philosophy* (neither, for that matter, would David Hume (1711–1776), Adam Smith (1723–1790), or Tocqueville), they incorporated and depended upon the history and power of natural rights in their own self-understandings and in their understanding of America. Only insofar as the notion of natural rights achieves and maintains its place in a larger moral narrative—call it a "living" narrative if you will—can a commonly shared commitment to most of the original values of the Constitution be secured.

To turn George Washington Plunkitt (1842–1924) on his head, the inclusion of natural rights in a shared national narrative of popular sovereignty would make the Constitution a constituent element of civic friendship.

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