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CONTENTS

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FOUNDING LIBERALISM, PROGRESSIVE LIBERALISM, AND THE RIGHTS OF PROPERTY

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I. Introduction

There may be no better indication in America of the growing opposition between capitalism and modern liberalism than the conscious and pervasive effort of today's liberals to connect themselves to America's Progressive Movement. As America's modern liberals have moved sharply away from the free-market foundations of classical liberalism, some of them, at least, seem to recognize that such a move necessitates their abandonment of the term "liberal" altogether. Few liberals (in the contemporary usage of that term) in national politics today proclaim themselves as such; instead, they claim the label "progressive." No doubt, in some cases, this is merely a tactical move: "liberal" is still a dirty word in the contemporary American lexicon due to the effects of the national political debate in the 1980s, and politicians on the Left are prudent to avoid being tarred with it. But there is something deeper than this at work; for many on the Left, self-identification as "progressive" goes well beyond finding a more palatable way of saying "liberal." When pressed about this in a debate during the 2008 Democratic primary campaign for the presidency, Hillary Clinton emphatically identified herself not just as a "progressive," but as a progressive who could best be understood by "going back to the Progressive Era at the beginning of the twentieth century."[1] What is arguably the most influential think-tank on the Left today, headed by John Podesta, a former aide to President Bill Clinton, is called the Center for American Progress; the title of Podesta's popular 2008 book is *The Power of Progress: How America's Progressives Can (Once Again) Save Our Economy, Our Climate, and Our Country.*[2] Considering these developments together with the national legislative agenda that has emerged from 2008 to 2010, it can be argued that modern liberalism has come home to its progressive roots.

What this development means is that the variant of liberalism that emerged over the course of the twentieth century does not have much to do with its eighteenth-century predecessor that was so influential on the founding of the United States. By invoking the American Progressive

[1] Democratic Presidential Debate, July 23, 2007, held at The Citadel in South Carolina.

[2] John Podesta, *The Power of Progress: How America's Progressives Can (Once Again) Save Our Economy, Our Climate, and Our Country* (New York: Crown Books, 2008).

Movement, modern liberals invoke the very movement which had as its chief characteristic an intellectual and political assault on the principles of eighteenth-century liberalism. Thus, in order to explore the relationship between liberalism and capitalism, liberalism and free markets, or liberalism and property rights, we must first determine which liberalism we are talking about.[3] The story of the move from classical, eighteenth-century liberalism in America to the liberalism of America in the twentieth century centers on the Progressive Era and the transformation undertaken there in our understanding of equality, liberty, and rights—property rights, in particular. This essay endeavors to contribute to the exploration of liberalism and capitalism by discussing how liberalism changed its premise about the rights of property as it became transformed by the intellectuals and politicians of the Progressive Movement.

The liberalism of the American founding was a liberalism of natural rights. The Progressives understood this, and it is why their major intellectual works begin, almost without exception, with a critique of natural rights and the theory of social compact. The topic of natural rights and the American founding is deep enough for a lengthy study of its own; since the purpose of this essay is to explore the Progressive departure from the early American idea of rights, I will wade into the theory of the founding only to the extent that it is necessary to understand the subsequent Progressive departure.

II. Founding Liberalism

Progressives rightly identified the 1776 American Declaration of Independence as the preeminent statement of the new nation's governing philosophy, and they were especially troubled (as will be demonstrated below) by the transhistorical and limited account of the purpose of government contained in the Declaration. The Progressives identified the language of the Declaration with the social compact philosophy of John Locke's *Second Treatise of Government* (1689). Because the nature of Lockean liberalism is complex, we should be careful about unequivocally equating Locke's principles with the founders'; the actual significance of Locke's principles may be distinct from how those principles were understood by America's founding generation and applied in the statesmanship of the day. Nonetheless, there can be little doubt about the founders' adoption of the political teach-

[3] It is conceded that some scholars question the existence, or at least the degree, of a distinction between the old liberalism and the new liberalism, suggesting, in some cases, that certain inherent flaws present in the original liberalism are the cause of modern liberalism. For just one example, see Peter Augustine Lawler, "Natural Law, Our Constitution, and Our Democracy," in Ronald J. Pestritto and Thomas G. West, eds., *Modern America and the Legacy of the Founding* (Lanham, MD: Lexington Books, 2007), 207–37. The particulars of this debate lie beyond the scope of this essay, although by explicating the Progressive assault on the early American notion of property rights, the argument of the essay as a whole weighs against the assertions of Lawler and others.

ing of social compact theory:[4] the purpose of government, according to the Declaration, is the same for all men by virtue of their common nature, and does not change from one generation to the next. This purpose is to secure "certain unalienable rights," as the Declaration states—rights which all individuals possess in accord with "the Laws of Nature and of Nature's God." Natural rights are not conferred by government but by man's "Creator," and are thus not contingent upon whatever a particular society deems to be expedient at a given time. Government exists for the sake of protecting rights; without such a purpose, it becomes illegitimate, and the people rightly withdraw their consent.

This logic of the Declaration emerges out of its equality doctrine. Far from a command for government to use its power for the sake of bringing about an actual material equality, the Declaration's statement that "all men are created equal" was understood to mean that no man is the natural ruler of any other man. It was meant to counter the theory of divine right of kings or hereditary aristocracy. This meaning is evident not only from the Declaration itself, but also from the other public documents of the day, especially the many state declarations of rights. From those declarations, it is clear how the founding generation understood equality. For example, the Virginia Declaration of Rights—adopted just weeks before the Declaration of Independence—says that "all men are by nature equally free and independent." The Massachusetts Constitution of 1780, drafted by John Adams, says that "all men are born free and equal."[5] Equality for the founding generation pertained to equality of natural rights.

The Declaration's conception of natural rights is simply an extension of, or a consequence of, its equality doctrine. It is precisely because no other man is born my natural ruler that I may claim a right, by nature, to my life, liberty, and pursuit of happiness. Equality is a statement of fact in the Declaration—an observation about human nature—whereas the natural-rights statement derives a moral doctrine from that observation: because no one *is* naturally born my political superior, no one *ought* to interfere in the preservation of my life, my liberty, or my pursuit of happiness in whichever manner I choose. Because our natural equality of rights necessarily implies a duty on the part of others to respect those rights (without such a reciprocal duty, the assertion of rights becomes incoherent), this teaching of nature is also a "law" of nature, as seen in the Declaration.

The declarations of rights adopted by individual states are also useful in demonstrating that property was widely understood to be a fundamental natural right; private property rights are mentioned in *every* state declaration of rights. As Michael Zuckert has persuasively shown, Thomas Jefferson's employment of the "pursuit of happiness" language in the Declaration was not meant by him as a rejection of the right of property.[6] Rather, the understanding of the founding generation seems to have been that any legitimate government has an obligation to make its citizens secure in the title to the property they have earned through their labor. Without such an obligation on the part of government, individuals are not sufficiently free to pursue happiness in the manner that seems best to them. The point is not only to protect wealth already earned and held, but to allow individuals to pursue a living secure in the knowledge that whatever fruits come from their pursuit will also be protected. The natural right to property, with which we are all endowed equally, may therefore lead to an inequality in the amount and kinds of property we end up with. As James Madison explains in referring to the "rights of property" in *Federalist No. 10*, the equal protection of our unequal faculties of acquiring property will lead to unequal results. The job of a legitimate government is not to even out these results; indeed, one of the founders' greatest fears was that the power of government would be employed in such a mission at the behest of a majority faction. Rather, the job of government is to preserve the "different and unequal faculties of acquiring property." This job is called by Madison "the first object of government."[7] As we will see below, this formulation was at the heart of what Progressives found most objectionable about founding-era liberalism; they sought to undercut the recurrence to the "rights of property" as a defense against majority sentiment.

It should be acknowledged that some scholars have objected to understanding the American founding through the lens of eighteenth-century liberalism, and have downplayed the relevance of natural rights or social compact theory in early America.[8] Such arguments seem to defy the overwhelming evidence of the public documents of the founding era, as many other scholars have pointed out.[9] The relevant point for us is that the Progressives certainly did not downplay the role of natural-rights thinking in the American founding. Indeed, if eighteenth-century, natural-rights liberalism was not central to defining the original meaning of the

[4] On this, see Peter C. Myers, "Locke on the Social Compact: An Overview," in Ronald J. Pestritto and Thomas G. West, eds., *The American Founding and the Social Compact* (Lanham, MD: Lexington Books, 2003), 1–35.

[5] For my understanding of how state declarations of rights help to illuminate the meaning of the Declaration of Independence, I have profited from Thomas G. West, "Jaffa vs. Mansfield: Does America Have a 'Constitutional' or 'Declaration of Independence' Soul?" *Perspectives on Political Science* 31 (Fall 2002): 235–46. See also Michael P. Zuckert, *The Natural Rights Republic* (Notre Dame, IN: University of Notre Dame Press, 1996), 17–20, 33–34.

[6] Zuckert, *Natural Rights Republic*, 79–80.

[7] James Madison, *Federalist No. 10*, in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001), 43.

[8] In addition to the "republican" school of interpretation, headlined by Gordon Wood's *Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), see Barry Alan Shain, *The Myth of American Individualism* (Princeton, NJ: Princeton University Press, 1994); and John Phillip Reid, *Constitutional History of the American Revolutions: The Authority of Rights* (Madison: University of Wisconsin Press, 1986).

[9] Zuckert, *Natural Rights Republic*, 108–17, 246 n. 17. Paul A. Rahe, *Republics Ancient and Modern* (Chapel Hill: University of North Carolina Press, 1992), 555–60. Thomas G. West, "The Political Theory of the Declaration of Independence," in Pestritto and West, eds., *The American Founding and the Social Compact*, 98–111, 116–20.

American regime, one has to wonder why the Progressives would have wasted so much energy and ink in attacking that brand of liberalism. As I have mentioned, attacking the natural-rights liberalism of the founding was a signature characteristic of Progressive Era works.

III. The Progressive Interpretation of the Founding

For the Progressive intellectual John Dewey—arguably America's premier public philosopher for the first part of the twentieth century—identifying and understanding the natural-rights liberalism of the American founding was a critical part of understanding the crisis faced by progressive liberalism in Dewey's own day. In order to explain how liberalism faced a "crisis" in the twentieth century, Dewey employed a narrative of how liberalism had changed from the old to the new. His approach is curious, because his terminology implies that the changes in principle between eighteenth- and twentieth-century America are intra-family—they are, in other words, "developments" within liberalism itself, as opposed to a move from liberalism to something different. Yet Dewey's description of contemporary liberalism depicts it as the principled antithesis of the liberalism that dominated the American founding era.

For Dewey, America's original liberalism was Locke's liberalism, and his proof is the Declaration. "The outstanding points of Locke's version of liberalism," wrote Dewey, "are that governments are instituted to protect the rights that belong to individuals prior to political organization of social relations. These rights are those summed up a century later in the American Declaration of Independence." The prepolitical origin of these rights, Dewey went on to explain, gives primacy to the individual over the state. "The whole temper of this philosophy is individualistic in the sense in which individualism is opposed to organized social action. It held to the primacy of the individual over the state not only in time but in moral authority." Dewey also connected the dots in looking to the intellectual origins of the founders' natural-rights principles. He traced them not only to Locke, but to the older natural-law tradition; it was this connection to the broader tradition of natural law which made the founders' rights doctrine so inflexible, even in the face of strong majoritarian sentiment. The natural-law tradition, Dewey explained, "bequeathed to later social thought a rigid doctrine of natural rights." The natural-rights doctrine, in turn, "gave a directly practical import to the older semi-theological and semi-metaphysical conception of natural law as supreme over positive law." Dewey put the natural right to property squarely at the center of the American founding, and connected it directly to Locke's understanding. In fact, in his account of the Declaration, Dewey shifted seamlessly between it and the account of property rights from chapter 5 of Locke's *Second Treatise*. Dewey explained that "among the 'natural' rights especially emphasized by Locke is that of property, originating, according to him, in the fact that an individual has 'mixed' himself, through labor, with some natural hitherto unappropriated object." From this Lockean, natural right to property comes the natural "right of revolution," which is how Dewey tied Locke not just to the philosophy of the Declaration, but also to its immediate practical purpose.[10]

Woodrow Wilson, who, like Dewey, had done his graduate work at Johns Hopkins University, was a prolific Progressive academic before entering into public life, and he shared Dewey's assessment of the founding. Before one could talk about the Progressive conception of government, Wilson reasoned, one had to understand the flawed conception of government from which Progressivism aimed to rescue American politics. This is why, in the most comprehensive account that Wilson wrote of the principles of government—*The State* (1889)—Wilson devotes substantial portions of the very first chapter to the theory of social compact and natural rights.[11] From the point of view of Wilson, Dewey, and nearly every other Progressive intellectual, talking about American government necessitated talking first about social compact and natural rights. Wilson went on in subsequent works to trace the origins of American government to Jefferson's account of natural rights; this was a narrative that Wilson often repeated even in his political speeches. In one such speech from his 1912 presidential campaign, Wilson proclaimed that "the makers of our Federal Constitution read Montesquieu with true scientific enthusiasm. . . . Jefferson wrote of 'the laws of Nature,'—and then by way of afterthought,—'and of Nature's God.' And they constructed a government as they would have constructed an orrery [i.e., a mechanical model of the solar system]—to display the laws of nature."[12]

Frank J. Goodnow (1859–1939)—a more obscure, but influential Progressive—adopted the natural-rights account of the American founding to frame his broad view of what was happening in the America of his day. Goodnow was the founding president of the American Political Science Association, and was a very prominent and important academic who made his most effective contributions in the area of administrative law. With the vast discretion that Progressives wanted to grant to bureaucratic agencies, Goodnow pioneered the study of the kind of law that would be necessary to facilitate this delegation of power,[13] before he went on to become president of Johns Hopkins. In lectures reflecting on Progressive accomplishments, Goodnow explained how America had been born a child of eighteenth-century liberalism. "The end of the eighteenth cen-

[10] John Dewey, *Liberalism and Social Action* (1935; Amherst, NY: Prometheus Books, 2000), 15–16.

[11] Woodrow Wilson, *The State* (Boston: D. C. Heath and Co., 1889), sections 17, 18, 21, and 23.

[12] Woodrow Wilson, "What Is Progress?" in Ronald J. Pestritto and William J. Atto, eds., *American Progressivism* (Lanham, MD: Lexington Books, 2008), 50.

[13] See Frank Goodnow, *Comparative Administrative Law* (New York: G. P. Putnam's Sons, 1903); and Goodnow, *Politics and Administration* (New York: Macmillan, 1900).

tury," Goodnow said, "was marked by the formulation and general acceptance by thinking men in Europe of a political philosophy which laid great emphasis on individual private rights. . . . The result was the adoption in this country of a doctrine of unadulterated individualism. Everyone had rights." In tying eighteenth-century philosophy to the origin of the American regime, Goodnow's account is interesting because of his emphasis on law and the courts. He recognized that the American understanding of rights originating in nature was distinct from the more positivistic English conception of rights, and that this distinction had profound implications for the nature of the American judiciary. "The rights of men," Goodnow explained, "of which their liberty consisted, were, as natural rights, regarded in a measure—and in no small measure—as independent of the law." By this formulation, Goodnow meant that Americans understood their written Constitution as a manifestation of their natural rights, and thus these rights inherent in the Constitution superseded the ordinary positive law. Goodnow reasoned that such a distinction between fundamental rights and the positive law placed great power in the hands of the judiciary, which was taken to be the safeguard of those fundamental rights.[14] This vision of the founding becomes crucial for Progressives, especially those like Theodore Roosevelt who would regularly rail against the judiciary precisely because it was employing the doctrine of natural rights (property rights, in particular) as a weapon against Progressive accomplishments in the arena of positive law.[15]

As clear as Progressives were about the origins of the American regime in eighteenth-century liberalism, some of them were confused about eighteenth-century liberalism itself. While they properly placed Locke at the center of this older liberalism, some of them placed Jean-Jacques Rousseau there as well, often using Rousseau's conception of the social compact interchangeably with Locke's. It was because they conflated Rousseau and Locke that Wilson, and especially Goodnow, considered Rousseau to be an enemy of Progressivism, when in fact he was more of a philosophic ally. Without going too far astray into a sustained discussion of social compact philosophy, it is important to note the critical difference between Lockean and Rousseauian social compact theory if we are to understand Progressivism and its case against the founding and property rights. For Locke, property rights are natural and are thus a trump card which the individual carries with him into civil society. Locke's social compact has as one of its bedrock principles the necessity of protecting individual rights of property even against the will of a majority.[16]

[14] Frank Goodnow, "The American Conception of Liberty" (1916), in Pestritto and Atto, eds., *American Progressivism*, 55–59.

[15] See, for example, Theodore Roosevelt, "The Right of the People to Rule" (1912), in Pestritto and Atto, eds., *American Progressivism*, 251–60.

[16] John Locke, *Second Treatise of Government* (1689), ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), chaps. 5, 9, esp. sections 26–28, 34, 123–24.

For Rousseau, at least in his *Second Discourse*, property rights are not natural at all; they are artificial, the invention of an "impostor" that mark the introduction of bourgeois society and the enslavement of man.[17] And while the status of rights in Rousseau's *Social Contract* is more ambiguous, a true social compact, for Rousseau, is liberated from its obligation to the artificial rights of property and is driven, instead, by a general will. Thus, in making their case against the preeminence of property rights, America's Progressives could have employed the Rousseau of the *Second Discourse*, as opposed to vilifying him. Wilson and Goodnow seem to have assumed the following: because social compact theory is bad (they knew from Locke that it was responsible for the natural-rights doctrine of private property), and because Rousseau wrote a book called *The Social Contract*, Rousseau (like Locke) must be an enemy of progress. In his account of social compact theory in *The State*, Wilson lumped Rousseau in with Richard Hooker, Thomas Hobbes, and Locke, using each interchangeably with the others,[18] in spite of the fact that Rousseau actually launched his own account of nature with a rejection of the accounts of these others.[19] Goodnow was similarly confused, laying the origins of the eighteenth century's radical individualism at Rousseau's feet, and casting Rousseau as an enemy of those who would favor the good of society as a whole over the prerogatives of the individual.[20]

In spite of the occasional confusion with respect to distinctions within eighteenth-century political philosophy (and it is important to note that Dewey is guilty of no such confusion), the essential Progressive understanding of eighteenth-century liberalism clearly identified it with Locke, and clearly connected Lockean natural rights with the American founding. This understanding was paradigmatic both for the original Progressives and those who would later take up the Progressive agenda. Franklin D. Roosevelt provides a pertinent illustration. Roosevelt consciously grounded his 1932 presidential campaign and New Deal in the ideas of the Progressive generation that had preceded him, and especially in Wilson's brand of Progressivism.[21] And like the Progressives, Roosevelt knew that in speaking of the origins of American government, he had to begin with the natural-rights doctrine of the Declaration. In his 1932 "Campaign Address on Progressive Government" (also known as the "Commonwealth Club Address"), even as Roosevelt argued for a new conception of

[17] Jean-Jacques Rousseau, *Second Discourse* (1755), in *The First and Second Discourses*, ed. Roger D. Masters, trans. Roger D. and Judith R. Masters (New York: St. Martin's Press, 1964), esp. 141–42. See also Rousseau, *On the Social Contract*, ed. Roger D. Masters, trans. Judith R. Masters (New York: St. Martin's Press, 1978), esp. 46, 62.

[18] Wilson, *The State*, section 18.

[19] Rousseau, *Second Discourse*, 102–3.

[20] Goodnow, "American Conception of Liberty," 55, 57.

[21] Franklin D. Roosevelt, "Campaign Address on Progressive Government," September 23, 1932, in Samuel I. Rosenman, ed., *Public Papers and Addresses of Franklin D. Roosevelt*, vol. 1 (New York: Random House, 1938), 749–50.

the rights of property that would justify his New Deal, he began by identifying the old conception of these rights as the heart of the American founding. "The Declaration of Independence," Roosevelt proclaimed, "discusses the problem of Government in terms of a contract."[22] In his 1944 Annual Message to Congress, where Roosevelt famously argued for a second, economic "Bill of Rights" to go along with the original, he first traced the old understanding of rights to those "inalienable political rights" which had come from the Declaration.[23] And so we can see that the launching of the new liberalism in America, by the Progressives and their disciples, required a clear understanding of the essence of the old liberalism. Having identified the natural-rights doctrine at the heart of the old liberalism, Progressives understood that that doctrine had to be undercut, or at least redefined, in order for the new liberalism to take hold.

IV. The Progressive Rejection of Property Rights—In Principle

The primary weapon the Progressives employed against the principle of natural rights—and against property rights in particular—was historical contingency. Locke had argued in the *Second Treatise* that the standard for legitimate government is not to be found in history, but in nature—in particular, in the law of nature.[24] The logic of this argument is premised on the assumption that history is merely a record of human action, varying from epoch to epoch, sometimes witnessing events that are more just and sometimes witnessing those that are less so. It seems reasonable to conclude from Locke that one cannot derive a principle of what government *ought* to be from a mere record of what has been or what is; to do so would be to embrace the idea that might makes right, and to deny oneself an external standard of reference for judging the legitimacy of a particular political regime.[25] This is why Locke's articulation of natural rights was so congenial to the American colonists; nature was the ground of appeal for them that transcended the conventional laws and practices of the British regime in North America. The Progressives grasped this central Lockean element of the founding, and saw it for what it was: a

[22] Ibid., 753.

[23] Franklin D. Roosevelt, "Annual Message to Congress," January 11, 1944, in Basil Rauch, ed., *The Roosevelt Reader* (New York: Holt, Rinehart, 1957), 347.

[24] Locke, *Second Treatise*, section 6.

[25] Locke addresses the historical critique of his state-of-nature thesis in sections 101–18 of the *Second Treatise*, although the argument I refer to here is based on the logic of the work as a whole. The notion that justice can be found in the particulars of history reminds one of Friedrich Nietzsche's devastating critique of such a notion as an "idolatry of the factual" in Nietzsche, *On the Advantage and Disadvantage of History for Life*, trans. Peter Preuss (Indianapolis, IN: Hacket, 1980), 47—which is not to suggest that Nietzsche had much admiration for Lockean natural-rights theory either.

permanent barrier to changing the aim and scope of government in accord with what they believed were new historical demands.

Dewey, Wilson, and other Progressives thus asserted historical contingency against the Declaration's talk of the permanent principles underlying man's individual rights of property. The preeminence of property rights may have been appropriate, Progressives argued, as a specific, time-bound response to the tyranny of King George III, but, they concluded, all government must be understood as a product of its historical context. The great sin of which the founding generation had been guilty was not its adherence to natural rights of property, but rather its belief that the natural-rights doctrine was meant to transcend the particular circumstances of that era. Such a conception of the founding provided a stark contrast to the one that Abraham Lincoln had offered in 1859, when he wrote of the Declaration and its principal author: "All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times."[26]

As if speaking directly to Lincoln's ahistorical depiction of the founding, Dewey complained that the founders "lacked historic sense and interest" in explicating their natural-rights doctrine, and that they had a "disregard of history."[27] To this disregard of history, Dewey opposed a narrative of historical contingency. The natural-rights theory that undergirded the founders' conception of property rights had, Dewey argued, "blinded the eyes of liberals to the fact that their own special interpretations of liberty, individuality, and intelligence were themselves historically conditioned, and were relevant only to their own time. They put forward their ideas as immutable truths good at all times and places; they had no idea of historic relativity."[28] Instead of attacking the idea of property rights directly, Dewey placed them within the context of liberalism's development over time. It is in this way that liberalism can come to have a meaning in one era that is exactly opposite to its earlier meaning. The idea of liberty was not frozen in time, Dewey contended, but had instead a history of evolving significance. The history of liberalism was progressive—it told a story of the move from more primitive to more mature forms of liberty. Property rights were a characteristic of earlier liberalism.

[26] Abraham Lincoln, letter to Henry L. Pierce and others, April 6, 1859, in *Speeches and Writings, 1859–1865*, ed. Don E. Fehrenbacher (New York: Literary Classics of the United States, distributed by the Viking Press, 1989), 19.

[27] Dewey, *Liberalism and Social Action*, 40–41. Dewey's claim here seems to fly in the face of the deep reflection on history exhibited by most of the founding generation. To take *The Federalist* as only one example, the entire argument can be said to proceed from an understanding of the challenges popular government had faced since the time of ancient Greece, and it draws on the contributions made to the science of politics by thinkers from various points in history. See, for example, Alexander Hamilton, *Federalist No. 9*, in Carey and McClellan, eds., *The Federalist*, 37–38.

[28] Dewey, *Liberalism and Social Action*, 41.

Wilson, too, sought to explain away the property-rights origins of the American regime by casting them in historical perspective. He did so by interpreting the Declaration in such a way as to confine its ideas to the founding era. In a 1911 address ostensibly honoring Thomas Jefferson, he admonished his audience: "if you want to understand the real Declaration of Independence, do not repeat the preface."[29] By this he meant, of course, that one ought not look to that part of the Declaration which enshrines natural rights as the focal point of American government. If one were to take Wilson's advice, one would turn one's attention away from abstract notions like the rights of property and focus instead on the litany of grievances made against George III; one would conceive of the Declaration as a merely practical document, understood as a time-bound response to a set of specific (and now long past) historical circumstances. Since those circumstances are long gone, so too should be our conception of private property that was created to address them. Wilson thus claimed that "we are not bound to adhere to the doctrines held by the signers of the Declaration of Independence," and that every Fourth of July, instead of a celebration of the timeless principles of the Declaration, should instead "be a time for examining our standards, our purposes, for determining afresh what principles, what forms of power we think most likely to effect our safety and happiness."[30]

In order to see property rights through the lens of history—to see that their significance is contingent upon social circumstances—one must detach them from their mooring in nature. This was the goal of Wilson's account of the origin of political power in *The State*, which he offered as a "destructive dissolvent" to the social compact theory of Locke.[31] The problem with Locke was that his account of nature, upon which his entire standard of legitimate government rests, was purely speculative; the true foundation of government, Wilson countered, could only be uncovered by looking to the actual history of its development, not to conjecture or theory. Even while conceding that historical knowledge of the actual origins of government was imperfect, Wilson reasoned that even limited historical knowledge is far preferable to engaging in "a priori speculations" about the origins of government. In America, Progressives believed that a natural account of individual property rights was being employed to defy the wishes of popular majorities, and the only foundation for these rights was the philosophic musing of social compact theory—a theory which, according to Wilson, "simply has no historical foundation."[32]

[29] Woodrow Wilson, "An Address to the Jefferson Club of Los Angeles, May 12, 1911," in *The Papers of Woodrow Wilson*, 69 vols. (hereafter cited as *PWW*), ed. Arthur S. Link (Princeton, NJ: Princeton University Press, 1966–1993), 22:34.

[30] Woodrow Wilson, "The Author and Signers of the Declaration of Independence," in *PWW*, 17:251.

[31] Wilson, *The State*, 11.

[32] Ibid., 13–14.

Wilson's model for a form of government that looked for its principles to history, as opposed to nature, was England. As in Goodnow's account of the distinction between the American and English conceptions of rights (mentioned in Section III), Wilson worried about the American belief that permanent, abstract rights are enshrined in a written constitution that can be used to trump organic legislative development. Like Dewey, Wilson lamented the historical blindness of early liberals, and thought that America's written constitution exacerbated the inflexibility of early American notions of rights. The problem was made worse by the difficulty of the constitutional amendment process, which reinforced the idea that change and adaptation—what Wilson called organic development—were to be avoided. Too many Americans really looked at their constitution as a contract—as a permanent, definite creation not subject to organic development. "We have been too much dominated," Wilson worried, "by the theory that our government was an artificial structure resting upon contract only."[33] Wilson's fear was not only that the ahistorical conception of rights was inhibiting organic growth (and the new, enlarged role that Progressives had in mind for the national government), but that American government itself would ultimately burst and fall apart as a result. This fear can be traced back to Wilson's earliest days of thinking about government, as illustrated in the following 1876 entry to an early diary on the anniversary of American independence: "How much happier [America] would be now if she had England's form of government instead of the miserable delusion of a republic. A republic too founded upon the notion of abstract liberty! I venture to say that this country will never celebrate another centennial as a republic. The English form of government is the only true one."[34]

In contending for a more flexible, organic constitutionalism (in other words, the unwritten British constitution), Wilson argued that liberty and rights were concepts that could not be permanently defined. "Liberty fixed in unalterable law would be no liberty at all," he wrote. Liberty for the founding generation meant a doctrine of rights which protected the individual from tyranny in government, even when such a government might be fueled by a majority. But in his own day, Wilson reasoned, that founding-era conception of liberty was proving an impediment to liberty as it ought then to be understood. Liberty in contemporary times, Wilson explained, meant the liberty of majorities to use the power of government as they saw fit. Liberty thus had a history of evolving meaning, and the new meaning required an overturning of the old.[35] In his new conception of liberty as the right of majorities to rule unbounded by individual rights such as the right to property, Wilson sketched an idea that would later be taken up by Theodore Roosevelt when he crusaded against antimajoritar-

[33] Woodrow Wilson, "The Modern Democratic State," in *PWW*, 5:65–68.

[34] Woodrow Wilson, "From Wilson's Shorthand Diary," July 4, 1876, in *PWW*, 1:148–49.

[35] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 4.

ian judicial decisions. Too often, Roosevelt believed, Progressives had been successful in enacting parts of their legislative agenda—workers' compensation or labor regulation, for instance—only to see those successes turned into defeats when overturned by the courts.[36] Majority tyranny was no longer a problem that warranted concern, according to Roosevelt: "I have scant patience with this talk of the tyranny of the majority. . . . We are today suffering from the tyranny of minorities. . . . The only tyrannies from which men, women, and children are suffering in real life are the tyrannies of minorities."[37] This formulation demonstrates Roosevelt's belief that notions of liberty must be taken from "real life"—life which had changed drastically from the days of the founding—and not from abstract doctrines about the natural rights of the individual.

Goodnow, like Roosevelt, was quite direct in his 1911 criticism of the natural conception of rights. While acknowledging that the founders' system of government "was permeated by the theories of social compact and natural right," he contended that such theories were "worse than useless" because they "retard development":[38] the protections for individual liberty and property, in other words, inhibit the expansion of government. In contrast to this problem in America, Goodnow praised the conception of rights that was then becoming prevalent in Europe. There, he explained in 1916, "the rights which [an individual] possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society. Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action."[39] Property rights, under this model, could be adjusted to accommodate perceived social necessity. Indeed, as previously discussed, this is precisely the argument that Franklin Roosevelt would subsequently employ when drawing on Progressive principles in explicating his New Deal. When discussing the founding-era conception of fundamental rights, for example, in his "Campaign Address on Progressive Government," Roosevelt contended that "the task of statesmanship has always been the redefinition of these rights in terms of a changing and growing social order."[40]

V. The Progressive Rejection of Property Rights—In Practice

The Progressive critique of the principles underlying the original American understanding of rights paved the way for an attack on those rights

[36] Prominent examples of cases that particularly aggravated Progressives are *Lochner v. New York*, 198 U.S. 45 (1905), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[37] Theodore Roosevelt, "The Right of the People to Rule," 251–52.

[38] Frank J. Goodnow, *Social Reform and the Constitution* (New York: The Macmillan Company, 1911), 1, 3.

[39] Goodnow, "American Conception of Liberty," 57.

[40] Franklin D. Roosevelt, "Campaign Address on Progressive Government," 753.

in practice. Progressives called for significant changes both to political institutions and to national policy that were animated by their new conception of rights. Having argued that rights such as property should no longer be understood as grounded in nature, Progressives were liberated to seek changes to institutional arrangements that had originally been predicated on the old liberalism's privileging of natural rights. While it is impossible here to treat the numerous and varied ways in which the Progressive Movement affected the development of American political institutions, it is especially instructive to look at how Progressives conceived of the judiciary. The Progressive treatment of the judiciary is particularly relevant because it demonstrates how the meaning and relevance of property rights were transformed in the Progressive Era. As discussed in Section III, both Goodnow and Wilson saw it as a critical (but not felicitous) difference between America and England that fundamental rights in America were regarded as natural as opposed to conventional, and that they were thus distinct from and above the ordinary positive law. Such a construction, they knew, implied a role for the judiciary as the guardian of fundamental rights[41]—a role which could put it at odds with the organic development of legislation if such legislation was deemed a threat to the original meaning of rights.

In Theodore Roosevelt's view, this is exactly what had happened, and he became the leading Progressive antagonist to a judiciary that he believed was upholding the old theory of natural property rights at the expense of Progressive majorities. Roosevelt was especially aghast at instances where state courts had overturned legislation achieved by Progressive majorities, and he lamented they had done so in the name of property rights or freedom of contract.[42] This led him to advocate, in his unsuccessful third-party campaign to recapture the presidency in 1912, what can best be described as popular referenda on judicial decisions—or, to put it in the language found in the Progressive Party platform of 1912: "That when an Act, passed under the police power of the State, is held unconstitutional under the State Constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the Act to become law, notwithstanding such decision."[43] When judges defied the will of the people in the name of property rights, Roosevelt argued, this represented a corruption of democracy. "Democracy," he con-

[41] I am well aware that the founders did not see the judiciary as the exclusive guardian of fundamental rights, and that there is much debate on how the founders understood judicial review and the role of the courts in invalidating legislation. That debate is well beyond the scope of this essay, and probably beside the point. For us, what is relevant is that the Progressives understood the original conception of the judiciary in this way.

[42] See, for example, *Ives v. South Buffalo Railroad*, 201 N.Y. 271 (1911), where the New York Court of Appeals overturned the state's Workmen's Compensation Act of 1910.

[43] "Progressive Party Platform of 1912," in Pestritto and Atto, eds., *American Progressivism*, 276.

tended, "has a right to approach the sanctuary of the courts when a special interest has corruptly found sanctuary there."[44] Roosevelt almost always used the epithet "special interest" in cases where property rights had been employed as protection against majority will. "Special interest" seems to have meant, for Roosevelt, any nonmajority entity asserting its natural property rights. It was the "special interests"—and their property rights in particular—that stood in the way of Progressive social legislation. The courts, Roosevelt complained, "have construed the 'due process' clause[45] of the State Constitutions as if it prohibited the whole people of a State from adopting methods of regulating the use of property so that human life, particularly the lives of the working men, shall be safer, freer, and happier."[46] And whereas, under the old liberalism, property rights had been grounded in human nature and were understood as an integral part of the range of rights inherent in human personhood, Roosevelt conceived instead of "human rights" and "property rights" in opposition to one another. In calling for popular referenda on judicial decisions, he urged "that in such cases where the courts construe the due process clause as if property rights, to the exclusion of human rights, had a first mortgage on the Constitution," the people should be permitted to overturn the courts' adherence to the rights of property.[47] Judges who struck down laws due to a judgment that they contravened property rights were simply substituting a "political philosophy" for "the will of the majority."[48]

[44] Theodore Roosevelt, "The Right of the People to Rule," 254.

[45] The Fifth Amendment to the U.S. Constitution stipulates that no person shall be "deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment applies that exact language to the state governments, and most state constitutions have a similar provision. Understood in the context of Roosevelt's complaint, the "due process" clause had been employed by courts to protect the liberty interest of individuals against the exercise of regulatory or "police" power by state governments. In the *Lochner* case, for example, where the state legislature had enacted a law limiting the number of hours bakers could agree to work, the U.S. Supreme Court reasoned that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution," and that "the right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right" (198 U.S. 45 [1905], at 53). The Court continued: "There is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint" (id. at 56). With respect to the regulation of bakers' hours, the Court concluded that "there is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go" (id. at 58).

[46] Theodore Roosevelt, "The Right of the People to Rule," 254.

[47] Ibid.

Roosevelt's strong reaction to courts that had employed the doctrine of property rights to thwart legislatures in "regulating the use of property" naturally raises the question of what kind of regulation he had in mind, and why it would have been considered as a threat to the rights of property. As had been the case in founding-era liberalism, Roosevelt recurred to the principle of equality. But equality for the founders, as outlined above, meant an equality of rights, and the equal protection of rights might often lead, as Madison explained, to an inequality of results or rewards, due to the "diversity in the faculties of men, from which the rights of property originate."[49] So equality and the protection of individual property rights were, for the founders, two sides of the same coin. Roosevelt, by contrast, spoke of an "equality of opportunity," and meant something very different, as became clear in his 1910 "New Nationalism" speech. Roosevelt's equality meant using the power of government to destroy the "special interests" or "special privilege"—defined, as I have explained, as those asserting property rights against the will of the majority. These "special interests" had used the "rules of the game" to benefit themselves and not society as a whole; "I stand," Roosevelt proclaimed, "for having those rules changed so as to work for a more substantial equality of opportunity *and of reward*."[50] Unlike Madison, who accepted the fact that unequal rewards would result from the equal enforcement of individual property rights, Roosevelt seems to have called for the unequal

[48] Ibid., 257. Roosevelt here echoes the argument of Supreme Court Justice Oliver Wendell Holmes—whom Roosevelt had appointed to the Court—that the Constitution was not built on any political theory and that courts ought not use a theory of the Constitution to strike down legislation. See Holmes's dissent in *Lochner v. New York*, 198 U.S. 45 (1905), at 75–76. It should also be noted that Woodrow Wilson did not attack the judiciary in the way that Roosevelt did. In this respect, Wilson had more foresight than Roosevelt, for he foresaw the potential for the judiciary to be an agent of progress. There could well come a time, Wilson reasoned, when majority sentiment would lag behind the demands of progress, and that would be a time for judges to step up and take the lead. In any event, Wilson's defense of the judiciary should not be misconstrued; it came not from an attachment to the judiciary as a protector of individuals against Progressive majorities, but instead from a gratitude that the courts had often been willing to read the Constitution flexibly: "We can say without the least disparagement or even criticism of the Supreme Court of the United States that at its hands the Constitution has received an adaptation and an elaboration which would fill its framers of the simple days of 1787 with nothing less than amazement. The explicitly granted powers of the Constitution are what they always were; but the powers drawn from it by implication have grown and multiplied beyond all expectation, and each generation of statesmen looks to the Supreme Court to supply the interpretation which will serve the needs of the day" (Wilson, *Constitutional Government*, 157–58). Wilson, in other words, was able to see past the immediate sins of the Court during his own day, and to understand (correctly, as it turns out) that the Court was fundamentally a progressive institution—that it had helped the country to escape the bonds of its original constitutionalism, and would likely be a force for a similar kind of progressive change in the future.

[49] Madison, *Federalist No. 10*, 43.

[50] Theodore Roosevelt, "The New Nationalism" (1910), in Pestritto and Atto, eds., *American Progressivism*, 214–15 (emphasis added).

enforcement of rights (changing the "rules of the game," to use his language) so as to produce more equal results.

Roosevelt justified changing the "rules of the game"—that is, abandoning the equal enforcement of natural property rights—because he subscribed to the Progressive redefinition of rights themselves. One's right to property did not come, as it had for the eighteenth-century liberalism that influenced the founders, through an account of nature where individual labor gave title to property. Rather, one had a "right" to property, in Roosevelt's view, only insofar as it was socially beneficial for one to have it. Title to property became contingent upon its serving a social purpose. "We grudge no man a fortune which represents his own power and sagacity," Roosevelt explained, "when exercised with entire regard to the welfare of his fellows."[51] Property rights were no longer moored in nature, to be used as a trump against social action, but were instead, as Goodnow had urged they be, "conferred . . . by the society to which [an individual] belongs," and determined by "social expendiency."[52] Roosevelt was explicit about the contingency of property rights upon social utility, and about the new scope of state power which would correspond with such a conception of rights:

> We grudge no man a fortune in civil life if it is honorably obtained *and well used.* It is not even enough that it should have been gained without doing damage to the community. *We should permit it* to be gained only so long as the gaining represents *benefit to the community.* This, I know, implies a policy of far more active governmental interference with social and economic conditions in this country than we have yet had, but I think we have got to face the fact that such an increase in governmental control is now necessary.[53]

Roosevelt was conscious that his vision for equalizing rewards—the "Square Deal," as he called it—was not compatible with the original American conception of property rights, but was, instead, founded upon a new theory. "We are face to face with the new conceptions of the relations of property to human welfare," he proclaimed. In justifying this move from the old to the new, he once again employed the construction of property rights in opposition to human rights, where property is not an extension of the human person but serves instead to alienate man from his own welfare. We had been brought to this point, Roosevelt concluded, "because certain advocates of the rights of property as against the rights of men have been pushing their claims too far."[54]

[51] Ibid., 217.
[52] Goodnow, "American Conception of Liberty," 57.
[53] Theodore Roosevelt, "The New Nationalism," 217 (emphasis added).
[54] Ibid., 220.

VI. Conclusion

This new conception of property rights undergirded a host of policies—advocated not only by Theodore Roosevelt but by Progressives generally—that fulfilled the call for "far more active governmental interference with social and economic conditions." Progressives sought not only to have the federal government supervise the manner in which private wealth was earned, but also to have the government redistribute private wealth in order to ensure that it would serve the common good. To this end, Progressives pursued a graduated income tax and a substantial inheritance tax, both of which were called for in the 1912 Progressive Party platform. Progressives also fought successfully for the ratification of the Sixteenth Amendment to the Constitution, which was written to overcome a Supreme Court decision denying to the federal government the power to tax certain forms of income.[55]

The dual aims of centralized regulation of economic activity and the redistribution of wealth comprised the heart of Theodore Roosevelt's "New Nationalism" campaign, the Progressive Party platform, and many other Progressive enterprises.[56] Progressive Era reforms thus helped to shape the future course of liberalism in the twentieth century. These reforms were grounded on a novel interpretation of the political theory of the American founding that was ultimately adopted, as Section III explains, by Franklin Roosevelt in his establishment of the New Deal order for American national government. This essay has endeavored to show how the Progressive reforms were built upon a rejection of the rights of property, both in principle and in practice.

The new liberalism in America was built, in other words, upon a Progressive transformation of the natural-rights principles that had served as a foundation for the old liberalism, and thus it seems fitting that new liberals have come to prefer the label "progressive."

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[55] Specifically, in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), the Supreme Court had ruled that federal taxes on income derived from interest, dividends, and rents were "direct" taxes and thus were constitutionally required to be apportioned among the states on the basis of population. Taxes on wages were still considered to be indirect, and thus not subject to the apportionment requirement. *Pollock* thus made the question hinge on the source of income. In order to nullify this point, the Sixteenth Amendment declared that taxes on income, "from whatever source derived," could be levied by the federal government "without apportionment among the several States, and without regard to any census or enumeration."

[56] See, for example, the relevant works in the Social Gospel movement, which constituted the religious arm of Progressivism. Particularly revealing is Walter Rauschenbusch, *Christianizing the Social Order* (New York: The Macmillan Company, 1912), 419–29, where Rauschenbusch calls for the government to "resocialize property."