

Progressivism and the New Science of Jurisprudence

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More than any other branch of government, the judicial branch has adopted a historicist view of the Constitution and constitutionalism. This historicist view is not simply that we have, of necessity, an interpretable Constitution. It goes further and posits that the Constitution must be interpreted in light of a Progressive understanding of society in which the historically situated, contingent nature of the state, the individual, society, and constitutionalism itself determines the meaning of our fundamental law.

This understanding is in a considerable amount of tension with the earlier American constitutionalism of limited and dispersed powers serving the “Laws of Nature and of Nature’s God.” As Herman Belz has noted:

The conception of the constitution as a formal legal instrument or code giving existence to government and prescribing and limiting the exercise of its powers, rather than as the basic structure of the polity, not consciously constructed but growing organically through history, was one of the distinctive achievements of the American Revolution, and oriented constitutional description and analysis in the early republic toward a legalistic approach.¹

¹ Herman Belz, “The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship,” *The American Journal of Legal History*, Vol. 13, No. 2 (April 1969), p. 111.

The modern historicist, as opposed to legalistic, approach to the Constitution has been embraced by judicial appointees of different Presidents from different decades, Democrat and Republican, “liberal” and “conservative.” A major transformation in American political thought was necessary to bring such a diverse cast of characters to the same organic view of the Constitution.

This transformation is little understood. Legal historians have preferred to concentrate on legal education or legal theory narrowly construed rather than on the philosophical ideas that animate thought and action.² Political theorists for the most part have not filled the gap. We can only begin to assess the new constitutionalism—as well as the new science of jurisprudence that is its handmaiden—by tracing its philosophical origins.³

² The reluctance of historians to deal with philosophical categories, including those of the old constitutionalism that was replaced by the new, has been noted by Mark Warren Bailey in *Guardians of the Moral Order* (DeKalb, Ill.: Northern Illinois University Press, 2004), pp. 2–6.

³ As Belz notes, a strain of constitutional realism became evident in historical studies written in the years after Reconstruction by such pre-Progressive scholars as John W. Burgess, Herman Edward von Holst, J. Franklin Jameson, Alexander Johnston, Brooks Adams, George Bancroft, Christopher Tiedeman, and Sidney George Fisher. These men emphasized the importance of extraconstitutional influences on the practice of American politics and the development of constitutional understandings,

In 1863, Abraham Lincoln declared that America “was conceived in liberty, and dedicated to the proposition that all men are created equal.” In Lincoln we can see the culmination of the older understanding of the American constitutional order and the political principles it enshrined. Our Constitution and its principles were, in Lincoln’s view, handed down by the Founding Fathers, who bequeathed them to later generations to preserve. From relatively early in his adult life through the coming and prosecution of the Civil War, Lincoln exemplified the belief in formal constitutionalism overlaid with the complementary belief in the necessity of active statesmanship for preserving it.

Lincoln’s rhetoric and actions are testaments to the propositions that there are such things as natural rights that do not change with time; that the American Constitution is dedicated to preserving them; and that the role of great political actors, while responding to urgent necessities, is to look backward rather than forward. For Lincoln, the state is more formal than organic; history is not destined to unfold in a democratic direction; and democracy itself, because of its indissoluble link with the passions rather than reason, is always combustible. Moral and political regress is as likely—perhaps more likely—than progress. Furthermore, there are certain fixed principles beyond which progress is impossible. Sharing with Plato and Aristotle the belief that negative regime change is an ever-present possibility, Lincoln was profoundly wary of the very notion of progress; evolution and growth were not part of his political vocabulary.

American political thought subsequent to Lincoln

from the growth of political parties to the particular actions of the branches of government. While they went “beyond the façade of the formal written document” and examined particular historical circumstances, they did not, for the most part, rely on a strong theory of History or concentrate their attention on the role of the Supreme Court in promoting organic growth. See Belz, “The Constitution in the Gilded Age,” *passim*. Woodrow Wilson would become the most prominent exponent of a theory of History that suggested evolution in a particular direction—though he saw the executive rather than the judicial branch as primary expositor and superintendent of this evolution.

for the most part has undermined Lincoln’s (and the Founders’) conception of American constitutionalism and the philosophical proposition on which it rests. This transformation in political thought, commencing after Reconstruction and running through the Progressive era of the early 20th century, undergirds many forms of political action in America.

This essay will discuss the Progressive transformation of jurisprudence, but it will begin by explaining the Progressive philosophy as a coalescing of social Darwinism and pragmatism into a powerful intellectual movement that decisively informs institutional attitudes and behaviors—particularly, starting in the early 20th century, those of the judicial branch. Only by understanding this coalescence of social Darwinism and pragmatism can we identify the source of the novel legal ideas of Progressive jurists in the 20th century and today.

THE SOCIAL DARWINIST MOMENT

In the America of the late 19th century, the old understanding of the nature and permanent limits of politics was dead or dying. The death of the old view of politics was necessarily linked to a reevaluation and redefinition of the American Founders’ political ideas. The death was hastened, and arguably caused, by the arrival on the intellectual scene of the various doctrines and philosophic assumptions commonly associated with the phrase “social Darwinism.” As Richard Hofstadter has observed, “In some respects the United States during the last three decades of the nineteenth and at the beginning of the twentieth century was *the* social Darwinian country.”⁴

The Basic Tenets of Social Darwinism

On the foundation laid by the social Darwinists and those in allied philosophical movements, many of

⁴ Richard Hofstadter, *Social Darwinism in American Political Thought*, rev. ed. (Boston: Beacon Press, 1955). The phrase “social Darwinism” gained widespread intellectual currency as an appropriate descriptor of an amalgam of ideas only with the publication of the first edition of this book in 1944.

the most influential American political thinkers and actors—particularly judicial actors—came, in the 20th century, to share six core, overlapping ideas regarding the nature of politics and constitutional government:

- *First*, that there are no fixed or eternal principles that govern, or ought to govern, the politics of a decent regime. Old political categories are just that, and Lincoln’s understanding of the Founders’ Constitution, to the extent it is worthy of any consideration at all, is a quaint anachronism.
- *Second*, that the state and its component parts are organic, each involved in a struggle for never-ending growth. Contrary to the Platonic ideal of *stasis*, and contrary as well to the Aristotelian notion of natural movement toward particular ends, the Progressive organic view of politics suggests that movement *itself* is the key to survival and the political “good.”
- *Third*, that democratic openness and experimentalism, especially in the realm of expression, are necessary to ensure vigorous growth; they are the fertilizer of the organic state. There are no limits to our experimenting with our institutions and laws. Such experimentalism implies a particular sort of consequentialism or utilitarianism when judging institutions and laws: If no experiments are off-limits, the only way to distinguish good policy from bad is pure consequentialism.
- *Fourth*, that the state and its component parts exist only in History, which is understood as an inevitable process rather than as a mere chronicling of events.
- *Fifth*, that some individuals stand outside of this process and must, like captains of a great ship, periodically adjust the position of this ship in the river of History to ensure that it continues to move forward rather than run aground and stagnate. Politics demands an elite class, possessed of intelligence as a method, or reason directed to instrumental matters rather than fixed truth. This elite class springs into action

to clear obstacles in the path of historical progress in the form of outdated institutions, laws, and ideas.

- *Sixth*—and a direct corollary to the strong historicism reflected in the fourth idea, that the moral-political truth or rightness of action is always relative to one’s moment in History, or the exact place of the ship in the river of time.

The Influence of Darwin on Political Philosophy

According to the social Darwinists and those who would follow in their footsteps, a new social science was being formed from Darwinian principles, the organic, genetic, and experimental logic of which could be brought to bear on an array of human problems heretofore considered unsolvable, or at least permanent. Darwin came to be understood as a political philosopher and political scientist rejecting old modes and orders.

No one more clearly explicates the nature of this new science than John Dewey—one of the most prominent Progressive philosophers—in an important essay entitled “The Influence of Darwinism on Philosophy.”⁵ By the time he wrote it in 1909, Dewey was effectively summarizing the intellectual tenor of his times. He was giving an account of the origins of an already dominant pattern of American social and political thought.⁶

As Dewey explains, the publication of Darwin’s *Origin of Species* marked a revolution not only in the natural sciences, but also in the human sciences, which can continue in their old form only because of habit and prejudice. To speak of an “origin” of species is itself

⁵ John Dewey, “The Influence of Darwinism on Philosophy,” in *The Influence of Darwinism on Philosophy and Other Essays in Contemporary Thought* (New York: Henry Holt and Co., 1951).

⁶ The only other contender for the throne was the vigorous, pragmatic individualist frontier strain of thought associated with such figures as Frederick Jackson Turner and Mark Twain, but this strain was never as theoretically unified as social Darwinism and never found the same acceptance among the intellectual classes. Not coincidentally, perhaps, it could not be said to have undermined, in any direct or consistent manner, the principled understanding of the American Founding articulated by Lincoln.

a revolution in thought, implying that the organic sciences as well as the inorganic can concentrate on change rather than stasis.

In Dewey's words, "The influence of Darwin upon philosophy resides in his having conquered the phenomena of life for the principle of transition, and thereby freed the new logic for application to mind and morals and life."⁷ Darwin, more than anyone else, allows us to move from old questions that have lost their vital appeal to our perceived interests and needs. We do not solve old questions, according to Dewey:

[W]e get over them. Old questions are solved by disappearing, evaporating, while new questions corresponding to the changed attitude of endeavor and preference take their place. Doubtless the greatest dissolvent in contemporary thought of old questions, the greatest precipitant of new methods, new intentions, new problems, is the one effected by the scientific revolution that found its climax in the "Origin of Species."⁸

Dewey's Darwin rejects "the sacred ark of permanency" that had governed our understanding of human beings. Darwin challenges the most sacred belief in the Western tradition, one that had been handed down from the Greeks: the belief in the "superiority of the fixed and final," including "the forms that had been regarded as types of fixity and perfection."⁹ The Greeks expounded upon the characteristic traits of creatures, attaching the word *species* to them. As they manifested themselves in a completed form or final cause, these species were seen to possess uniform structure and function and to do so repeatedly, to the point where they were viewed as unchanging in their essential being. All changes were therefore held "within the metes and bounds of fixed truth."¹⁰ Nature

⁷ Dewey, "The Influence of Darwinism on Philosophy," pp. 8–9.

⁸ *Ibid.*, p. 19.

⁹ *Ibid.*, p. 1.

¹⁰ *Ibid.*, p. 6. There are problems with this Deweyan tendency to identify nature as final cause or form with changelessness. Such

as a whole came to be viewed as "a progressive realization of purpose."¹¹ The Greeks, then, propounded ethical systems based on purposiveness.

But now, according to Darwin, "genetic" and "experimental" processes and methods can guide our inquiries into the human things. In fact, on Darwinian terms, change is the essence of the good, which is identified with organic adaptation, survival, and growth. With experimental social arrangements, change in useless directions can quickly be converted into change in useful directions. The goal of philosophy is no longer to search after absolute origins or ends, but to search after the processes that generate the right kind of change.¹² What *materially is* becomes more important than what *ought to be*, because only the former can be observed by the new empirical science.

In the absence of fixity, morals, politics, and religion are subject to radical renegotiation and transformation. Essences are no longer the highest object of inquiry, or indeed any object of inquiry. Rather, science concentrates on particular changes and their relationship to particular useful purposes, which depend on "intelligent administration of existent conditions."¹³ Philoso-

an account comes close to capturing the essence of Plato's forms, but for Aristotle there are no fixed, immutable ideas separate from matter. Rather, things develop to their natural perfection, which for human beings is happiness, relying on a combination of intellectual and moral virtue. There is a tension in Aristotle between philosophy (man as knower) and politics (man being a political animal—i.e., a virtuous actor—rather than, or in addition to, a knower). It is far from clear, in either Aristotle or Plato, how these virtues interact at all levels. What *is* clear is that there is no simple teleology in Aristotle when it comes to human beings. Simple teleologies are for the lower forms, whereas for humans there are choices involving politics, ethics, and philosophy, and nature many times misses its mark. Furthermore, for Aristotle, essence is not form simply, but activity or what a thing does. In his science, repose does not represent the highest state of being. Although there is a good amount of truth to Dewey's characterization of Western science, or philosophy, as the search for the transcendent, he seems wrong insofar as he puts a Platonic gloss on Aristotle.

¹¹ Dewey, "The Influence of Darwinism on Philosophy," p. 6.

¹² *Ibid.*, p. 13.

¹³ *Ibid.*, p. 15.

phy is reduced from the “wholesale” to the retail level, from the realm of general ideas to the realm of particular effects.¹⁴ Through the emphasis on administration of concrete conditions, Dewey claims, responsibility is introduced to philosophy. Instead of concentrating on metaphysics, or even politics in the full Aristotelian sense, we are in effect freed to concentrate on policy—or, in Dewey’s language, “the things that specifically concern us.”¹⁵

The Reduction of Political Philosophy to Modern Scientific Method

Darwin broke down the last barriers between scientific method and reconstruction in philosophy and the human sciences generally because of his attack on the view that human nature is different from the physical sciences and therefore requires a different approach. Briefly put, the Progressive view is that the physical and moral (or “social”) sciences are indistinguishable. This is contrary to Aristotle’s understanding that different methods of inquiry are required for different kinds of beings: There is no single scientific or philosophic mode of inquiry that applies across the board. Philosophy and science—the human striving after wisdom or knowledge—seeks an understanding of the *highest* things through an examination of *all* things according to methods appropriate to each.

One way to understand Dewey’s enterprise is to view it as an attempt to reintegrate science and philosophy, which had been torn asunder by modernity. But while Dewey seeks their reintegration, he does so on uniquely modern terms by *reducing* philosophy to empirical, naturalistic science—the process of science without the ends or essences or highest things.¹⁶

According to Dewey, we can therefore reduce human sciences, including politics, to relatively simple principles, contrary to the Aristotelian or ancient

view, which held that politics is much *harder* than physics precisely because one must take into account unpredictable behavior and choice-worthy, purposive behavior toward *complex* ends rather than more predictable motions and processes toward simple ends. The human sciences, which at the highest level involve statesmanship, are, for Aristotle, more complex than the physical and rely on great practical, experiential wisdom as well as theoretical wisdom.¹⁷ By contrast, for Dewey and his generation, Darwinism seemed to break down the barriers between the human and the non-human.

Dewey’s elucidation of the utility of Darwinism to social science and the new philosophy of man draws from the thought of a number of the major social Darwinist thinkers, including William Graham Sumner, Lester Frank Ward, and W. E. B. DuBois. Together with Dewey, these men provided many of the intellectual categories of their age, and their ideas continue to exert a powerful control over political and jurisprudential discourse to the present day. Collectively, they point to a view of society as an organism that, constantly in the throes of change, must grow and evolve or die.

For the social Darwinists, to look backward—whether to founding principles or any other fixed standard of political right—inevitably reflects a death wish. While to some degree borrowing Hegelian historical categories, American social Darwinism shares no single rational end point with Hegelianism. Change in itself becomes the end in many instances and is always preferable to its opposite.

PRAGMATISM AND PROGRAMMATIC LIBERALISM

Despite its defining many of the terms of intellectual discourse in late 19th century America, social Darwinism would not become known as the quintessential American philosophy. This honor belongs to prag-

¹⁴ *Ibid.*, p. 16.

¹⁵ *Ibid.*, p. 17.

¹⁶ See, for example, John Dewey, *Reconstruction in Philosophy* (Boston: Beacon Press, 1957), *passim*.

¹⁷ This is the reason why we do not expect great statesmen—exercising practical and theoretical wisdom—to be young, whereas mathematicians might be.

matism. In fact, it has recently been suggested that by the 1890s, social Darwinism was a “fading ideology.”¹⁸

However, the links between pragmatism and social Darwinism are profound, and it is impossible to understand the “American philosophy” of pragmatism without understanding its relationship to social Darwinism. It is also impossible to dismiss social Darwinism’s enduring influence on American political thought. The pragmatic tradition worked “with the basic Darwinian concepts—organism, environment, adaptation,” and spoke “the language of naturalism.”¹⁹

William James’s reflections on “What Pragmatism Means”²⁰ elucidate the links between these two schools of thought that combined to produce American Progressivism. James recognizes himself as the popularizer of Charles Peirce’s argument that the only meaning of a thought or idea is what conduct or consequences it is fitted to produce.²¹ Even though James rejected the Hegelian–Darwinian historical categories that were never far from the thinking of his fellow pragmatist and younger contemporary John Dewey, the two shared a thoroughgoing skepticism about the tradition of absolutes, a faith in progress, and an emphasis on the process rather than essence of human life and activity.

Pragmatism’s Rejection of Absolute Truths

With Darwinism, pragmatism rejects the “rationalist temper” that is ossifying rather than instrumental and accepts the displacement of design from scientific consciousness.²² According to James, all ideas must be interpreted in light of practical consequences rather than purposes or metaphysical underpinnings. If no practical difference in the realm of consequences can

be found, the debate over any competing notions is idle and useless.²³ There are no important differences in abstract truth that do not express themselves in concrete fact—no principles, absolutes, or *a priori*s can govern the pragmatic method, which is an attitude of casting one’s glance away from first things toward last things, meaning the “fruits, consequences, facts” of life.²⁴

While pragmatism has much in common with earlier empiricism, it is purer in its rejection of finality and its concentration on action and power. However, it does so without the materialist or anti-ideological bias that characterized empiricism.²⁵ Ideas “become true just in so far as they help us to get into satisfactory relation with other parts of our experience.”²⁶ James’s pragmatism therefore contains within it a theory of truth, not just meaning. New ideas are true if they gratify “the individual’s desire to assimilate the novel in his experience.”²⁷

The test of the truth of a proposition is its ability to marry what we know to new facts. Pragmatism thus becomes a method and means to bind old belief to a new set of facts when new beliefs are inchoate, providing a kind of psychic tranquility that prevents internal conflict: “The reason why we call things true is the reason why they *are* true.”²⁸ In short, what works for us is true, and the pragmatist understanding of what works is linked to the inevitability of change and growth. At the very end of his essay “The Will to Believe,” James approvingly quotes Fitzjames Stephen: “We stand on a mountain pass in the midst of whirling snow and blinding mist.... If we stand still we shall be frozen to death. If we take the wrong road we shall be dashed to pieces. We do not certainly know whether there is any right one.”²⁹

¹⁸ Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus, Giroux, 2001), p. 302.

¹⁹ Hofstadter, *Social Darwinism in American Political Thought*, p. 125.

²⁰ William James, “What Pragmatism Means,” in William James, *Essays in Pragmatism*, ed. and int. Alburey Castell (New York: Hafner Press, 1948); originally delivered by James as a lecture in 1906.

²¹ *Ibid.*, pp. 142–143.

²² *Ibid.*, pp. 153–154.

²³ *Ibid.*, pp. 141–142.

²⁴ *Ibid.*, p. 146.

²⁵ *Ibid.*, pp. 144–145, 154.

²⁶ *Ibid.*, p. 147.

²⁷ *Ibid.*, p. 150.

²⁸ *Ibid.* Emphasis in original.

²⁹ William James, “The Will to Believe” (1896), in *Pragmatism: A Reader*, ed. and int. Louis Menand (New York: Vintage Books, 1997), p. 92.

It is hardly clear that these two understandings of pragmatism—as a theory of method to arrive at objective reality and as a theory of subjective satisfaction that might affect the questions we choose to ask—are entirely compatible. Nonetheless, James runs with them, going so far as to argue that even *mystical* experiences are true if they have practical consequences. If “God” works for us—if religious belief is effective in guiding our actions or giving us comfort—then pragmatism cannot deny it.³⁰ Religion—the will to believe—can have its place.

For James personally, belief in the Absolute clashes with other truths whose benefits he hates to give up,³¹ but for others it might not. If belief in the Absolute could be restricted “to its bare holiday-giving value,” it would not clash with James’s other truths,³² for such a belief would understand religious symbols in purely secular terms. Alas, James cannot personally adopt religious belief, for underlying the belief is a system of logic and metaphysics of which he is the enemy.³³

Of course, this opens James and pragmatism to the same lines of criticism that can be directed toward utilitarianism or laissez-faire economics: There can be different truths or goods for different people, depending on what is expedient for them. James’s pragmatism here comes perilously close to reducing all human beings to isolated individuals seeking the greatest good not even for the greatest number, but for themselves. It has no fixed ends beyond growth and practicality, but the direction of this growth is not rationally intelligible in a way that transcends a consequentialist analysis. As James argues:

Rationalism sticks to logic and the empyrean. Empiricism sticks to the external senses. Pragmatism is willing to take anything, to follow either logic or the senses and to count the humblest and most personal experiences. She will count mystical experiences if they have practical consequences. She will take a God who lives in the very dirt of private fact—if that should seem a likely place to find him.

Her only test of probable truth is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experience’s demands, nothing being omitted....

But you see already how democratic she is. Here manners are as various and flexible, her resources as rich and endless, and her conclusions as friendly as those of mother nature.³⁴

It is indeed the very protean nature of pragmatism, its willingness to take *anything*, combined with its democratic ethos and faith in scientific intelligence, that has made it an enduringly popular doctrine for Americans—politicians and jurists no less than private-sector entrepreneurs. Indeed, in the pragmatic understanding, it seems that any idea or pursuit can be justified if it serves this ethos and this faith.

The fact that versions of pragmatism that were not espoused at the time of the Founding are today espoused in all branches of American government is telling with respect to the development of our constitutional understandings. Many have noted the movement in 20th century political rhetoric away from discussions of the Constitution or constitutionalism and toward discussion of policy.³⁵ This move is at least

³⁰ James, “What Pragmatism Means,” pp. 154–155.

³¹ *Ibid.*, pp. 156–157.

³² *Ibid.*, p. 157.

³³ Interestingly, U.S. courts, in Establishment Clause jurisprudence, have come to deal with the Absolute in similarly pragmatic terms. If government celebration of or teaching about religious holidays, institutions, or symbols can be understood in purely secular terms, it passes constitutional muster. Unlike James, many judges do not appear to suffer cognitive dissonance as a result.

³⁴ James, “What Pragmatism Means,” pp. 157–158.

³⁵ One need only compare the constitutional rhetoric of Lincoln to that of virtually any recent President to see this difference in stark relief. See Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, N.J.: Princeton University Press, 1987).

partly a reflection of the hold of pragmatism on the American political imagination.

John Dewey's Combination of Pragmatism and Social Darwinism

Dewey brought pragmatism and social Darwinism together as a compact set of political ideas while showing their mutually reinforcing character. Dewey's pragmatism in some respects follows James, but it remains reliant on the intellectual categories of "left" social Darwinism.

James's purer pragmatism all but did away with the categories of nature and natural law that were still central, albeit only in a materialist sense, to the Darwinists. Dewey's pragmatism, by contrast, re-injects natural forces and a strong sense of historical unfolding. It is in Dewey that we can see how social Darwinism and pragmatism together become an intellectual and political force to be reckoned with: a modern liberalism whose goal is to help history along its democratic path, relying on the intellectual inputs of an elite vanguard that need not directly consult the people or ask for their consent.

While still a graduate student at Johns Hopkins, Dewey had fortuitously heard the social Darwinist Lester Frank Ward present his paper, "Mind as a Social Factor."³⁶ But more fundamentally, Dewey was deeply antagonistic—as was an increasing proportion of the intellectual class of his day—toward classical economics and philosophical individualism. Like Ward, Dewey thought human beings had the capacity and responsibility to make choices aimed at directing organic social and individual growth, which is now stifled by outmoded notions of competition and individual rights.

Such choices and the policies that flow from them are always provisional responses to the flux of life, but their ultimate end is a more democratic society. Ideas grow and survive not because they are true or transcend human experience, but because they respond to circumstances most effectively. "Social action" is called for once we understand that scientific intelligence can

in fact oversee the unfolding of History.³⁷

In his short book *Liberalism and Social Action*, based on a series of lectures, Dewey offers a history of liberalism, an analysis of the crisis it faces, and its prospects for a renaissance that will cement it as the guiding force of social life. As reason becomes purely instrumental, no longer concerned with ultimate truths but only with "concrete situations,"³⁸ liberalism comes into its own.

According to Dewey, the Western understanding of liberalism has evolved from Locke's natural rights to Adam Smith's dynamic economism to Jeremy Bentham's psychology of pleasure and pain that seeks the greatest happiness for the greatest number. Bentham's theory argued for judging law by its consequences and for the supremacy of the national over the local. Furthermore, Bentham picked up on Hume's denial of natural rights—which exist only in "the kingdom of mythological social zoology"³⁹—and thereby set the stage for the final move from individualist to collectivist liberalism.⁴⁰ Dewey thus presents the evolution of liberalism as a gradual and rational process in which the implicit ideas of Locke are realized most fully in the modern liberal ideas that follow.

Interestingly, Dewey notes that the source of factory laws and other reforms in England was not Benthamite liberalism alone. Rather, liberalism was informed by evangelical piety, humanitarianism, literary romanticism, and Tory hostility to industry. German idealism also played a role, emphasizing the organic connection of individuals to the collective and the creation of the conditions for positive freedom.⁴¹

³⁷ Indeed, Louis Menand notes that the growth of American social science disciplines was a consequence of the rejection of the notion that evolutionary laws govern in a way that cannot be improved upon by public policy. See Menand, *The Metaphysical Club*, p. 302.

³⁸ Dewey, *Liberalism and Social Action* (Amherst, N.Y.: Prometheus Books, 2000; orig. pub. 1935), p. 29.

³⁹ *Ibid.*, p. 27.

⁴⁰ This move was delayed in the United States due to the more agrarian nature of its economy and the lack of a Benthamite influence. See Dewey, *Liberalism and Social Action*, pp. 27–28.

⁴¹ *Ibid.*, pp. 30–35.

³⁶ Menand, *The Metaphysical Club*, p. 302.

Still, there was nothing fundamental to Bentham's doctrine "that stood in the way of using the power of government to create, constructively and positively, new institutions if and when it should appear that the latter would contribute more effectively to the well-being of individuals."⁴² Liberalism accommodated and assimilated a wide range of doctrines but never lost its historicism, consequentialism, or scientism. As a result, "the majority who call themselves liberals today are committed to the principle that organized society must use its powers to establish the conditions under which the mass of individuals can possess actual as distinct from merely legal liberty."⁴³ The challenge for this modern liberalism is to make itself a "compact, aggressive force."⁴⁴

This new liberalism is distinct from its outmoded earlier version because it makes itself relevant to the problems of social organization and integration of various historically situated forces. In fact, the lack of a historical sense on the part of earlier liberals blinded them to the fact that their own interpretations of liberty were historically conditioned rather than immutable truths. In other words, the problem of the earlier liberals like Locke is that they thought their ideas were good for all places and all times. Later liberals like Dewey have recognized that ideas are contingent upon their time period, relative to their society.

Historical relativity finally frees liberalism to assert that economic relations are the "dominantly controlling" forces of modernity and that they require social control for the benefit of the many.⁴⁵ Ensuring free competition and the removal of artificial barriers to economic activity is no longer enough. Instead, in modern liberalism, the individual's powers must be "fed, sustained, and directed"⁴⁶ through cooperative control of the forces of production.⁴⁷ Individuality

itself does not simply exist, but is attained through continuous growth.⁴⁸

The demand for a form of social organization that should include economic activities but yet should convert them into servants of the development of the higher capacities of individuals, is one that earlier liberalism did not meet. If we strip its creed from adventitious elements, there are, however, enduring values for which liberalism stood. These values are liberty, the development of the inherent capacities of individuals made possible through liberty, and the central role of free intelligence in inquiry, discussion, and expression.⁴⁹

In Dewey, we see a dominant theme of American Progressivism and 20th century liberalism: the belief that there is an intelligence or "method of intelligence" that can be applied to solve social problems, which are themselves primarily economic in nature. It is this intelligence, which makes no pretense to knowledge except as a result of a pragmatic experimentation,⁵⁰ that captures the spirit of democracy more so than any philosophical or institutional analysis. While all social relations are historically situated and in flux, there is one constant: the application of intelligence as a Progressive ideal and method.

For Dewey, therefore, "the only adjustment that does not have to be made over again...is that effected through intelligence as a method."⁵¹ It is the only simulacrum of God in an otherwise desiccated world of process, evolution, and growth.

Dewey's Vision for Modern Liberalism

Dewey rounds out his discussion by giving us insight into the nature of a "renascent liberalism." Self-

⁴² *Ibid.*, p. 24.

⁴³ *Ibid.*, p. 35.

⁴⁴ *Ibid.*, p. 36.

⁴⁵ *Ibid.*, p. 42.

⁴⁶ *Ibid.*, p. 40.

⁴⁷ *Ibid.*, p. 59.

⁴⁸ *Ibid.*, p. 46.

⁴⁹ *Ibid.*, p. 40.

⁵⁰ *Ibid.*, p. 80.

⁵¹ *Ibid.*, pp. 55-56.

realization of the individual must be physical, intellectual, and moral, and all classes and individuals must benefit. This, of course, means that a vast state mechanism must be constructed that is confidently dedicated to ensuring individual self-realization by means of progressive education, the welfare state, and redistribution of capital.

The older political science of the Founding era, including that of *The Federalist*, is easily swept aside by Dewey. While the exact contours of public power and policy are not necessarily the same for him as they are for Progressive political actors such as Theodore Roosevelt and Woodrow Wilson, they all agree that there are no inherent limits on state power. Like Roosevelt and Wilson, Dewey is impatient with constitutional restraints and institutional forms. Separation of powers is a doctrine rooted in stasis and, therefore, political death. It stands in the way of progress and change.

Meanwhile, concerning oneself with constitutional forms and formalities is to give to institutions an abiding and permanent character they do not deserve. Certainly, Dewey did not concern himself with the possibility that many publics are formed by complex industrial societies and that a theory of representation is needed to integrate them. Such considerations are subsumed to the newly political categories of change and growth. Long before “the courage to change” became an effective presidential campaign slogan, Dewey helped ensure that “change” would have a central position in American political rhetoric.

As constitutional restraints are seen as counterproductive and even dangerous, the restraints of character take their place in a decent political order. Education becomes a check on the power of the state as it creates citizens capable of participating fully in the republic of experimentation.⁵² But the old virtues—whether they be of Aristotle’s *Ethics*, Plato’s *Republic*, or the Judeo-Christian *Bible*—must be overcome in Dewey’s estima-

⁵² See especially John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Free Press, 1966; orig. pub. 1916).

tion. They must be replaced by the new virtues inculcated by a democratic education, including non-competitive striving, cooperation, and self-actualization.

All-around growth, peculiarly, seems to exclude certain *individual* strivings, such as those after honor, money, or power. Dewey seems to be concerned about the exercise of arbitrary power but has little concern for the accumulated power of the state that his vision entails. The cure for a powerful democratic state seems to be constant evolution in the direction of more democracy. The key to the perpetuation of our political institutions is far removed from either the constitutionalism of the Founders or the statesmanship of Lincoln.

In a profound summation of social Darwinism, Progressivism, and contemporary liberalism, Dewey claims:

[Flux] has to be controlled [so] that it will move to some end in accordance with the principles of life, since life itself is development. Liberalism is committed to an end that is at once enduring and flexible: the liberation of individuals so that realization of their capacities may be the law of their life.⁵³

Human life therefore *is* nothing in particular, beyond a continual unfolding and advancement, and liberalism is dedicated to its liberation through social policy. When the economic necessities are provided, individuals may pursue the higher life according to their spiritual needs, whatever they might be and however they might change.

And change they will. Dewey’s vision of liberalism is ultimately of an individual free of the various constraints that previously were thought by so many to be necessitated by a dangerous and eternal nature. This vision of liberalism is a version of Marx’s notion that truly free men may fish in the afternoon and criticize after dinner. Although today’s constraints happen

⁵³ Dewey, *Liberalism and Social Action*, p. 61.

to be, for Dewey, largely economic in nature, it is not materialism but growth toward freedom that is at the heart of modern liberalism.

THE PROGRESSIVE SYNTHESIS AND THE NEW SCIENCE OF JURISPRUDENCE

Progressivism as an intellectual and political (as opposed to populist) movement amounts to the *politicizing* of the twin doctrines of social Darwinism and pragmatism. By harnessing these doctrines for political ends—as Dewey hoped—the Progressives were able to usher in a new order of the ages that would overtake American politics.

Commencing in the early years of the 20th century, political and judicial actors borrowed freely from pragmatism and social Darwinism to construct a theory of politics, constitutionalism, and human life. Politically, the age-old question of “what works” was increasingly divorced from a sense of constitutional restraint, which was replaced by an organic conception of a state unlimited in principle, with growth and development to buttress certain contemporary understandings of democracy and the choosing self as its only end.

By the late 20th century, the Progressive synthesis was bearing full fruit, particularly in the judicial branch. For example, in the early 1990s, the plurality opinion of the U.S. Supreme Court in *Planned Parenthood v. Casey*⁵⁴ (1992) famously asserted or reasserted an individual right to be “free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” It went on to add that such “intimate and personal choices” are “central to personal dignity and autonomy” and to the liberty protected by the Fourteenth Amendment, which at its heart supplies “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” all of which “define the attributes of personhood.”

⁵⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Affirming this language a decade later, Justice Anthony Kennedy, writing for the majority in *Lawrence v. Texas*⁵⁵ (2003), also asserted the importance of an “emerging recognition” of new rights worthy of judicial protection, in this case concerning homosexual conduct. “In all events,” he argued, “we think that our laws and traditions in the past half century are of most relevance here” because they “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”

Only through recognition of such liberty, argued Justice Kennedy, can we avoid stigmatizing and demeaning the autonomous choices of individuals, whose dignity is revealed in time. In fact:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

In striking down the state statutes at issue, these decisions relied on purported substantive due process protections of the Fourteenth Amendment—in Justice Kennedy’s phrasing, the “due process right to demand respect for conduct protected by the substantive guarantee of liberty.” But in order to justify their opinions, they also advanced particular, interlocking understandings of constitutionalism, individuality, and a dynamic of historical unfolding, or History as more than a mere record of events. Along with these

⁵⁵ *John Geddes Lawrence and Tyron Garner v. Texas*, 539 U.S. 558 (2003).

understandings is a theory, adopted *sub silentio*, of the judiciary's role in History.

Living Constitutionalism and the Court as Engine of History

This is a theory adopted more explicitly by the late Justice William J. Brennan when he claimed that judges must recognize that “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”⁵⁶ According to Brennan, the “vision of our time” is destined to be different from the vision of other times, and a central part of the judicial role is to act as visionary. Although the Constitution is in some degree a “structuring text” marking out the bounds of government, it is more fundamentally a visionary document demanding ever more democracy and respect for individual dignity.⁵⁷

To inject meaning into these terms, the judge will eschew “a technical understanding of the organs of government” in favor of “a personal confrontation with the wellsprings of our society.”⁵⁸ Asserting that individual dignity is the most important of all political values, Brennan sees the judge's job as articulating its meaning as that meaning reveals itself in time.

This revelation is aided by the full play of ideas. The reason for the protection of “broad and deep rights of expression”⁵⁹ is that they are related to the intellectual and spiritual growth over time that lends dignity to the human creature. Citing approvingly Justice Brandeis's dictum in *Whitney v. California*⁶⁰ (1927) that the state has no end beyond ensuring full development of human faculties, Brennan avers that the “demands of

human dignity will never cease to evolve.”⁶¹ Dignity is not fixed; it has no principles or laws beyond those governing its internal evolutionary dynamic. In fact, the very act of looking for fixed principles or laws is regressive, for in so acting we cast a glance toward a past wherein dignity was, by definition, less developed and more stultified.

A corollary of this view is that the scope and power of government—whether state or national—are in principle unlimited because of the need to support human dignity and the constant development of human faculties. Courts merely adjudicate at the “collision points” between state and society and are on guard against anything that stifles salutary development.⁶²

The task of judging is therefore itself protean, accurately reading and responding to the constant flux of human aspiration.⁶³ The Supreme Court has the last word on constitutional interpretation, but the last word for any one time is not the last word for all time, or else the Constitution “falls captive” to the “anachronistic views of long-gone generations.”⁶⁴ The Constitution is timeless only because its interpretations are time-bound; its genius lies in its recognition of the inevitability of the “evolutionary process.”⁶⁵ Adaptation to the “ever-changing conditions of national and international life”⁶⁶ is the *sine qua non* of constitutionalism, and the motor of this process is the judicial branch.

Brennan's colleague on the Court, the late Justice Thurgood Marshall, also pointedly claimed that the meaning of the Constitution was not fixed in Philadelphia or anywhere else.⁶⁷ The Constitution that

⁵⁶ William J. Brennan, “The Constitution of the United States: Contemporary Ratification,” *South Texas Law Review*, Vol. 27 (1986), p. 438.

⁵⁷ *Ibid.*, pp. 438–439.

⁵⁸ *Ibid.*, p. 440.

⁵⁹ *Ibid.*, p. 442.

⁶⁰ *Whitney v. California*, 274 U.S. 357 (1927).

⁶¹ Brennan, “The Constitution of the United States,” p. 443.

⁶² *Ibid.*, pp. 439–440.

⁶³ Excepting those areas where the judge's position apparently should be “fixed and immutable”—for example, in opposition to capital punishment as a violation, in all circumstances, of the Eighth Amendment ban on cruel and unusual punishment. See Brennan, “The Constitution of the United States,” p. 443.

⁶⁴ Brennan, “The Constitution of the United States,” p. 444.

⁶⁵ *Ibid.*, p. 445.

⁶⁶ *Ibid.*

⁶⁷ Thurgood Marshall, “The Constitution: A Living Document,” *Howard Law Journal*, Vol. 30 (1987), p. 915.

emerged from Philadelphia was merely “a product of its times,”⁶⁸ as is the Constitution we now have. The changes we have witnessed in our constitutional fabric were not, and could not have been, foreseen or accepted by those who gathered in 1787 to draft the document.⁶⁹ The constitutional text itself lies dead in a vault in the National Archives.⁷⁰ The views of our own time are all that lives.

Constitutional interpretation therefore involves perceiving and clearly articulating the direction of evolutionary change for an organic document that serves the needs of an organic state. Those who possess an insight into History—namely, those sitting on the Supreme Court—must redefine outdated notions of liberty, justice, and equality. Their aim is to aid a process that is outside the full control of any one individual or institution. The historical process is an immense struggle for survival of the good over the bad, and good fortune is indispensable to a proper unfolding of History.⁷¹

The Rapidity of the Court’s Directional Change

On some questions, History moves rapidly. It is the job of the wise majority of the Court to recognize its direction and clear the obstacles, often in the form of state laws, that stand in its way. The rapidity of Historical change is illustrated by the difficulty even the Court has in keeping up with it. Certain minority opinions gain majority status in remarkably short periods of time.

It took only 17 years for *Lawrence* to overturn *Bowers v. Hardwick*⁷² (1986), in which a 5–4 majority of the Supreme Court upheld a Georgia anti-sodomy statute. According to Justice Kennedy in *Lawrence*, even as *Bowers* was being decided, there was an “emerging recognition” of the substantial liberty of adult persons to choose freely in “matters pertaining to sex.” The

Court’s majority in *Bowers* failed by failing to recognize the stamp of approval that History had already placed on homosexual conduct—but this Historical fact was not lost on the *Bowers* dissenters.

For example, Justice Harry Blackmun quoted Oliver Wendell Holmes—the Court’s first social Darwinist—in condemning a law whose grounds “have vanished long since.” Such “blind imitation of the past”⁷³ is senseless because the ethical grounds upon which such statutes were based have shifted radically over time. For our time, at least, “much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature”⁷⁴ of that relationship. Human personality must be allowed to develop by keeping the state out of the business of restricting “intimate associations.”

The asserted primacy of freedom of choice thus allows us to define our natures as we see fit, subject only to the principle of mutual consent. The process of redefinition is in principle virtually unlimited and will continue to unfold as new understandings of human personality manifest themselves in History.

A mere eight years before *Lawrence*, in *Hurley v. Irish–American Gay, Lesbian, and Bisexual Group of Boston*⁷⁵ (1995), the Court had held unanimously that a privately organized parade could exclude groups that wished to convey a message contrary to that favored by the parade organization, thus protecting the organization’s First Amendment rights. However, just five years later, in *Boy Scouts of America v. Dale*⁷⁶ (2000), the Court could muster only a slim 5–4 majority for the proposition that an open homosexual did not have a right to join the Boy Scouts as an adult leader because his presence in the organization would convey a message contrary to the one the Boy Scouts wished to convey.

⁶⁸ *Ibid.*, p. 918.

⁶⁹ *Ibid.*, p. 919.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁷³ This is a quotation from Holmes’s essay, “The Path of the Law.”

⁷⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Blackmun, J., dissenting). Emphasis in original.

⁷⁵ *Hurley v. Irish–American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995).

⁷⁶ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

What had happened in the intervening five years?⁷⁷

The dissent in *Boy Scouts*, penned by Justice John Paul Stevens, gives us some clues. For him, unfavorable views of homosexuals are rooted in ancient prejudices, best likened to the “equally atavistic opinions about certain racial groups,” that have “been nourished by sectarian doctrine.” Only “habit, rather than analysis” grounds the man–woman distinction.

Thus does Justice Stevens, in a single paragraph, take on and dismiss both revelation and classical moral reasoning. In the same paragraph, he goes on to substitute History and historical progress for these outdated forms of moral reasoning, including the findings of social science as revealed in History:

Over the years...interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified these opinions. A few examples: The American Psychiatric Association’s and the American Psychological Association’s removal of “homosexuality” from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun’s classic opinion in *Bowers*; Georgia’s invalidation of the statute upheld in *Bowers*; and New Jersey’s enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.

A series of “right to die” cases further illustrates the centrality of historical reasoning to some members of the Court. In *Cruzan v. Missouri Department of Health*⁷⁸ (1990), a 5–4 majority held that a competent person has a constitutionally protected Fourteenth Amendment

⁷⁷ For an extended discussion of the relationship of this and similar cases to the doctrine of *stare decisis*, see John C. Eastman, “Stare Decisis: Conservatism’s One-Way Ratchet Problem,” in Bradley C. S. Watson, ed., *Courts and the Culture Wars* (Lanham, Md.: Lexington Books, 2002), pp. 127–137.

⁷⁸ *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990).

liberty interest in refusing unwanted medical treatment, but that the state of Missouri could require clear and compelling evidence of an incompetent person’s wishes concerning the withdrawal of lifesaving medical treatment.

Justice Scalia, in a concurring opinion, would have had the Court stand back from “right to die” questions entirely, for the Constitution is silent on the matter, and indeed it has never been the case that states have been prohibited from interfering with such a purported right, the contours of which “are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.” But in considering right to die cases non-justiciable on constitutional grounds, Scalia was a minority of one.

In *Washington v. Glucksberg*⁷⁹ (1997), the Court upheld a Washington State statute that outlawed assisted suicide. In writing for the majority, Chief Justice Rehnquist noted the cases in which the Court had held that the Fourteenth Amendment’s Due Process Clause offers substantive protections of liberty going beyond fair procedure. These have included, among other things, the right to marry, the right to marital privacy, and (in *Casey*) the right to abortion. But Rehnquist also asserted the reluctance of the Court to expand substantive due process to other areas because of the fundamentally political nature of the enterprise and the superiority of legislative debate, experimentation, and compromise to judicially imposed substantive standards.

In a concurring judgment, Justice Souter agreed that the experimentation of the legislative process is to be preferred—but only for the present time. “The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents’ claim should not be recognized,” wrote Souter, “I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.” For Souter, judicial interven-

⁷⁹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

tion is not called for until it is called for. Facts revealed as History unfolds, rather than common law or constitutional principles, determine the justiciability of fundamental moral-political questions.

Souter offered a similar concurrence in *Vacco v. Quill*⁸⁰ (1997), which was heard in conjunction with *Glucksberg*. In *Vacco*, an equal protection claim was raised against a New York law that allowed competent patients to refuse medical treatment but made it a crime to assist a competent person to commit suicide, including by prescription of lethal medication. The argument in favor of striking down the law alleged that it resulted in different treatment for similarly situated patients, one subset of whom chose suicide by refusal of treatment, the other by ingestion of medication.

Justice Rehnquist, speaking for the Court, maintained that the distinction between refusal of treatment and assisting with suicide was rational, the former resulting in death from “an underlying fatal disease or pathology” and the latter involving the intention on the part of a doctor that “the patient be made dead.” In his concurrence, Justice Souter would say only that he did “not conclude that assisted suicide is a fundamental right entitled to recognition at this time.” According to Justice Souter’s reasoning, for the time being—but *only* for the time being—the state statutes in *Glucksberg* and *Vacco* are not unconstitutional under either the due process standard or the equal protection standard; but History will be the ultimate judge, and the Court will discern when History has rendered a pronouncement on such matters.

CONCLUSION

Like its overtly political counterpart, Progressivism in jurisprudential guise steps outside the bounds of Madisonian constitutionalism for the sake of faith in the future rather than faith in the past. The Progressive task is to read the public mind and loosen the chains of society enough to allow individual and social growth.

There is a residual incoherence to Progressive jurisprudence. It alternates between two poles. On the one hand, it expresses the desire to make decisions that are legitimate in the eyes of the community—ones that respond to something like, in Oliver Wendell Holmes’s words, the “felt necessities” of the age—and on the other, it expresses the desire for decisions that counter what it claims is illegitimate majority will.

However, neither pole is rooted in constitutional text, tradition, logic, or structure. Rather, they are both rooted in the judge’s view of which necessities are most deeply felt and most likely to encourage social and personal growth. The practical result, in contemporary jurisprudence, is that art trumps economics, expression trumps the common good, subjectivity trumps morality, freedom trumps natural law, and will trumps deliberation. Such is the face of Progressive jurisprudence, a face that now seems barnacle-encrusted from its triumphal march of a hundred years’ duration.

Because of the extent to which this jurisprudence is now rooted in the historicist thought that guides America and, under different names, the Western world as a whole, and because of the strength and momentum it has gained on its virtually uninterrupted path, its effects will not be reversed any time soon. Its success is marked by the fact that it no longer seeks victory—only legitimation.

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⁸⁰ *Vacco v. Quill*, 521 U.S. 793 (1997).

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