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# THE PROGRESSIVE ERA ASSAULT ON INDIVIDUALISM AND PROPERTY RIGHTS*

By James W. Ely, Jr.

## I. Introduction

The Progressive Era of the early twentieth century witnessed sustained condemnation of individualism and individual rights. "The idea of the liberty of the individual," Washington Gladden (1836–1918) declared in 1905, "is not a sound basis for a democratic government."[1] Gladden, a Progressive and leader of the Social Gospel movement, was hardly alone in expressing such sentiments. A few years later Herbert Croly (1869–1930), a prominent Progressive theorist, attributed economic ills to "the peculiar freedom which the American tradition and organization have granted to the individual."[2] Indeed, most Progressives viewed skeptically claims of individual rights, which they associated with property rights. Progressives, in short, moved dramatically away from the classical liberalism of John Locke (1632–1704), which stressed the primacy of the individual over the state. Instead, Progressives invoked concepts such as "public welfare," "social justice," and "common good" to justify greater statist control of society.

This essay examines the widespread criticism of individualism and property rights which flourished in the late nineteenth and early twentieth centuries, and which would eventually have a profound influence on the polity. The intellectual currents of the Progressive era called into question the individualist values of classical liberalism, and paved the way for the political triumph of the New Deal. The Progressive agenda amounted to a fundamental challenge to the prevailing view of the proper role of government. To this end, Progressives virtually revamped the traditional understanding of the Constitution, rejecting the notion of limited government. "They saw in constitutional interpretation," legal scholar Richard A. Epstein aptly pointed out, "the opportunity to rewrite a Constitution that showed at every turn the influence of John Locke and James

* I wish to thank David E. Bernstein, Mark Brandon, and David N. Mayer for their insightful comments on earlier versions of this essay.

[1] Washington Gladden, *The New Idolatry and Other Discussions* (New York: McClure, Phillips & Co., 1905), 171.

[2] Herbert Croly, *The Promise of American Life* (Boston: Northeastern University, 1909; reprint, Cosimo, Inc., 2005), 23.

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Madison into a different Constitution, which reflected the wisdom of the leading intellectual reformers of their own time."[3]

One must of course, tackle the Progressive Movement with caution. There is a vast literature on the subject.[4] Historians are by no means in agreement about the nature, goals, or achievements of Progressivism. Nor did all the participants in the movement share the same priorities. Progressivism flourished among members of both the Republican and Democratic parties, and found its most expansive expression in the Progressive Party of 1912 under Theodore Roosevelt (1858–1919). "The Progressive movement," one historian has emphasized, "sheltered uneasy alliances in a big tent."[5] Progressives, then, were not always cohesive or consistent. At root, Progressivism was a response to the sweeping economic changes which transformed American society at the end of the nineteenth century. Alarmed by the consolidation of large-scale businesses, labor conflict, and an increase in urban poverty, Progressives had confidence that governmental action could reshape society and eliminate social problems. "Among the most durable and controversial characteristics of Progressive legal thought," legal scholar Herbert Hovenkamp has cogently observed, "were its distrust of the market and its faith that the government agency, whose salaried officials did not profit from their decisions, could regulate the economy better."[6]

An outpouring of legislation, such as workplace safety laws, food and drug regulations, conservation programs, child labor laws, and strengthened antitrust provisions, attest to the regulatory zeal of the Progressives. The Sixteenth Amendment, promoted by the Progressives, authorized Congress to levy an income tax. This new source of revenue facilitated the growth of national power, undercutting state autonomy. With their stress on governmental intervention in the economy, the Progressives laid the groundwork for the growth of the modern welfare state.

Yet to gain a full appreciation of Progressivism one must avoid an overly sanitized view. It bears emphasis that Progressives were generally hostile to claims of individual rights, which might complicate the achievement of their vision of the common good. Thus, they displayed little interest in free speech,[7] were indifferent to racial segrega-

[3] Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington, D.C.: Cato Institute, 2006), 135.

[4] See, e.g., Richard Hofstadter, *The Age of Reform From Bryan to F.D.R.* (New York: Alfred A. Knopf, 1955), 131–269; John D. Buenker, *Urban Liberalism and Progressive Reform* (New York: Scribner, 1973); John Morton Blum, *The Republican Roosevelt,* 2d ed. (Cambridge, MA: Harvard University Press, 1977); Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (New York: Oxford University Press, 2003).

[5] Jackson Lears, *Rebirth of A Nation: The Making of Modern America, 1877–1920* (New York: HarperCollins Publishers, 2009).

[6] Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," *Iowa Law Review,* 81 (1995): 157.

[7] Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991), 78–79 ("Most prominent early twentieth-

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tion,[8] promoted eugenics and immigration restriction,[9] pursued quixotic campaigns against vice,[10] and supported prohibition.[11] The Progressive Party Platform of 1912 made no mention of rights. As Daniel T. Rogers has pointed out, "a striking phenomenon of the late nineteenth and early twentieth centuries was the abandonment of rights talk by Americans who aligned themselves with the progressive movements of the day."[12] In this regard, Progressives were entirely unlike post-World War liberals, who were preoccupied with an eruption of rights claims.

century proponents of federal and state economic regulations also supported federal and state speech regulations."); David M. Rabban, *Free Speech in Its Forgotten Years* (New York: Cambridge University Press, 1997), 212 (noting that Progressives had a limited conception of free speech).

[8] McGerr, *A Fierce Discontent,* supra note 4, at 182–218 ("Progressives seldom contested the increasing division of Americans into separate enclaves."); David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2011), 78 ("Most Progressive political and intellectual leaders shared the racism of the day and did not support equal rights for African Americans.").

[9] Donald K. Pickens, *Eugenics and the Progressives* (Nashville: Vanderbilt University Press, 1968), 102–30; Michael Willrich, "The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930," *Law and History Review,* 16 (1998): 63, 64 (". . . eugenicists in the Progressive Era were eager to use the full range of state police powers to prevent the reproduction of criminality, deviancy, and dependency."); Vincent J. Cannato, *American Passage: The History of Ellis Island* (New York: Harper-Collins, 2009) (discussing the affinity between Progressives and immigration control).

[10] David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* (Chicago: University of Chicago Press, 1994), 6. (Progressives believed that by "the proper use of social engineering, often employing the coercion of the federal government, individual behavior could be controlled and changed through legislation."); McGerr, *A Fierce Discontent,* supra note 4, at 81–94 (discussing Progressive campaigns against prostitution and divorce); Susan M. Schweik, *The Ugly Laws: Disability in Public* (New York: New York University Press, 2009) (discussing municipal ordinances in the Progressive era which banned the appearance of maimed or deformed persons on the streets); Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill, N.C.: University of North Carolina Press, 1980), 7 (treating efforts to eliminate prostitution during the Progressive era, and concluding that "in one sense anti-prostitution was a progressive reform and, like much of the progressive reform impulse, had its optimistic and confident, not to mention self-righteous, strains"); Steven Schlossman and Stephanie Wallach, "The Crime of Precocious Sexuality: Female Juvenile Delinquency ant the Progressive Era," in D. Kelly Weisberg, ed., *Women and the Law: A Social Historical Perspective* (Cambridge, MA: Schenkman Publishing Company, 1982, 2 vols.), vol. II, (detailing Progressive campaign against prostitution and female delinquency).

[11] James H. Timberlake, *Prohibition and the Progressive Movement, 1900–1920* (Cambridge: Harvard University Press, 1963), 2 (". . . prohibition was actually written into the Constitution as a progressive reform. As an integral part of the Progressive movement, prohibition drew on the same moral idealism and sought to deal with the same basic problems."). In fact, many conservatives opposed prohibition on grounds that it infringed property rights and enlarged the power of the federal government. Ibid., 176–77. See also, Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 74 ("Prohibition, moreover, like the assertion of regulatory power over other aspects of economic life at the time, was understood as a progressive measure and a full part of the progressive political program.").

[12] Daniel T. Rodgers, "Rights Consciousness in American History," in David J. Bodenhamer and James W. Ely, Jr., eds., *The Bill of Rights in Modern America,* rev. ed. (Bloomington: Indiana University Press, 2008), 18.

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In addition, much of the economic legislation sponsored by the Progressives was harmful. Stringent railroad regulations did a great deal to hurt the economic health of the industry.[13] Protective legislation for working women proceeded on paternalistic assumptions and often handicapped women in the job market by pigeonholing them in certain occupations.[14]

My purpose is not to dismiss wholesale the Progressive legislative program, but to emphasize that the legacy of the movement was decidedly mixed and defies easy categorization. Despite its somewhat ambiguous character, I submit that Progressive thought was characterized by several central features:

1. Rejection of individualism in favor of statist ideology
2. Antipathy to the central place of property rights in American society and constitutional thought
3. Confidence in regulatory agencies, staffed by nonpolitical experts, to carry out legislative policy
4. Intense suspicion of the judiciary as unduly protective of individual and property rights, and therefore as an obstacle to the Progressive program

These points mark a sharp break from the classical legal tradition.

## II. Locke and Classical Liberalism

Most historians agree that John Locke had an enormous influence on the Founding generation. "By the late eighteenth century," Pauline Maier observed, "'Lockean' ideas on government and revolution were accepted everywhere in America: they seemed, in fact, a statement of principles built into the English constitutional tradition."[15] Among these Lockean precepts was a belief in natural law that embodied certain individual rights which existed before the formation of political authority. Important among these was the right of private property ownership. Locke viewed private property as a necessary component of individual liberty. He fur-

[13] James W. Ely, Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001), 225–39; Albro Martin, *Enterprise Denied: Origins of the Decline of American Railroads, 1897–1917* (New York: Columbia University Press, 1971).

[14] Nancy S. Erickson, "Historical Background of 'Protective' Labor Legislation: *Muller v. Oregon*," in D. Kelly Weisberg, ed., *Women and the Law: The Social Historical Perspective* (Cambridge, Mass: Schenkman, 2 vols., 1982), vol. 1, 155–86 (stressing that Progressives favored paternalistic legislation that limited employment opportunities for women); Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991) 193–203. For an expression of the typical Progressive attitude, see Richard T. Ely, *Socialism and Social Reform* (New York: Thomas Y. Crowell & Co., 1894), 322 ("Night work should be prohibited for women and persons under eighteen years of age; and, in particular, all work injurious to the female organism should be forbidden to women.").

[15] Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997), 87.

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ther articulated the social contract theory under which legitimate government was grounded on an implicit compact between the people and their rulers. According to Locke, government was primarily instituted to safeguard the natural rights of individuals. Both the natural law and social contract doctrines stressed protection of individuals by limiting governmental power, which was seen as the greatest threat to individual liberty.[16] Locke's classical liberalism, with its focus on natural law and the rights of individuals, was reflected in the Declaration of Independence as well as the constitution-drafting experience at both the state and federal level in the years following the American Revolution.[17] The Bill of Rights also manifested a Lockean spirit, providing additional safeguards for individual liberty and private property.

Building upon Locke's philosophy, Anglo-American constitutional thought had long emphasized individual liberty and the close tie between liberty and private property. For example, the 1776 Virginia Declaration of Rights proclaimed: "All men . . . have certain inherent rights, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[18] Members of the 1787 Constitutional Convention repeatedly stressed the tie between liberty and property.[19] The close association between liberty and property prevailed throughout the nineteenth century.[20] As John Dewey (1859–1952) noted: "The concern for liberty and for the individual, which was the basis of Lockean liberalism, persisted."[21] A New York judge provided a thoughtful analysis of the values which characterized American society during the nineteenth century:

> The 19th century was a period of individualism. In politics a minimum of government was best; in economics free competition was essential; and in law the preservation of the rights of persons and property, including freedom of contract, was fundamental.[22]

[16] John Dewey, *Liberalism and Social Action* (New York: C. P. Putnam's Sons, 1935): 16 ("The whole temper of [Locke's] philosophy is individualistic in the sense in which individualism is opposed to organized social action.")

[17] Ellen Frankel Paul, "Freedom of Contract and the 'Political Economy' of *Lochner v. New York*," *NYU Journal of Law & Liberty* 1 (2005): 528–37 (pointing out that Lockean principles are evident in the Declaration of Independence and the state constitutions of the Revolutionary period).

[18] Virginia Constitution of 1776, sec.1.

[19] Walter Dellinger, "The Indivisibility of Economic Rights and Personal Liberty," *Cato Supreme Court Review* 2003–2004: 19 ("Economic rights, property rights, and personal rights have been joined appropriately, since the time of the founding.").

[20] In 1890, Justice Stephen J. Field declared: "It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain." "Centenary of the Supreme Court," 134 U.S. 729, 745 (1890).

[21] John Dewey, *Liberalism and Social Action,* supra note 16, at 18.

[22] Leonard C. Crouch, "Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock," *Cornell Law Quarterly* 12 (1927): 142.

Not until the end of the nineteenth century did a political and constitutional order based on individual rights come under prolonged attack. The transformation of the economy and the rise of large-scale business enterprise caused some to reconsider Locke's assumptions about liberty. Howard Gillman has argued: ". . . the last quarter of the nineteenth century witnessed changes that crushed the Lockean state of nature that inspired many of America's founders. . . ."[23] Moreover, with the rise of social science and new schools of jurisprudence, natural law theory fell out of favor. Oliver Wendell Holmes (1841–1935), for instance, famously ridiculed the concept.[24] The doctrine of natural rights, Charles A. Beard (1874–1948) declared in 1908, "really furnishes no guide to the problems of our time."[25] Beard approvingly noted that there were decreasing references to natural law in political writings and suggested that at best natural rights were merely moral aspirations. By 1900 classical liberalism found itself on the defensive.

## III. The Initial Assault

Attacks on individualism and private property can be traced to eighteenth-century France and such writers as Jean-Jacques Rousseau (1712–1778), with his insistence that the general will must triumph over individuals. Under the notion of the general will the collective spirit of the community must prevail over all claims of individual rights.[26]

Perhaps a better starting place for this inquiry, however, would be the publication of Edward Bellamy's *Looking Backward 2000–1887* in 1888.[27] In this futuristic novel Bellamy pictures a socialist utopia set in the then far away year of 2000. The government is the sole landowner and employer, providing a guaranteed maintenance for all citizens by means of an annual credit card. There is no money, and no private property beyond personal belongings. Competition is dismissed as wasteful. This utopia is a highly regimented society in which both young men and women must serve in an industrial army until the age of forty-five. Additionally, Bellamy sketches

[23] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), 63.

[24] Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 9, 26.

[25] Charles A. Beard, *Politics* (New York: Columbia University Press, 1908), 31.

[26] Under Rousseau's theory of the social contract individuals must surrender all rights to the community and abandon ideas of natural liberty. The community acts "under the supreme direction of the general will" for purposes of "the common good." Rousseau did not scruple to embrace authoritarian means to achieve his goals. "In order, therefore," he wrote, "that the social compact may not be a meaningless formality, it includes the tacit agreement, which alone can give force to the rest, that anyone who refuses to obey the general will shall be forced to do so by the whole body; which means nothing more or less than that he will be forced to be free." Frederick Watkins, ed., *Rousseau—Political Writings* (New York: Thomas Nelson and Sons, 1953).

[27] Edward Bellamy, *Looking Backward 2000–1887* (Boston: Tichnor & Co., 1888; reprinted, Matthew Beaumont, ed., New York: Oxford University Press, 2007).

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a centralized society. The individual states are abolished and decisions are made by shadowy councils and bureaus. There is only a limited degree of popular control over the government. Most striking for our purposes is that Bellamy repeatedly criticizes individualism, which he contrasts unfavorably with the cooperative society of the future. Moreover, he decries "the imbecility of the system of private enterprise."[28]

There was a long tradition of utopian literature but *Looking Backward* stands out because it was a huge success. The book sold thousands of copies, was compared in its influence to *Uncle Tom's Cabin,* and stimulated the formation of clubs to promote Bellamy's socialist vision.[29] As might be expected, the volume had its share of critics, and it appears neither realistic nor appealing to modern eyes. Nonetheless, Bellamy's critique of individualism and his utopian fable attracted a host of readers in the Gilded Age (1875–1900). Clearly there were people receptive to Bellamy's call for a different type of society. Many followers of Bellamy were attracted to the Populist movement of the 1890s. By the same token, other citizens were alarmed. Protesting a New York scheme to regulate grain elevator prices, Justice David J. Brewer warned that a state might seek to control prices for all services and uses of property. "And if so," he lamented, "'Looking Backward' is nearer than a dream."[30]

## IV. Sources of Progressive Thought

The rapid changes in American society at the end of the nineteenth century stimulated the Progressive movement. Still, the economic and social conditions did not dictate the particular direction of reform efforts. To understand the Progressive mentality one must probe the formative influences which guided the movement. One wellspring of Progressivism was an unlikely source: Imperial Germany. A number of individuals who were later leaders of the Progressive movement, notably Richard T. Ely (1854–1943), pursued graduate study in Germany.[31] They were impressed with the steps taken by Chancellor Otto von Bismarck (1815–1898) to deal with social problems arising from industrialization. Bismarck not only centralized the German nation, but introduced social welfare measures,

[28] Ibid. at 141.

[29] Elizabeth Sadler, "One Book's Influence: Edward Bellamy's 'Looking Backward'," *New England Quarterly* 17 (1944): 530–55.

[30] *Budd v. New York,* 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

[31] Eldon J. Eisenach, *The Lost Promise of Progressivism* (Lawrence: University Press of Kansas, 1994), 92–94 ("By the first decade of the twentieth century the connection between study in Germany and reform in America had become clear."); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Belknap Press of Harvard University Press, 1998), 76–89 (discussing impact of study in German universities on young Progressive intellectuals); Lears, *Rebirth of A Nation,* supra note 5, at 198 ("Some Progressive Intellectuals were also profoundly impressed by the welfare-state policies emerging in Berlin and other European centers of social-democratic thought."). See also Epstein, *How Progressives Rewrote the Constitution,* supra note 3, at 3 (noting that "Progressives were influenced in part by Bismarckian social initiatives in nineteenth-century Germany").

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such as pensions and laws protecting industrial workers. He was able to effectively impose this social legislation and tolerated little dissent. Bismarck's purpose, of course, was to forestall greater socialism by undercutting the political Left within Germany through governmental largess. He had little interest in nurturing either democracy or individual liberty. Nonetheless, Bismarck's legacy significantly influenced American Progressivism to look favorably upon the construction of a powerful welfare state.

Another admirer of Bismarck was Herbert Croly, who helped to formulate Theodore Roosevelt's New Nationalism policy and was a founder of the *New Republic.* Although Croly never studied in Germany, he was an enthusiast for Bismarck's program. Among the leaders of the modern German nation, Croly wrote in *The Promise of American Life* (1909), "The man who planned most effectively and accomplished the greatest results was Otto von Bismarck." Croly pointedly observed that Bismarck rejected the nation-building path of allowing "the individual every possible liberty."[32] Instead, Croly explained at length:

> Bismarck's whole scheme of national industrial organization looked in a very different direction. He believed that the nation itself, as represented by its official leaders, should actively assist in preparing an adequate domestic policy, and organizing the machinery for its efficient execution. He clearly saw that the logic and purpose of the national type of political organization was entirely different from that of a so-called free democracy . . . and he successfully transformed his theory of responsible administrative activity into a comprehensive national policy.[33]

Note Croly's emphasis on organization, planning, and a strong executive, as well as his dismissal of democratic individualism. As we shall see, these themes figure prominently in Croly's Progressive creed. For many Progressives, Bismarck's Germany became the model for a reformed United States. Amusingly, with the outbreak of World War I many Progressives found it convenient to forget the German inspiration for their social policies.

In addition to faith in planning and scientific government, Progressive thought was shaped by the emergence of the Social Gospel theology. The Social Gospel movement had a significant impact on Protestant Christianity in the early twentieth century. Moving away from a focus on individualistic pietism, Social Gospel adherents sought to adjust Christianity to the insights of evolutionary science. Emphasizing the need for a changed social and economic environment rather than personal regeneration, they advocated action by government to alleviate

[32] Croly, *The Promise of American Life,* supra note 2, at 249–50.
[33] Ibid.

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social problems. They were especially concerned about the conditions of industrial workers and urban housing, and were generally hostile to laissez-faire economics. Indeed, some Social Gospel theologians, notably Walter Rauschenbusch (1861–1918), advocated a form of Christian socialism.[34] Broadly speaking, Social Gospel leaders rejected economic competition and the market in favor of a cooperative society. In order to transform the political and social environment, Social Gospel advocates called for governmental action. "Since the Christianizing of the social order was a central component of social Christianity," one scholar stated, "it was essential for the movement to find some way to relate to the political life of the nation."[35]

One consequence of the Social Gospel theology was a blending of Christianity with the Progressive political agenda.[36] Not surprisingly, a number of prominent Social Gospel figures spoke in favor of a variety of social causes and became involved in Progressive era political life. The Social Gospel outlook left a deep mark on Progressivism by imparting a moralistic tone to the movement.[37] Calls for regulatory intervention in the economy were cloaked in a Christian message. Recall that the two presidents most closely associated with the Progressive movement, Theodore Roosevelt and Woodrow Wilson (1856–1924), often employed messianic rhetoric and depicted their programs in religious terms.[38] Wilson apparently viewed himself as an instrument of God. This moralistic dimension of the Progressive movement is another marked difference between Progressives and post-World War II liberals, who largely jettisoned explicit religious appeals.[39]

[34] In a series of writings Walter Rauschenbusch assailed capitalist society, urged a more egalitarian distribution of wealth, attacked economic competition, and called for public ownership of the means of production. See, e.g., *Christianity and the Social Crisis* (New York: Macmillan, 1907; reprint Louisville, KY: Westminster/John Knox Press, 1991) Rauschenbusch complained: "Our industrial individualism neutralizes the social consciousness created by Christianity." Ibid. at 388.

[35] Donald K. Gorrell, *The Age of Social Responsibility: The Social Gospel in the Progressive Era, 1900–1920* (Macon, GA: Mercer University Press, 1988), 191.

[36] Walter Rauschenbusch, "The Ideals of Social Reformers," *American Journal of Sociology* 2 (1892): 202 ("One of the special tasks of our generation is the work of wedding Christianity and the social movement").

[37] Lears, *Rebirth of A Nation,* supra note 5, at 196–97 ("In fact it was the religious dimension of reform that underwrote its intensity and its virtually limitless scope."). See Walter Rauschenbusch, *Christianizing the Social Order* (New York: Macmillan Company 1912) (urging "socializing property").

[38] Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Albert A. Knopf, 1994), 230 (commenting that 1912 Progressive Party convention, which nominated Theodore Roosevelt for president, "had more the air of a religious crusade than a political gathering"); Gorrell, *The Age of Social Responsibility,* supra note 35, at 182–89 (discussing the number of Social Gospel advocates who actively supported the Progressive Party in 1912).

[39] Lears, *Rebirth of A Nation,* supra note 5, at 352–53 (pointing out that when Progressive ideas reappeared in the 1930s they were presented in secular terms and characterized as "liberal" rather than Progressive). See also Ronald D. Rotunda, *The Politics of Language: Liberalism as Word and Symbol* (Iowa City: University of Iowa Press, 1986), 14–17, 38–51 (discussing how the term "liberal" replaced the older term "progressive" in the 1930s).

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The most important aspect of the Social Gospel movement for our purpose was its repeated denunciation of individualism as a basis for society. In 1889 Gladden declared: "It begins to be clear that Christianity is not individualism. The Christian religion has encountered no deadlier foe during the last century than that individualistic philosophy which underlies the competitive system."[40] In the same vein, Rauschenbusch proclaimed in 1896 that under current economic conditions "individualism means tyranny."[41] Returning to the same theme a decade later, Gladden insisted: "I do not believe that political society or industrial society or any other society will endure on a purely individualistic basis."[42] In 1914, as Social Gospel thinking approached the height of its influence, one organization affiliated with the movement boldly proclaimed: "We believe that the age of sheer individualism is past and the age of social responsibility has arrived."[43]

## V. The Apotheosis of Government

While hardly alone, Croly was among the most influential intellectuals to tackle Progressivism. In two revealing books, *The Promise of American Life* (1909) and *Progressive Democracy* (1914), he explored the meaning and purpose of the movement. Croly called for a new social order to redress the imbalances in economic and political power that he attributed to the emergence of large-scale business organizations. His remedy was to strengthen governmental authority, a step which would allow Americans to realize the "national purpose" and "the idea of social justice." Advocates of Progressivism, Croly explained, "are committed to a drastic reorganization of the American political and economic system, to the substitution of a frank social policy for the individualism of the past, and to the realization of this policy, if necessary, by the use of efficient governmental instruments."[44] Whereas the framers of the Constitution were suspicious of government as a potential threat to liberty, Croly welcomed expanded government. He made clear his impatience with constitutional doctrines that restrained the role of the national government.

Several aspects of Croly's thought warrant further attention. He was an unstinting cheerleader for vigorous executive power modeled after Theodore Roosevelt. "Progressive democracy needs executive leadership," Croly insisted, because "it organizes and vitalizes the rule of the

[40] William Gladden, "Christian Socialism," Minutes of the National Council of the Congregational Churches of the United States, October 9–14, 1889 (Boston: Congregational Sunday School and Publishing Company, 1889), 338.
[41] Walter Rauschenbusch, "The Ideals of Social Reformers," supra note 36, at 211.
[42] Gladden, *The New Idolatry*, supra note 1, at 130.
[43] "Declaration of Principles," *Religious Education* 9 (April 1914): 98.
[44] Croly, *Progressive Democracy* (New York: Macmillan Company, 1914), 15.

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majority."[45] He added: "As a consequence of bestowing the leadership of the state upon one man who represents the dominant phase of public opinion, it develops and consolidates majority rule as it has never yet been developed and consolidated in the history of democracy."[46]

Croly was also a proponent of centralized government, and saw a diminished role for the individual states. "The state governments, either individually or by any practicable methods of cooperation," he observed, "are not competent to deal effectively in the national interest and spirit with the grave problems created by the aggrandizement of corporate and individual wealth and the increasing classification of the American people."[47] Croly maintained that changes in the economy had rendered obsolete the distinction between interstate and intrastate commerce, and that consequently all commerce should be under national control. He even questioned whether marriage should remain a state responsibility.

In fashioning his proposed economic policy, Croly lost no opportunity to denounce competition. He regarded big business as efficient and a major contributor to economic growth. He believed that such organizations should be accepted as part of modern life. Croly therefore argued that it was both foolish and futile to attempt to break up large business enterprises. He called for repeal of the Sherman Anti-Trust Act, and urged instead a regime of regulation by commissions. Consistent with his preference for collective rather than individual action, Croly declared that "it should be the effort of all civilized societies to substitute cooperative for competitive methods."[48]

To effectuate his vision of good government, Croly stressed the need for increased administrative authority. He lovingly described the independent and efficient agencies that would, in theory, carry out the policies of a progressive democracy. Croly positively gushed in picturing the qualities of his imagined administrative officials. Such an official must be an expert who follows scientific methods, must be reasonable and flexible, must be indifferent to shifts in political opinion, and must generally function as an agent of democracy.[49] Borrowing from the military and perhaps Bismark, Croly suggested that expert administrators "must provide a general staff for a modern progressive state."[50] Croly was perhaps naively optimistic about the future of the modern administrative state. Funda-

[45] Ibid., at 304.

[46] Ibid. See Charles Forcey, *The Crossroads of Liberalism: Croly, Weyl, Lippmann, and the Progressive Era, 1900–1925* (New York: Oxford University Press, 1961), 40–41 (stressing Croly's virtual obsession with executive power to effectuate reform).

[47] Croly, *The Promise of American Life,* supra note 2, at 275.

[48] Ibid., at 359.

[49] Croly, *Progressive Democracy,* supra note 44, at 347–77. Croly revealingly contrasted the administrative process and traditional courts: "The administrative court represents a social policy based on a collective social ideal. The common-law judge represents a social policy founded on the protection of individual rights." Ibid., at 368.

[50] Ibid. at 370.

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mental economic problems involved disputes over policy, and could not be removed from the political realm by resort to supposed experts.[51] Nonetheless, Croly championed a trained bureaucracy which relied on scientific expertise to solve problems. Like many Progressives, he had great faith in the ability of an educated elite to manage the economy.

Croly's confidence in disinterested experts to effectuate his program highlights an unresolved tension within Progressive thought. Progressives were fond of claiming to represent "the people" and to speak for the popular voice. They sponsored political reforms, such as the direct election of senators, the initiative, and the referendum, in order to promote democratic government. "Progressives often spoke of their commitment to democracy," Michael McGerr has observed. "But many reformers, so critical of individualism and individual rights, were not very democratic at all."[52] Hovenkamp reached a similar conclusion: "Progressive Era social sciences were much more paternalistic than democratic. . . . Almost from the beginning, social scientists were committed to the view that important decisions should be made by experts."[53] At root, many Progressives favored governance by educated elites (like themselves) who would lead the nation and guide the political process.[54] This attitude had profound consequences for the polity. Voter participation dropped in the 1912 presidential election, a sign of lack of public interest at the height of the Progressive movement. At least part of the explanation for this decline was the growth of the new administrative state, which removed much decision-making from the political arena. "People saw less reason," one political historian concluded, "to take part in elections that often produced meaningless results."[55]

Conspicuously absent from Croly's theory of government was any emphasis on individual rights. He tended to associate claims of rights with judicial support for the rights of property owners. For example, Croly gave virtually no attention to racial or gender issues,[56] or to the role of expressive freedom. As we have seen, there was a pervasive hostility to individual rights among leaders of Progressivism. In their view, rights

[51] Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987), 112. ("Certainly the Progressive Faith in the efficacy of placing 'experts' in positions of authority—social engineers to solve social problems—was naïve at best".)

[52] McGerr, *A Fierce Discontent*, supra note 4, at 217.

[53] Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge: Harvard University Press, 1991), 77.

[54] Forcey, *The Crossroads of Liberalism*, supra note 46, at 38–40, 43. ("... Croly had an abiding faith in the powerful few.")

[55] Lewis L. Gould, *Four Hats In The Ring: The 1912 Election and the Birth of Modern American Politics* (Lawrence, Kan. University Press of Kansas, 2008), 182. See also Mark Lawrence Kornbluh, *Why America Stopped Voting: The Decline of Participatory Democracy and the Emergence of Modern American Politics* (New York: New York University Press, 2000), 138–60 (discussing impact of administrative governance on participation in politics).

[56] Edward A. Stettner, *Shaping Modern Liberalism: Herbert Croly and Progressive Thought* (Lawrence, KS: University Press of Kansas, 1993), 166.

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were grounded in natural law, which most Progressives rejected. Further, rights claims could well stand in the way of realizing their conception of a good society. Individual rights, therefore, must be curtailed for the benefit of the nation.This helps to explain the Progressive strictures against individualism, because that concept denoted a society focused on individual rights.[57]

Croly did not overtly attack private property ownership, but his statist philosophy entailed diminished respect for property rights. He complained that the legal system in practice "is tantamount to automatic operation in the interests of existing property owners."[58] He vaguely urged "the radical transformation" of the institution of property, but made clear that he favored its modification not elimination.[59] Croly also called for a more equal distribution of wealth, a proposal that would threaten existing ownership rights to some extent.[60] It is fair to conclude that Croly never systematically addressed the issue of property rights in his notion of progressive democracy, but he certainly intimated that property, like other individual rights, was subordinate to the public will.

Obviously Croly has wandered intellectually from the fear of arbitrary government which animated classical liberalism. Indeed, in the 1920s Croly, like a number of Progressives, found much to admire in the Italian fascism of Benito Mussolini (1883–1945). Croly saw in fascism an exciting experiment under the guidance of a strong leader. To his mind, fascism offered a seemingly rational scheme of economic planning, known as corporatism, which promised a middle path between Marxism and individualistic capitalism. In addition, it appeared to bridge the gap between social classes. While recognizing the warts of the fascist movement, Croly nonetheless reacted positively to the fascist attempt to remake Italian society.[61]

Another important figure in shaping Progressive thought was Richard T. Ely. Educated in Germany and affiliated with the Social Gospel movement, Ely was an influential economist at Johns Hopkins and the University of Wisconsin as well as a founder of the American Economic Association.[62] His numerous writings blended scientific inquiry with eth-

[57] Ibid. at 59–60 (stressing Croly's confidence in a trained bureaucracy).

[58] Croly, *Progressive Democracy,* supra note 44, at 314.

[59] Croly, *The Promise of American Life,* supra note 2, at 209.

[60] Ibid. at 209–10. Croly declared that "under a legal system which holds private property sacred there may be equal rights, but there cannot possibly be any equal opportunities for exercising such rights." Ibid. at 181.

[61] John P. Diggins, *Mussolini and Fascism: The View from America* (Princeton: Princeton University Press, 1972), 204–5, 228–31. Croly, of course, was not the only Progressive intellectual to initially look with favor upon Italian fascism. But see Stettner, *Shaping Modern Liberalism,* supra note 56, at 155–57 (disputing contention that Croly was sympathetic to fascism).

[62] Benjamin G. Rader, *The Academic Mind and Reform: The Influence of Richard T. Ely in American Life* (Lexington, KY: University of Kentucky Press, 1966), 1–66.

ical and Christian preachments.[63] Ely consistently advocated a statist approach to social problems. Indeed, he tended to exalt the state as a means to reform the society. As one scholar stressed:

> In Ely's eyes, government was the God-given instrument through which we had to work. Its preeminence as a divine instrument was based on the post-Reformation abolition of the division between the sacred and the secular and on the State's power to implement ethical solutions to public problems. The same identification of sacred and secular which took place among liberal clergy enabled Ely to both divinize the state and socialize Christianity: he thought of government as God's main instrument of redemption.[64]

Drawing upon Darwinian theory, Ely rejected the Lockean concept of natural rights and denied the existence of natural law. In Ely's estimation, private economic power, not the state, was the primary threat to individual liberty. Contrary to Locke, Ely maintained that property and contract were products of society created for "social purposes."[65] It followed that society could regulate or even abolish private property and contracts. Ely, in the words of one commentator, "had little loyalty or nostalgia for the older individualistic America of the early nineteenth century."[66]

As might be expected, Ely regularly lambasted economic competition and what he perceived as laissez-faire capitalism in the United States. Sympathetic to socialism, he urged public ownership of railroads and "natural monopolies." Still, Ely stopped short of a full endorsement of socialism and seemed to be searching for some middle path between socialism and capitalism.[67] Like Croly, he favored regulation rather than an antitrust programs to break up large enterprises.[68] Again like Croly, he gave little attention to the plight of racial minorities,[69] and at times was openly hostile to civil liberties claims.

Woodrow Wilson's relationship to the Progressive movement has long perplexed historians, and they have failed to achieve any consensus. Until about 1908 Wilson appears to have been a conservative Demo-

[63] Jean B. Quandt, "Religion and Social Thought: The Secularization of Postmillennialism," *American Quarterly* 25 (1973): 402–3; Hovenkamp, *Enterprise and American Law,* supra note 53, at 101. ("the economics of Progressives such as Ely contained a good deal of religious moralizing that proved unacceptable to more positivist economists in the 1930s and after.")

[64] Quandt, "Religion and Social Thought," supra note 63, at 403.

[65] Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth* (New York: Macmillan Company, 1914, 2 vols.), vol. I at 165–90 (property), II at 615–18 (contract).

[66] Rader, *The Academic Mind and Reform,* supra note 62, at 103.

[67] Richard T. Ely, *Socialism and Social Reform* (New York: Thomas Y. Crowell & Co., 1894), 253–54; Rader, *The Academic Mind and Reform,* supra note 62, at 102–3.

[68] Rader, *The Academic Mind and Reform,* supra note 62, at 104–5.

[69] Ibid., at 235.

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crat, supportive of states' rights and free markets, and suspicious of expanding governmental power. As he became more active in the political arena, however, Wilson gravitated gradually toward Progressive ideology. Whether this shift was motivated by political expediency or by principled conviction remains a matter of debate.[70] Certainly Croly and other Progressive intellectuals, who had given their hearts to Roosevelt, were initially skeptical about Wilson and his New Freedom program. Although as president Wilson successfully promoted such Progressive measures as a reduced tariff and the Federal Reserve System to oversee banking, leading Progressives continued to bemoan his reluctance to endorse more pervasive governmental intervention in the economy.[71]

In contrast to Croly and Ely, Wilson often spoke in terms of individual rights. At the center of his New Freedom program in 1912 was a pledge to destroy monopolies and restore competition. He championed "the liberating light of individual initiative, of individual liberty, of individual freedom, the light of untrammeled enterprise."[72]

Yet, for all the rhetoric about individual liberty, much of Wilson's emerging philosophy cut in the statist direction. Early in his academic career Wilson dismissed the Lockean contract theory of the origins of government, rejecting the idea of natural law. He pictured the role of government in a broad light. "Government does not stop with the protection of life, liberty, and property, as some have supposed," he declared in 1889, "it goes on to serve every convenience of society."[73] Wilson added: "It is of the nature of government to regulate property rights: it is of the policy of the state to regulate them *more* or *less*."[74] Brushing aside laissez-faire theory, he maintained that government was essential and potentially beneficial, not just a necessary evil. Americans, Wilson maintained, should act "as believers in the wholesomeness and beneficence of the body politic."[75] Moreover, he asserted that "modern individualism has much about it that is hateful, too hateful to last."[76]

As we have seen, Progressives sought to break the traditional tie between individual liberty and the minimal state. Wilson helped to advance this program of so-called positive liberty. He stated that Thomas Jefferson's philosophy that the best government consisted in governing as little as

[70] Clifford F. Thies and Gary M. Pecquet, "The Shaping of a Future President's Economic Thought: Richard T. Ely and Woodrow Wilson at 'The Hopkins'," *The Independent Review* 15 (2010): 267–75.

[71] Forcey, *The Crossroads of Liberalism,* supra note 46, at 169, 185–86.

[72] Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page & Co., 1913, reprint 1919), 286.

[73] Woodrow Wilson, *The State* (Boston: D.C. Heath, 1889, rev. ed. Boston: D.C. Heath, 1901), 621.

[74] Ibid., at 623.

[75] Ibid., at 631.

[76] Ibid., at 632.

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possible was obsolete in modern circumstances, and that government must assist individuals. "Freedom to-day," Wilson famously observed, "is something more than being let alone. The program of a government of freedom must in these days be positive, not negative merely."[77] Such sentiments opened the door for the Progressive legislative and redistributive agenda to gain legitimacy in the polity.

Wilson's view of the Constitution is also revealing as to the Progressive mindset. As early as 1893 Wilson denied that the Constitution expressed fixed norms. "It seems to me impossible to treat a written Constitution as you would any other document," he declared. "A Constitution must hold (contain) *the prevalent opinion,* and its content must change with national purpose."[78] During the 1912 presidential campaign he dismissed the constitutional system of checks and balances as outmoded and a barrier to good government. Wilson asserted "Government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton."[79] He continued: "Living political constitutions must be Darwinian in structure and in practice. . . . All that progressives ask or desire is permission—in an era when 'development,' 'evolution,' is the scientific word—to interpret the Constitution according to the Darwinian principles."[80] The evolutionary lessons of Darwin made clear to Wilson that constitutional norms must adapt to changed economic and social conditions and that Americans should abandon devotion to the views of the Framers. Indeed, Wilson even suggested that the Constitution was not the true basis of political life. "Justly revered as our great Constitution is," he wrote, "it could be stripped off and thrown aside like a garment, and the nation would still stand forth clothed in the living vestment of flesh and sinew, warm with the heartblood of one people, ready to recreate constitution and laws."[81] As this indicates, Wilson was an early champion of what would later be described as a "living Constitution" cut free from any original understanding of the document.

In sum, Wilson's constitutional vision regarded the growth of governmental power as part of an inevitable evolutionary process, treated provisions limiting governmental authority as outdated impediments to efficient governance, and gave little heed to the constitutional rights of individuals. It is true that, as president, Wilson sometimes pursued a more conservative course than some ardent Progressives would have

[77] Wilson, *The New Freedom,* supra note 72, at 284.

[78] Woodrow Wilson to Hermann Eduard von Holst, June 29, 1893, in Arthur S. Link, ed. *The Papers of Woodrow Wilson,* vol. 8 (Princeton: Princeton University Press, 1970), 271.

[79] Wilson, *The New Freedom,* supra note 72, at 47.

[80] Ibid., at 39.

[81] Link, ed., *The Papers of Woodrow Wilson,* vol. 5, supra note 78, at 69. See also George Thomas, *The Madisonian Constitution* (Baltimore: Johns Hopkins Press, 2008), 65–69 (examining Wilson's dislike of the separation of powers doctrine, and desire to reconstruct constitutional authority to effectuate popular will).

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preferred. This, however, represented a policy decision, not a recognition of constitutional restraints on the reach of government.

Of course, Croly, Ely, and Wilson were not the only voices in the dialogue over the meaning of Progressivism. But they were key figures, and were united by a commitment to activist government, and by hostility to traditional notions of individualism, laissez-faire economics, and concepts of limited government. Together they underscore the profound ideological shift in the early twentieth century toward a more extensive role for government at all levels.

## VI. Progressive Jurisprudence

It remains to consider the impact of Progressivism upon constitutional jurisprudence. Although Progressives demonstrated considerable political strength and were able to enact a host of laws which intervened in the economy to an unprecedented extent, they remained apprehensive about the judicial reaction to their program. Both federal and state courts generally adhered to a constitutional philosophy grounded on limited government and respect for the rights of property owners. Progressives, as we have seen, displayed little patience with constitutional doctrines which constrained the reach of government. Despite their preference for governance by experts, Progressives saw themselves as champions of greater democratic rule. They soon viewed the judiciary as a barrier to their reform ideas. In 1912 Senator Robert M. LaFollette of Wisconsin forcefully articulated this sentiment: "Gradually the judiciary began to loom up as the one formidable obstacle which must be overcome before anything substantial could be accomplished to free the public from the exactions of oppressive monopolies and from the domination of the property interests."[82] In the same year, Theodore Roosevelt charged that the New York courts and the Supreme Court "have placed well-nigh or altogether insurmountable obstacles in the path of needed social reforms."[83]

Such complaints were in fact considerably exaggerated. It is simply a myth that the federal or state courts invalidated wholesale legislation of the Progressive Era, much less that they sought to impose a laissez-faire legal regime. Attacking the notion of laissez-faire constitutionalism as an invention by supporters of the Progressive movement, David N. Mayer has insisted "judges did not read Herbert Spencer's Social Statics or any other laissez-faire writing into the Constitution."[84] The United States has never had a period of strict laissez-faire, and courts could not have imple-

[82] Robert M. LaFollette, Introduction to Gilbert E. Roe, *Our Judicial Oligarchy* (New York: Huebsch, 1912), v.

[83] Theodore Roosevelt, "Judges and Progress," *Outlook* 100 (January 6, 1912): 42.

[84] David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* (Washington, DC: Cato Institute, 2011) 6.

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mented one if they tried.[85] In reality, courts were surprisingly receptive to Progressive legislation, and the regulatory state grew steadily in the first decades of the twentieth century.[86]

Nonetheless, legal writers associated with the Progressive movement seized upon a handful of atypical decisions, such as *Lochner v. New York* (1905),[87] to launch a far-ranging attack on judicial review, constitutionalized property, and the individualistic ethos. Employing moralistic rhetoric common to the movement, Progressives pictured the Supreme Court as the last bulwark of property rights, and a one-sided defender of the wealthy and big business against the interests of workers.[88] This demoniac tale had only a slight relation to reality, but it served the needs of Progressive political leaders.

The Progressive era produced numerous proposals to curb the courts. Some historians reopened the question of whether the framers of the Constitution had ever envisioned judicial review of legislation.[89] Many Progressives went a step further in their desire to reign in the judiciary, calling for enactment of provisions for the recall of state judges. They reasoned that the availability of the recall remedy would keep judges in sync with prevailing public opinion.[90] Joining this debate, Roosevelt particularly championed the recall of state judicial decisions. He reasoned that "when a judge decides a constitutional question, when he decides what the people as a whole can and cannot do, the people should have the right to recall the decision if they think it wrong."[91] This radical idea aroused fury among conservatives and even upset many of Roosevelt's Progressive allies. Critics feared that recall of either judges or judicial decisions would erode judicial independence. Yet such proposals dramatized the deep discontent of many Progressives with the judiciary. Ultimately the Progressive recall campaign faded with little result.

[85] Ibid. at 115 (pointing out that judicial invocation of laissez-faire principles "would have resulted in the overturning of literally hundreds of laws that the Court upheld as valid exercises of the police power").

[86] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights,* 3d ed. (New York: Oxford University Press, 2008), 108–9.

[87] 198 U.S. 45 (1905). For assessments of this important case, see David E. Bernstein, *Rehabilitating Lochner,* supra note 8 ; David A. Strauss," Why Was *Lochner* Wrong?, *University of Chicago Law Review* 70 (2003): 373; David N. Mayer, *Liberty of Contract,* supra note 84, at 70–76.

[88] David E. Bernstein, "*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism," *Georgetown Law Journal* 92 (2003): 2–9 (criticizing historians of the Progressive and New Deal eras for tailoring constitutional history to serve political objectives).

[89] William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Supreme Court, 1890–1937* (Princeton: Princeton University Press, 1994), 49–69 (discussing Progressive denunciation of judicial review as a usurpation of power).

[90] Ibid., at 110–29.

[91] Theodore Roosevelt, "Judges and Progress," supra note 83, at 46; *New York Times,* February 22, 1912; "A Charter of Democracy", in Theodore Roosevelt, *Social Justice and Popular Rule* (New York: Charles Scribner's Sons, 1926), 119: Ross, *A Muted Fury,* supra note 89, at 130–54. See also, William Draper Lewis, "The Recall of Judicial Decisions," *Proceedings of the Academy of Political Science* 37 (1913): 37.

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While debates continued over the appropriate role of the courts in American political life, Progressive historians began to ask fundamental questions about the Constitution itself.[92] They emphasized that the Constitution was essentially an undemocratic document. Some even contended that the Constitution was not sacrosanct, and argued that the United States in the early twentieth century could not be successfully governed by eighteenth-century principles. In this context Charles A. Beard published his landmark book, *An Economic Interpretation of the Constitution* (1913). This volume has long been a topic of controversy and cannot be treated in detail here. Beard saw the Constitution as the product of political conflict, and stressed that the Framers were skeptical about majority rule. He maintained that most of the framers anticipated economic benefits to themselves from the new constitutional order. Beard concluded: "The Constitution was essentially an economic document based on the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities"[93] Such a conclusion was uncongenial to the Progressive mind. Yet by urging people to view the Constitution with less awe Beard may have hoped to encourage constitutional change. This may explain the appeal of the book to the Progressive generation. "It first took root in the Progressive era," Richard Hofstadter commented, "because it was suited to the spirit of protest and the hope for reform."[94]

Even at the zenith of the Progressive movement, however, it was difficult to bring about formal changes in the judiciary itself. Progressives enjoyed more success in pioneering a supposed new outlook toward the nature of law. Roscoe Pound (1870–1964) was instrumental in promoting the development of "sociological jurisprudence."[95] A student of biology as well as law, Pound was readily inclined to see law from an evolutionary perspective. He repudiated natural law and natural rights as anachronisms which encouraged thinking of law in terms of abstract legal doctrines. Instead, he urged courts to utilize data provided by social science.

In advancing his call for "sociological jurisprudence" Pound fashioned myths which have long plagued the history of constitutional law in the late nineteenth century. He was primarily responsible for crafting an image of courts adhering to so-called "mechanical jurisprudence". Pound asserted that courts followed a closed method of making deductions from

[92] Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (Chicago: University of Chicago Press, 1968), 182–206.

[93] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan Company, 1913), 324.

[94] Hofstadter, *The Progressive Historians,* supra note 92, at 218.

[95] Paul L. Murphy, "Holmes, Brandeis, and Pound: Sociological Jurisprudence as a Response to Economic Laissez-Faire," in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* (Albany, NY: State University of New York Press, 1989), 56–60; Bernstein, *Rehabilitating Lochner,* supra note 8, at 42–47.

predetermined conceptions without regard to underlying facts or social consequences. He took special aim at the liberty of contract doctrine under the Fourteenth Amendment, particularly as exemplified in *Lochner.*[96] Discussing the Fourteenth Amendment, Pound made this extraordinary comment: "Starting with the conception that it was intended to incorporate Spencer's Social Statics in the fundamental law of the United States, rules have been deduced that obstruct the way of social progress."[97] On its face this statement is overly broad and requires qualification. First, the only authority cited by Pound for such a sweeping contention is the dissent by Justice Oliver Wendell Holmes (1841–1935) in *Lochner,*[98] which he apparently accepts as gospel. But the Holmes dissent is a slender reed indeed, because Holmes in turn makes dubious generalizations with no evident support. Second, whether judicial decisions "obstruct the way of social progress" is a value-laden matter of opinion. Third, as I have argued elsewhere, there is ample evidence that courts in the late nineteenth century were neither mechanical in their approach to issues nor inclined to block all Progressive reform measures.[99] Indeed, the Supreme Court under Chief Justice Melville W. Fuller (1888–1910) pursued instrumental goals of protecting investment capital and safeguarding the national market.[100] In short, Pound has created a "mechanical jurisprudence" straw man.

According to Pound, the remedy for alleged "mechanical jurisprudence" lay in the adoption of "sociological jurisprudence." Pound elaborated his thinking about "the new juristic theory" in a series of articles. One is struck with the extent to which he relied upon European schools of jurisprudential thought as a basis for his conclusions, and how little attention he paid to American law. The danger was that Pound would draw lessons from civil code systems and apply them uncritically to common law courts, thus reaching erroneous conclusions about judicial behavior in the United States. In discussing the purpose of "sociological jurisprudence," Pound insisted that "the conception of law as a means

[96] Pound's vigorous assault on the liberty of contract doctrine is quite curious. In fact, the doctrine was rarely invoked by the Supreme Court. Gregory S. Alexander, "The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism," in Francis H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (Durham, N.C.: Duke University, 1999) ("... even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle."); Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History,* 2d ed. (New York: Oxford University Press, 2009), 264 ("The Lochner decision was in many ways an aberration with limited impact."). This raises a serious question of whether Pound was simply tilting at windmills.

[97] Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 616.

[98] 198 U.S. at 75–76.

[99] Consider the jurisprudence of Justice Rufus W. Peckham, the author the majority opinion in *Lochner.* See James W. Ely, Jr, "Rufus W. Peckham and Economic Liberty," *Vanderbilt Law Review* 62 (2009): 637 ("Even a glance at Peckham's opinions makes it evident that he was not engaged in abstract deduction from legal principles and precedents. Instead, Peckham championed what he regarded as socially desirable outcomes in defense of property rights and contractual freedom. Peckham cannot fairly be described as a legal formalist.").

[100] James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888–1910* (Columbia, SC: University of South Carolina Press, 1995), 73–74, 83–149.

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toward social ends" would require judges "to keep in touch with life."[101] He explained: "The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account of the social facts upon which law must proceed and to which it is to be applied."[102] Pound added that "sociological jurists" favor "equitable application of law" in which rules are treated as "a general guide to the judge", who remains free "within wide limits" to dispense justice in individual cases.[103]

As Pound saw it, courts were ill-equipped to ascertain the necessary "social facts." "Judicial law-making cannot serve us," he bluntly declared.[104] Instead, Pound reasoned that only legislative bodies were in a position to conduct hearings, assess expert opinions, and then determine "social facts." It followed that judges under a regime of "sociological jurisprudence" should defer to legislative findings. In a revealing comment in 1908 Pound hailed the Holmes dissent in *Lochner* as "the best exposition" of "sociological jurisprudence."[105] But Holmes mentioned no facts, "social" or otherwise, in his *Lochner* opinion.[106] Holmes simply made a series of pronouncements that he apparently regarded as self-evident and concluded that the Supreme Court should affirm "the right of a majority to embody their opinions in law." Pound's endorsement of this opinion indicates that he was less interested in "social facts" than in a policy of judicial deference to legislation. Indeed, for all his professed devotion to facts, Pound offered virtually no empirical evidence to support his claims.

The emerging "sociological jurisprudence" was in harmony with the political aims of Progressives, who saw claims of individual right as inconsistent with their dedication to activist government. Pound and other elite legal figures associated with Progressivism shared these attitudes. For example, Pound complained about "[t]he currency in juristic thought of an individualistic conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation. . . ."[107] Rights do not figure prominently in his thinking. Similarly, Learned Hand, a supporter of Roosevelt in the 1912 presidential campaign, assailed the notion that the due process norm "embalms individualistic doctrines of a hundred years ago."[108] Taking a somewhat different tack, Beard in 1908 enthused that

[101] Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 25 (1911): 146–47.

[102] Pound, "Sociological Jurisprudence" supra note 100, part III, (1913): 512–13.

[103] Ibid. at 515.

[104] Pound, "Mechanical Jurisprudence," supra note 97, at 621.

[105] Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 464.

[106] See William E. Leuchtenburg, *The Supreme Court Reborn: Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 19 (calling attention to Holmes's "disdain for facts").

[107] Pound, "Liberty of Contract," supra note 105, at 457,

[108] Learned Hand to Van Vechten Veeder, December 11, 1913, as quoted in Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994), 211.

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"the stress once laid on individual liberty in the juristic sense is being diminished."[109]

Pound's invectives against "mechanical jurisprudence" rested upon deeply flawed history and a heavy dose of German legal science. Recently Brian Z. Tamanaha has charged that Pound simply created an imaginary account of how cases were actually decided at the turn of the twentieth century.[110] Nonetheless, by virtue of frequent repetition and Pound's prestigious position as Dean of Harvard Law School, his views gradually gained widespread acceptance in the academy.

Pound helped to advance the Progressive political agenda in several ways.[111] He stigmatized a period of judicial history in which courts defended economic rights, an era that Progressives particularly disliked. This would ultimately degenerate into a morality tale about how "good" Progressives battled reactionary Supreme Court justices to uphold salutary laws.[112] Yet such an account is very wide of the mark. There never was a brief period in which judges suddenly began to reason in the mechanical and deductive manner depicted by Pound. As Morton J. Horwitz has pointed out: ". . . by seeking to stigmatize the *Lochner* era, Progressives lost sight of the basic continuity in American constitutional history before 1937."[113] Nonetheless, the historical fiction created by Pound formed the basis for a new orthodoxy.

Pound was influential in other respects as well. He popularized the view that law could be a vehicle for social change, a position congenial to Progressives. Further, his appeal for judicial deference marked a sharp break from the past and became a centerpiece of Progressive jurisprudence. The ominous implications of judicial deference for individual rights are obvious, but, as we have seen, rights did not bulk large in Progressive thought.

Themes developed by Pound found ready acceptance among legal intellectuals. Charging that "legal science" had become static, Louis D. Brandeis (1856–1941) pictured an obtuse judiciary mechanically invoking legal rules without regard to their actual consequences. He complained: "Courts

[109] Beard, *Politics,* supra note 25, at 29.

[110] Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2010, 24–43 (". . . contrary to what Pound and others have asserted, lawyers, academics, and judges at the time did not widely believe that judging was an exercise in mechanical deduction"). See also Alschuler, *Law Without Values,* supra note 24, at 91–100 (rejecting notion that judges in the nineteenth century adhered to mechanical jurisprudence, and insisting that judges adapted law to meet changing circumstances).

[111] Bernstein, *Rehabilitating Lochner,* supra note 8, at 41 (". . . the Progressive legal elites' support for 'sociological jurisprudence' often masked a political agenda that favored a significant increase in government involvement in American economic and social life").

[112] Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 7: ("Although in every other field of American history, Progressive historiography, premised on a conflict between the "people" and the "interests" has been overthrown as simplistic, in the constitutional history of the *Lochner* era it has continued to be the standard mode of explanation.")

[113] Ibid.

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continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. . . . Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away." [114] To support this broad caricature of judicial behavior, Brandeis took aim at *Lochner* and a handful of other state and federal decisions dealing with workplace regulations, the usual suspects rounded up by Progressives.[115] The remedy for this perceived problem, in Brandeis's mind, was the "living law" which harmonized "law with life." This result could best be achieved by integrating economics and sociology into legal education and legal arguments. Implicit in Brandeis's thinking was the view that legislatures were more in tune with the "living law" than courts, and that judges should move slowly in overturning statutes as violations of liberty or property.

In the same vein, Edwin R. Keedy, a University of Pennsylvania law professor, extolled Pound and "sociological jurists" for their pragmatism. He was pleased to find that the trend of legal thought "is away from reverence for fixed principles toward consideration of the economic, industrial and social merits of the particular controversy, away from artificiality towards simplicity, and from an individualistic towards a collective attitude." [116] Accepting without question Pound's treatment of a supposed earlier school of "mechanical jurisprudence" based on deductive reasoning, Keedy posited that under "sociological jurisprudence" courts "should take into consideration the social and economic conditions underlying the cases that come before them and should not base their decisions entirely upon abstract rules." Like Pound, he gave no attention to the thought that this point was not a novel insight. Keedy linked individualism with private property, contractual freedom, and economic competition. Happily, he concluded, individualism was in decline. Cooperation had replaced competition in business affairs, and property was regulated "for the public benefit." Keedy broke no new ground, but helped to perpetuate Pound's message of a retrograde judiciary and the need for a more collectivist approach to legal issues. Not surprisingly, he made no mention of individual rights or of the Constitution as a restraint on governmental authority.

## VII. Militant Progressivism

The new constitutional thinking stirred up by the Progressive movement found expression in a number of utopian novels. Among the most

[114] Louis D. Brandeis, "The Living Law," *Illinois Law Review* 10 (1916): 464.

[115] In addition to *Lochner,* Brandeis singled out *Ives v. South Buffalo Railway Co.,* 201 N.Y. 271 (1911) (invalidating New York's workers' compensation law) and *Adair v. United States,* 208 U.S. 161 (1908) (striking down on liberty of contract doctrine a congressional measure outlawing so-called yellow dog contacts). These were favorite targets of the Progressives.

[116] Edwin R. Keedy, "The Decline of Traditionalism and Individualism," *University of Pennsylvania Law Review* 65 (1916): 772.

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revealing of such works was *Philip Dru Administrator: A Story of Tomorrow 1920–1935,* published anonymously in 1912 as the Progressive movement gained ascendancy in American life.[117] Four years later it was discovered that the author was the influential Edward Mandell House (1858–1938). Better known as Colonel House, although he never held a military commission, the author was a close friend and confident of President Wilson.[118] *Philip Dru,* which incorporates Progressive values into a dramatic and disturbing tale, lays open both the promise and perils of Progressivism. It warrants careful investigation.

Philip Dru, the title character, is a graduate of West Point who resigns from the army after suffering an eye injury. A career as a journalist and social worker in New York City exposes Dru to the plight of the urban poor and the sordid state of politics. Anxious to seek reforms to assist the unfortunate, Dru finds both political parties controlled by wealth. Plutocrats form a league for the "nefarious plan" of electing a president favorable to their interests. Orchestrated by a corrupt but powerful senator, this plan succeeds. When the scheme comes to light, the president uses force to prevent free elections. As the nation veers toward civil war, the impending conflict pits the rich and very poor against the middle class. Recall that Progressives were fond of picturing themselves as champions of the middle class. Dru takes command of an insurgent force and defeats the regular army. The president flees and Dru assumes dictatorial powers. He proclaims himself Administrator of the Republic, but promises to eventually restore democratic government.

For several years Dru is busy reconstructing American political institutions along Progressive lines. His first target is the legal system. Dru reduces the number of courts and eliminates judicial review. Dru limits the power of courts "to the extent that they could no longer pass upon the constitutionality of laws, their function being merely to decide, as between litigants, what the law was, as was the practice of all other civilized nations." Nor were private lawsuits exempt from Dru's reformist zeal. Because the United States had "the most complicated, expensive and inadequate legal machinery of any civilized nation," Dru takes steps to prevent lawyers from bringing frivolous lawsuits "of doubtful character, and without facts and merit to sustain them." Moreover, he names an expert commission to revise and prune down both federal and state laws. To assist in this endeavor Dru selects as advisors "eminent lawyers" from England, France and Germany. He directs that states should simplify land

[117] Edward Mandell House, *Philip Dru Administrator: A Story of Tomorrow 1920–1935* (New York: B. W. Huebach, 1912, reprinted Memphis, Tenn.: General Books, 2010). *Philip Dru* has received surprisingly little attention from scholars. For exceptions, see Lears, Rebirth of A Nation, supra note 5, at 330–31; Maxwell Bloomfield, "Constitutional Ideology and Progressive Fiction," *Journal of American Culture* 18 (1995): 3–4. See also a review of this work by Walter Lippman, "America's Future," *New York Times,* December 8, 1912.

[118] For the close relationship between Wilson and House, see Arthur S. Link, *Woodrow Wilson and the Progressive Era, 1910–1917* (New York: Harper & Row, 1954), 26.

titles to facilitate real estate transfers and should adopt uniform divorce laws.

Dru also mandates many changes on the economic front. He imposes a graduated income tax and abolishes protective tariffs. Dru realizes that improvements in communication and travel "were, for all practical purposes, obliterating State lines and molding the country into a homogeneous nation." Thus, he feels that the national government should assume certain functions that have previously been under state control. Dru proposes a Federal Incorporation Act, which included the requirement that government and "Labor" should have representatives on corporate boards. Railroads and public service corporations are to function under the supervision of regulatory commissions. Significantly, Dru does not directly attack private property and declares that investors should have reasonable profits as well as protection against unfair state interference. Only the telephone and telegraph companies are to be taken over by the government, and that upon payment "for their properties at a fair valuation."

Dru's ideas regarding the labor force are noteworthy. In exchange for profit sharing, strikes are forbidden. All grievances must be submitted to arbitration. Dru further directs that work shall be limited to eight hours a day, six days a week. The government would become the employer of last resort for those who cannot find work. Dru then makes plans for old-age pensions and a disability insurance law.

Some of Dru's most radical moves are in the area of constitutional law. Sympathetic to the women's movement for greater equality with men, Dru grants universal suffrage. He then turns to overhauling the Constitution. Dru proceeds on the premise that "America is the most undemocratic of democratic countries." "Our Government," he charges," is, perhaps, less responsive to the will of the people than that of almost any of the civilized nations." Therefore Dru set out to fashion a more responsive government. Like many Progressive leaders, he has little time for the system of checks and balances. We have already seen how Dru drastically curtailed the power of the judiciary. In contrast to Croly, Dru expresses the view that the office of president is too powerful. Under the new constitution the executive is chosen by the House of Representatives and serves at the pleasure of the House. The executive may select a cabinet, but has no veto power and appears to function as a sort of parliamentary leader in the British manner. The president occupies a purely ceremonial post. The weakening of the executive branch is palpably ironic given the fact that this change is made by a dictator. Senators are to be elected directly by popular vote, but the place of the Senate in the new legislative process is secondary to the House. There is no mention of a Bill of Rights, reflecting the general Progressive lack of interest in individual right. Nor is there any provision for amendment.

Amid his prodigious efforts to overhaul the political system of the United States, Dru remains keenly interested in international affairs. He

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pursues a highly aggressive policy to promote United States interests abroad, a reminder that many prominent Progressives, such as Roosevelt and Senator Albert J. Beveridge of Indians, were ardent imperialists.[119] For example, Dru engineers an Anglo-American alliance to secure commercial freedom. Much of the world is divided into spheres of influence among the United States and European powers. England relinquishes control of Canada, and that nation moves closer to the orbit of the United States. More striking, Dru invades Mexico to check political chaos in that country. Again victorious, Dru imposes a sort of protectorate over Mexico to maintain order, and directs that Mexican officials prepare a new form of government. This portion of the novel may well have been inspired by actual events, for in 1912 Mexico was engulfed in civil conflict. Indeed, Dru's actions with respect to Mexico seem to have prefigured Wilson's military interventions to safeguard democracy there. However, the fictional Dru was far more successful than Wilson's ill-fated "missionary diplomacy."[120]

There is a strong note of coercion throughout the novel. Dru comes to power as part of a military overthrow of the established government, a troublesome development for modern readers who recall the rise of totalitarian dictators by means of military coup. Although a benevolent despot, Dru nonetheless imposes his reforms by decree. There is nothing democratic about his period of rule. Dru talks in terms of government for "the people," but he in fact relies on expert boards, not popular input to devise his new laws. Evidently Dru and his experts know best what the people need. Paternalism and efficiency guide his lawmaking, not democratic accountability. Another pronounced theme is increased national authority over the states, a view congruent with that of many Progressives. Dru even incorporates some elements of Social Gospel thinking in his planning. Picturing his program as an application of Christian morality, Dru proclaims: "And from the blood and travail of an enlightened people, there will be born a spirit of love and brotherhood which will transform the world; and the Star of Bethlehem, seen but darkly for two thousand years, will shine again with a steady and effulgent glow."

More a political tract than a novel, *Philip Dru* is largely forgotten today. Still, the work affords troublesome insight into the Progressive mindset. Colonel House comes close to suggesting that the Progressive goals of social and economic transformation can best be achieved by a military putsch, repudiation of the Constitution, and a temporary dictatorship.

[119] William E. Leuchtenburg, "Progressivism and Imperialism: The Progressive Movement and American Foreign Policy, 1898–1916," *Mississippi Valley Historical Review* 39 (1952): 483–504.

[120] Link, *Woodrow Wilson and the Progressive Era,* supra note 118, at 81–114 (discussing Wilson's extensive interventions in Caribbean nations and Mexico, and noting that Wilson was "dedicated to the democratic ideal, at least theoretically, and obsessed with the concept of America's mission in the world.").

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One can only guess what impact House had on President Wilson, who described House as his "alter ego." Certainly House fashioned a mythical great leader who would dominate the nation. Croly would have approved. Others may detect a whiff of totalitarianism, anticipating the enormous expansion of the coercive power of government by the Wilson administration during World War I.

## VIII. Conclusion

Individualism and economic rights continued to have strong defenders during the Progressive era. In 1913 Elihu Root (1845–1937), a prominent conservative, challenged the premises that lay at the heart of Progressive ideology. In contrast to the Progressive writers, he asserted: "I assume an agreement that the right of individual liberty and the inseparable right of private property which lie at the foundation of our modern civilization ought to be maintained." [121] Root argued that the essential features of our constitutional system "all aim to preserve rights by limiting power." Pointing to the natural law tradition, he maintained that government was not the source of individual rights but was an instrument for preserving them. Root saw the separation of powers among the three branches of government as a "security for liberty." He took issue with the Progressive view that courts should defer to legislative decisions, reasoning that "the effect of this would be that the legislature would not be limited at all except by its own will." Indeed, he expressed concern that legislatures "frequently try to evade constitutional provisions." [122] But Root was speaking against the day. The Progressive assault on individualism and property proved highly influential and left a lasting legacy.

It is perhaps surprising that this should be the case. After all, most historians agree that Progressivism as a political force collapsed in the aftermath of World War I.[123] Nonetheless, the Progressives succeeded in bringing about a profound shift in the dialogue about constitutionalism in the United States. Lockean liberalism, premised on a theory of natural rights, was largely abandoned in favor of a statist ideology. Despite setbacks and disappointments, Progressives achieved greater social control by means of an expanded government. This development necessarily entailed a diminished regard for individualism and claims of right against the state. Moreover, Progressives laid the intellectual groundwork for a jurisprudence which substantially stripped property of constitutional protection, an agenda brought to fruition by the New Deal Supreme Court after 1937.

[121] Elihu Root, *Experiments in Government and the Essentials of the Constitution* (Princeton: Princeton University Press, (1913), 3.

[122] Ibid. at 43, 44, 53, 62–63, 75.

[123] Hofstadter, *The Age of Reform*, supra note 4, at 273 ("Participation in the war put an end to the Progressive movement."); McGerr, *A Fierce Discontent*, supra note 4, at 299–313.

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To be sure, there has been sharp criticism of the Progressive movement, and revisionist scholars have called into question many aspects of Progressive jurisprudence. Yet the classical liberal position remains on the sidelines in the academy and the courts. So perhaps the last word should go to the cantankerous H. L. Mencken (1880–1956) who defined a Progressive as "one who is in favor of more taxes instead of less, more bureaus and jobholders, more paternalism and meddling, more regulation of private affairs and less liberty."[124]

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[124] H. L. Mencken, *Baltimore Sun,* January 19, 1926.

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