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# LOOKING BACKWARD: RICHARD EPSTEIN PONDERES THE “PROGRESSIVE” PERIL

*Michael Allan Wolf\**

HOW PROGRESSIVES REWROTE THE CONSTITUTION. By *Richard A. Epstein*. Washington, D.C.: Cato Institute. 2006. Pp. xiii, 156. \$15.95.

## INTRODUCTION

The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, “Looking Backward” is nearer than a dream.

—Justice David J. Brewer<sup>1</sup>

In the 1888 novel *Looking Backward*, Edward Bellamy dreamed up a twentieth century America that was a socialist utopia,<sup>2</sup> a vision invoked four years later by the conservative Justice David J. Brewer as a warning against government regulation.<sup>3</sup> In *How Progressives Rewrote the Constitution*, Richard Epstein,<sup>4</sup> looking back at the twentieth century through an interpretive lens much more similar to Brewer’s than Bellamy’s, sees and bemoans the growth of a dominant big government of which the novelist could only dream. Epstein pulls no punches in his attack on those he deems responsible

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1. *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting). See J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 *MISS. L.J.* 315, 318–19 (1991) (“He believed that liberty of contract was a right protected by the Constitution; he favored a narrow interpretation of the state police power; and he rejected the concept of a paternalistic state.”).

2. EDWARD BELLAMY, *LOOKING BACKWARD: 2000 TO 1887*, at 93–94 (John L. Thomas, ed., The Belknap Press of Harvard University Press 1967) (1888).

3. For a helpful introduction to the place Bellamy’s utopian novel holds in American history, see William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 *TUL. L. REV.* 1, 28–29 (1991) (discussing “the growth of popular reform movements and their supporting ideologies” in the latter part of the nineteenth century, as reflected in Bellamy’s popular and highly influential novel).

4. James Parker Hall Distinguished Service Professor of Law, University of Chicago.

for the shift in the American polity from private to public control, asserting that the “Progressives . . . were determined that their vision of the managed economy should take precedence in all areas of life,” and that they “and their modern defenders have to live with the stark truth that the noblest innovations of the Progressive Era were its greatest failures.”<sup>5</sup>

Epstein, the nation’s leading classical liberal legal scholar/lightning rod,<sup>6</sup> has Progressivism and its constitutional legacy in his sights in his latest work. His intent is to show how, during the early decades of the twentieth century, “Progressive” justices on the U.S. Supreme Court began a concerted and ultimately successful attack on traditional views of government power, which to that point had been severely curtailed, and of individual rights, which to that point had been quite expansive. According to Epstein’s brief though meandering historical account,<sup>7</sup> the regulatory policies that these revolutionary judges championed—despite apparent conflicts between the policies and important liberty interests—amounted to government-sponsored cartels and monopolies. Looking backward from our day to the dawn of the modern regulatory state, Epstein identifies the Progressive Era as the point at which the nation was led astray from its founding, indubitably classical liberal, principles. His yearning for a return to the ideology and jurisprudence of the “Old Court” is palpable.

This slim volume, comprising a bit more than 150 small pages, is based on the B. Kenneth Simon Lecture in Constitutional Thought that Epstein delivered at the Cato Institute in the fall of 2004, in which he spoke on “the intellectual development of the Progressive movement of which [he] ha[s] long been critical on constitutional, economic, and philosophical grounds” (p. vii). Epstein’s design in that lecture, and in *How Progressives*, is to “offer[] a full defense of the earlier constitutional protection of economic liberties—the right to dispose of one’s labor and property as one sees fit—and a limited view of federal power under the Commerce Clause of the United States Constitution.”<sup>8</sup> *How Progressives* should receive a warm reception from the audience, lawyers and laypeople alike, who view the New

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5. P. 137. Epstein paints a somewhat anachronistic portrait of the Progressives—“the self-conscious social and legal reformers who occupied center stage in the period roughly from the onset of the 20th century through the election of Franklin Delano Roosevelt as president in 1932”—and of their “key social and legal positions.” Pp. 2–3.

6. For a fond, though cautious, appraisal of Epstein’s influence, see generally James W. Ely, Jr., *Impact of Richard A. Epstein*, (Vanderbilt Public Law Research Paper No. 05-31, 2005), available at <http://ssrn.com/abstract=825045>. For a recent case that relies on Epstein’s classical liberal view, see *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (invalidating a local government’s use of eminent domain).

7. For example, in what is supposed to be a discussion of the Old Court’s federalism, on pages 24–33, Epstein goes back to the Marshall Court (for good reason), but then leaps ahead to the post-1937 Court, citing opinions by “Progressive” Justices. He also introduces some good Old Court federalism cases in Chapter Three (“The Progressive Era”).

8. Pp. vii–viii. See also Richard A. Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, CATO SUP. CT. REV., 2004–2005, at 11, 11 n.\*, available at <http://www.cato.org/pubs/scr/2005/progressiveconstitutionalism.pdf>.

Deal as a mistake of epic proportions.<sup>9</sup> For the rest of us, significant gaps will still remain between, on the one hand, our understanding of the nation's past and of the complex nature of constitutional lawmaking and, on the other, Epstein's version of the nature of twentieth-century reform and Progressive jurisprudence.

*How Progressives*, like many of the works in the impressive Epstein bibliography, is important not only because of the provocative nature of its arguments, but also because of the wide and ideologically diverse audience that pays attention to this important and seemingly ubiquitous voice in the classical liberal chorus. The book returns the reader to some of the themes Epstein raised in *Takings*,<sup>10</sup> his influential 1985 work that launched the modern private-property-rights movement,<sup>11</sup> and it follows on the heels of another offering from Cato's closet: Randy Barnett's *Restoring the Lost Constitution*.<sup>12</sup> Given the current judiciary's keen interest in the framers' intent and skepticism about the powers of the federal government, *How Progressives* has the potential to be another influential Epstein work, but only if some fundamental flaws are overlooked or excused by the reading audience.

Following a summary of the stated goals and organization of *How Progressives*, this review, in an attempt to provide a counterbalance for Epstein's visions of the formative period of modern constitutionalism, considers three aspects of the book: First, Epstein's practice, shared by many constitutional law scholars, of starting the "story" of a legal doctrine in the middle, in particular, paying too little attention to the suspect nature of the individual "liberty" jurisprudence fashioned by the Old Court. The second notable aspect is Epstein's effort to place himself at the "moderate" point on the ideological scale. Finally, this review will consider his premature attempt to write "winner's history." Epstein's unorthodox version of the social and economic conditions that gave rise to reform in the first few decades of the twentieth century, like his demonization of "Progressive" legal thought,

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9. See, e.g., David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 119-35 (1993) ("New Deal Labor Legislation as a Cause of Persistent Black Unemployment"); see also Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 255 (1996) ("One of the most striking features of the period since 1980 has been sustained national criticism of the New Deal reformation.").

10. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

11. See, e.g., Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 510 (1998) ("[M]any of the changes in takings law that have taken place over the last 11 years correspond quite closely to a blueprint for takings doctrine proposed by Professor Richard Epstein in his now-famous book called *Takings* . . .").

12. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). We can easily view Epstein's new book as an effort to reclaim preeminence among his liberty-devoted peers. See Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081-82 (2005) (book review) ("Barnett's book immediately replaces Richard Epstein's *Takings* as the leading tome about constitutional law written from a libertarian perspective.") (footnote omitted).

should not be surprising to those familiar with his earlier writings. Still, despite Epstein's efforts in *How Progressives* to portray himself as a moderate, this problematic historical foray demonstrates that Epsteinian ideas, like Bellamy's utopian socialist dreams, do not yet hold a place in or near America's ideological center.

### I. GIVING HISTORY A TRY

In the Preface entitled "Why We Must Reopen Closed Debates" (p. vii), Epstein challenges the view, which he attributes to "many, lawyers and laymen alike," that "there seems to be little reason to unearth a set of legal controversies that had sorted themselves out by the middle of the New Deal in favor of expanded government power" (p. viii). Epstein then asks, "[I]f the Progressives remade the Constitution in their own image, so what?" (p. viii). But Epstein cannot resist taking the opportunity to set the historical record straight, in order "to correct what [he] believe[s] to be pervasive misconceptions about the central features of the pre-New Deal constitutional legal order—chiefly, federalism and economic liberties," and to "help inform readers of the ability of these now discarded views to lead us toward sound constitutional government in the years to come" (p. xiii). For these and other<sup>13</sup> reasons, Epstein has decided to dabble in history.

In the introduction that follows, before addressing the struggle between "Progressives and traditionalists," Epstein turns to "a few preliminaries on constitutional theory"—a nuanced, non-Scalian<sup>14</sup> version of "constitutional textualism,"<sup>15</sup> and a short tutorial on "the level of scrutiny the Court should apply in exercising its power of judicial review" (pp. 10–11). Throughout the book, Epstein returns to these two elements in an attempt to convince his reader that our rights are best protected by non-deferential judges who are not hesitant to depart from the exact wording of the constitutional text.

In the next chapter, "The Classical Liberal Synthesis," Epstein explains that, while classical liberals and pure libertarians both favor "freedom of choice and freedom of contract" (p. 16), there are differences, such as the latter group's intolerance of the state's exercise of taxation and eminent domain powers. Given the absolutist nature of pure libertarianism, Epstein feels comfortable noting in passing "that the Constitution is unambiguously in the classical liberal camp" (p. 16). When the list of possible choices of ideology moves beyond these two kissing cousins, however, ambiguity rears

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13. One of those other reasons could be the contemporary context in which the newly framed debate is taking place. It is highly likely, if not a certainty, that in the wake of the Reagan Revolution, the American reading public is more skeptical of government power. Unfortunately, Epstein takes this general skepticism a good bit too far when he asserts that "no longer do most people have *unquestioned* faith in the desire or ability of the government to act *only* in the public interest" (p. 13; emphasis added). Even during the height of Franklin Delano Roosevelt's popularity during the New Deal, such unqualified devotion was not prevalent.

14. See, e.g., Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

15. P. 9 ("[T]his textual enterprise is only the first stage of the larger business of constitutional interpretation.")

its ugly head. In other words, while it is easy to concede that the Constitution is *more* classical liberal than libertarian, that does not mean that the document (especially when one includes the Reconstruction amendments) does not also encompass philosophical positions that are more accommodating of the modern regulatory state.

Epstein then explores how well the “American constitutional experience”—first the justices of the Old Court (a term whose temporal dimension he never nails down, although we know its reign ended in the October 1936 Term), and then, in the following chapter, “The Progressive Era” justices—“stack[s] up” against the classical liberal ideal whose “watchwords are limited government, private property, and freedom of conduct” (p. 19). Most readers will not be surprised to learn that, in both general areas of inquiry—federalism and individual rights (primarily property and contract)—the traditionalists on the late nineteenth and early twentieth century Courts outperformed their left-leaning successors. The traditionalists remained true to the classical liberal principles that supposedly informed the Constitution in cases involving rate regulation, monopolies, and labor regulation. Included in the last category are cases that received very broad condemnation among legal academics until the last few decades: *Lochner v. New York*,<sup>16</sup> invalidating maximum hours legislation,<sup>17</sup> and three cases upholding “yellow-dog” labor contracts “that required a worker not to be a union member (or not to become one on the union demand) so long as he remained in the employ of the firm.”<sup>18</sup> The “Progressives” pulled the Constitution away from its classical liberal moorings in the federalism and individual rights arenas (now expanded to include civil liberties other than those of property and contract), much to Epstein’s dismay: “However grandly their rhetoric spoke about the need for sensible government intervention in response to changed

16. 198 U.S. 45 (1905). *Lochner*’s shifting reputation has been the subject of much legal commentary, especially on the occasion of the opinion’s centennial. The *Lochner* symposium, opened and summarized by David J. Seipp, *Lochner Centennial Conference, Introduction*, 85 B.U.L. REV. 671 (2005), provides examples of such legal commentary.

17. *Lochner*, 198 U.S. 45 (1905). Epstein notes that, in addition to “the dangers of legislative paternalism . . . a second, if tacit, dimension of the case concerns the competitive position of small, immigrant-owned bakeries against their larger, unionized rivals.” P. 48. This dimension is probably a lot more imagined than “tacit.” According to Paul Kens, who has written widely and carefully on the history of *Lochner*, “[t]hose who claim that a conspiracy of unions and large bakeries produced the Bakeshop Act provide no primary support.” Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 409 n.19 (2005); see also PAUL KENS, *Lochner v. New York: ECONOMIC REGULATION ON TRIAL* (1998).

18. P. 49. The three cases are *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adair v. United States*, 208 U.S. 161 (1908), discussed on pp. 48–50. These contracts developed their colorful name because “labor complained bitterly [that the contracts] treated workers like ‘yellow dogs.’” EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 71 (2000).

Rather than focus on the onerous nature of this provision in an unequal bargaining situation, or on the limited opportunities many workers had to seek alternative employment, Epstein draws a link between enforcement of the clause and the promotion of a central classical liberal strategy: “The key advantage of that contract from a social perspective is that it retards the formation of labor monopolies.” P. 49.

conditions, the bottom line, sadly, was always the same: replace competitive processes, by hook or by crook, with state-run cartels” (pp. 52–53). In this way, Epstein conflates state and federal regulation (of railroad rates, child labor, maximum hours, and price floors) with ownership. So now, in order to endorse Epstein’s conclusion, the reader must believe (1) the Constitution is close to a purely classical liberal document, (2) the Old Court consistently applied classical liberal principles, (3) a large chunk of government regulation amounts to monopolistic behavior, and (4) judges who uphold such regulations enacted by coequal branches of government (even by overwhelming margins)<sup>19</sup> are the ones “rewriting the Constitution.”

Probably the most controversial example of the benefits to be gained by neutralizing Progressive regulation that Epstein includes in *How Progressives* is his defense of the otherwise notorious *Hammer v. Dagenhart*,<sup>20</sup> the 1918 decision in which a slim majority of the Court struck down a federal law prohibiting the transportation in interstate commerce of certain goods manufactured by businesses that used child labor, because the statute exceeded Congress’s power under the Commerce Clause. Epstein’s major problem with the act that the Court struck down is that firms were forced to “capitulate[] to the federal mandate” (p. 59). Viewed through the classical liberal lens, the greater evil here was not the employment of children in factories, sweatshops, and other hazardous settings, but the stifling of competition: “For our purposes, what is important in *Hammer* is the light it sheds on the general principle of competition between states as a means to choose the optimal level of regulation” (p. 60). Moreover, essential contract rights are also at stake, as Epstein earlier notes: “[T]he prohibition on child labor often misunderstood the complex nature of these contracts, which often included, in addition to employment, some education and custodial care. The cost of invalidating these contracts was that it reduced the opportunities available to children who were members of well-functioning families.”<sup>21</sup>

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19. For a notorious example, the Bakeshop Act struck down in *Lochner* passed both houses of the New York legislature unanimously. David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1482 (2005) (citing Paul Kens, *Lochner v. New York: Rehabilitated and Revised, but Still Reviled*, 1995 J. SUP. CT. HIST. 31, 34).

20. 247 U.S. 251 (1918).

21. P. 43. Even more revealing is this example of the logic employed by Epstein in pondering the apparent illogic behind child labor laws:

Here the [federal government’s] argument has to be that child labor laws are needed in order to prevent parents from abusing their offspring. On this view, weak laws should be construed as a license to commit neglect and abuse, so that more stringent standards become an urgent necessity. But that judgment presupposes that most parents of limited means will place their own interests above those of their children, when the safer assumption is that parents will trade off their own interests with those of their children, typically enduring great personal sacrifice to help ensure that their children lead better lives. On this view, parents whose children engage in child labor are making the best of a bad situation. If so, then the alternative to child labor is not a life of education or leisure for the young. It could be begging, prostitution, or back-breaking work in the informal economy, without the benefit of any legal protection at all.

P. 61 (footnote omitted).

For less controversial versions of the evils of child labor laws, see Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 30–31 (2001);

Epstein would shift the burden to defenders of the Progressives to explain why a legislative solution was needed when, after all, “the percentage of children in the workforce declined consistently throughout the period before federal regulation of child labor” (p. 62). Epstein himself has already discussed one probable factor for the decline—the numerous state laws that the federal legislation was designed to complement and strengthen. Moreover, even if we rely on the figures that Epstein provides earlier in *How Progressives*, there were still 1.6 million children between the ages of 10 and 15 in the workforce in 1910 and 1.4 million in 1920 (p. 5), before stiff immigration laws reduced the nearly free flow of cheap labor in the mid-1920s. While child labor, like slavery a half-century before in the eyes of some defenders, would have just faded away as the result of some invisible, yet inexorable force, the monopolists on the left were too impatient: “[N]o argument that stresses the slow but steady improvement could slow down the Progressive challenge, so long as one child [not 1.4 million children?] of tender age continued to work” (p. 62). When the steady progress experienced by American workers came to a crashing halt in the 1930s, New Deal reformers were equally inept to enact “fair” competition, as they failed to understand that the nation’s economic woes were exacerbated by the two “self-inflicted” wounds of the Smoot-Hawley tariff and currency deflation (p. 63).

While Old Court justices, committed to scrutinizing statutes with a skeptical eye, continued to put up a good fight against the regulatory onslaught in cases such as *A.L.A. Schechter Poultry Corp. v. United States*,<sup>22</sup> ultimately they gave way to the “Progressive intellectuals-turned-New Dealers” (p. 72) who, deferential to the core, contorted the Commerce Clause in *United States v. Wrightwood Dairy Co.*<sup>23</sup> and *Wickard v. Filburn*.<sup>24</sup> By the 1940s, the rewriting was complete: “Whether the issue was economics, religion, or speech, constitutional protection remained at its low ebb under Progressive theories” (p. 110).

Epstein identifies the constitutional jurisprudence of the “Post-Progressive Period” with the bifurcated approach endorsed by the (in)famous footnote four from *United States v. Carolene Products Co.*<sup>25</sup> He compliments Justice Harlan Fiske Stone’s plurality opinion for getting the essential issue of

Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 41–44 (1988); and Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1430–32 (1987).

Epstein has thus distanced himself from the many social scientists, historians, and government officials throughout the world who somehow fail to see that “there are two sides to this issue on the merits.” P. 43. See, e.g., HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* (2002); STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* (1968).

22. Pp. 64–66; 295 U.S. 495 (1935).

23. Pp. 67–70; 315 U.S. 110 (1942).

24. Pp. 67–72; 317 U.S. 111 (1942).

25. Pp. 111–16; 304 U.S. 144, 152 n.4 (1938).



judicial oversight half-right,<sup>26</sup> but proposes that, “[i]f Stone is correct, then a set of *uniform* standards should make it more likely that judicial intervention will respond to the risks to discrete and insular minorities” (p. 115). While consistency is often a value in the decision-making process, judicial and otherwise, Epstein still fails to explain why the judiciary’s use of a classical liberal litmus test (1) is explicitly or even implicitly required by the Constitution, (2) would not end up in arbitrary contests among competing individual rights, and (3) will not again (as it has in the *Dred Scott* and *Schechter Poultry* past) threaten the delicate balance of power embodied in our constitutional structure.

The closing chapter of *How Progressives* addresses “Progressivism Today,” or at least as “Progressive” jurisprudence manifested itself in three decisions from the October, 2004 Term of the Supreme Court. While, in Epstein’s view, the Court did take some positive steps during the Chief Justiceship of William H. Rehnquist, “beat[ing] a modest retreat from the commerce power’s high-water mark” (p. 74), the Court blundered in *Gonzalez v. Raich*,<sup>27</sup> when, in invalidating under federal controlled-substances law the medical-marijuana-use provisions of the California Compassionate Use Act, it failed to correct the gross Commerce Clause expansion in *Wickard*. Deference was also, to Epstein (pp. 121–26), the unfortunate rule in *Lingle v. Chevron U.S.A. Inc.*, in which two lower federal courts used dictum from a 1980 regulatory takings case that suggested a slightly heightened standard of review<sup>28</sup> “to strike down a Hawaii statute that limits the rent that oil companies may charge to dealers who lease service stations owned by the companies.”<sup>29</sup> Rather than commending the lower courts for their competent Old Court–style economic analysis, Justice Sandra Day O’Connor’s opinion beat a retreat to the more pro-regulatory standard of *Penn Central Transportation Co. v. New York City*.<sup>30</sup> The third notable example of the Court’s twenty-first century “Progressivism” was the highly controversial holding in *Kelo v. City of New London*,<sup>31</sup> the eminent domain case in which “a five-member liberal majority” (a group that included Justice Anthony Kennedy) (pp. 127–28) sided with government regulators and private developers over homeowners whose property was targeted by a large-scale economic development project. The “one jurisprudential lesson that should

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26. Epstein writes, “[T]here is nothing wrong with Stone’s instinct that the courts must intervene in those cases in which the political process breaks down.” P. 114.

27. 545 U.S. 1 (2005).

28. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”).

29. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005).

30. *Id.* at 538–40 (rejecting the “substantially advance[s]” test and citing factors in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), as the proper basis for determining whether a regulation results in a taking).

31. 545 U.S. 469 (2005). For the numerous state legislative and judicial responses in the wake of *Kelo*, see, for example, 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.03[3][b] (Michael Allan Wolf general ed., Matthew Bender 2006).

be learned from *Kelo*,” according to Epstein, “is that the Progressive tradition continues to operate in its bankrupt fashion to the present day” (p. 134), despite the fact that the admittedly expansive interpretation of the phrase “public use” found in the Takings Clause has a history reaching much farther back than the opening years of the twentieth century.

## II. STARTING IN THE MIDDLE

The major constitutional crime of the “Progressives,” as suggested by the book’s title, is that “[t]hey saw in constitutional interpretation the opportunity to rewrite a Constitution that showed at every turn the influence of John Locke and James Madison into a different Constitution, which reflected the wisdom of the leading intellectual reformers of their own time” (p. 135). In fact, these undeniably reformist judges were *un*-rewriting the Constitution, correcting the textual emendations attempted by the Old Court.

Epstein, like so many others who tell stories of constitutional history, is starting in the middle. He presents the element of “liberty of contract,” for example, as a *fait accompli*, a supposedly inherent constitutional element that, given the affections of Locke and Madison, needed no articulation in the actual writing of the document. Yet the skepticism about the pedigree of an expanded interpretation of the word “liberty,” as it appears adjective-less in both Due Process Clauses, is far from new. Consider, for example, the conclusion that the Supreme Court historian Charles Warren drew in a 1926 *Harvard Law Review* article:

The phrase, “life, liberty or property without due process of law” came to us from the English common law; and there seems to be little question that, under the common law, the word “liberty” meant simply “liberty of the person,” or, in other words, “the right to have one’s person free from physical restraint.” It did not include all a person’s civil rights.<sup>32</sup>

Warren then carefully traces the use of the term “liberty,” failing to find any significant expansion in state and federal courts between 1789 and 1868 (when the Fourteenth Amendment became law).<sup>33</sup>

The situation changed gradually over the course of the next three decades, beginning with Justices Joseph B. Bradley’s and Noah Swayne’s dissents in 1873’s *Slaughter-House Cases*,<sup>34</sup> followed by two concurring

32. Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926); see also Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 391–92 (1891) (“[T]he tendency to give the clause a broad interpretation, and at the least to include within the term ‘liberty’ the right to follow any lawful calling . . . seems, upon examination, to have little real foundation in history or principle.”).

33. Warren writes, “In only one case does the term ‘liberty’ seem to have been given a wider scope, prior to 1868.” Warren, *supra* note 32, at 444 (discussing *Herman v. State*, 8 Ind. 545, 558–63 (1855)).

34. See 83 U.S. 36, 122 (1873) (Bradley, J., dissenting) (“[T]he citizens’ right of choice is a portion of their liberty; their occupation is their property.”); see also *id.* at 127 (Swayne, J., dissenting) (“Liberty is freedom from all restraints but such as are justly imposed by law.”).

opinions in a monopoly case eleven years later,<sup>35</sup> then dictum in an opinion by the first Justice John M. Harlan from 1888,<sup>36</sup> and culminating nine years after that in Justice Rufus Peckham's opinion for a unanimous Court in *Allgeyer v. Louisiana*.<sup>37</sup> The rewriting of the Due Process Clause by the Old Court was complete when, in the last named case, the justices invalidated a statute prohibiting contracts with marine insurance companies that did not comply with state law, offering as their rationale:

The liberty mentioned in th[e] [Fourteenth] [A]mendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>38</sup>

That the process of engrafting a change onto the text of the Constitution—in a familiar common-law pattern of dissent to dictum to holding—was not sudden does not detract from the fact that a rewriting took place, a rewriting that some “Progressive” judges sought to undo before, during, and after the New Deal.

### III. THE VOICE OF MODERATION?

The three cases discussed in the final chapter of *How Progressives*—*Raich*, *Lingle*, and *Kelo*—are important because they illustrate the significant gaps that, despite the Court's shift rightward in membership and ideology, still exist between Epstein's ideas about federalism and individual rights and the modern Court's jurisprudence. In each case, Epstein participated in an amicus curiae brief suggesting a strategy that even the Rehnquist Court chose not to follow.<sup>39</sup> In the Institute of Justice brief in support of the respondents in *Raich*, Epstein and his coauthors sought to have *Wickard*

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35. See *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 754 (1884) (Field, J., concurring); *id.* at 760 (Bradley, J., concurring).

36. *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888). Justice Field reiterated his expansive understanding of “liberty,” this time as a dissenter.

37. 165 U.S. 578 (1897).

38. *Id.* at 589.

39. In *How Progressives*, Epstein notes his amicus participation in the three cases. See pp. 149 n.196 (*Raich*); 150 n.208 (*Lingle*); 151 n.217 (*Kelo*). Because of a typographical problem (there are two footnotes numbered “180” on pages 107 and 108), the footnotes do not match the references in the last thirty pages of the text.

overruled.<sup>40</sup> The Court was unpersuaded, as *Wickard* was cited as controlling law in three opinions in the case.<sup>41</sup>

In its attempt to push takings law beyond its current boundaries, the Cato Institute's amicus brief in support of the private respondents in *Lingle*, also coauthored by Epstein, was equally unconvincing. The brief urged the Court to revisit the question of the constitutionality of rent control, deeming the device "a paradigmatic physical taking."<sup>42</sup> Epstein and his coauthor also instructed the justices on the analytical shortcomings displayed by the Court in its confrontation with World War I-era rent control in *Block v. Hirsch*.<sup>43</sup> Cato was rebuffed on both counts by a unanimous Court, which chose to avoid the courtroom contests between public and private sector economic experts that Epstein encourages.

In Cato's amicus brief in support of the homeowner-petitioners in *Kelo*, Epstein and his coauthors again tried to push the takings envelope a bit too far in the eyes of all but two justices. Asserting that "Condemnation For Blight Does Not Meet The Standard For Public Use,"<sup>44</sup> the brief railed against "[b]road deference under a lax standard" and criticized the source of that deference—the Court's 1954 opinion in *Berman v. Parker*.<sup>45</sup> In *Kelo*, Justice Stevens, writing for the majority, Justice Kennedy, concurring, and Justice O'Connor, for four dissenters, refused to abandon *Berman*.<sup>46</sup>

The Rehnquist Court was not anxious, or even willing, to follow Epstein's lead by revisiting long-abandoned pre-New Deal constitutional principles. If Epstein can somehow convince a majority of the justices or a meaningful segment of influential Court observers that the Old Court's *moderate* jurisprudence was replaced by an *extremist* Progressive agenda, his ideas will be much more palatable.

In Epstein's exaggerated version of "Progressivism," there seem few distinctions between the regulatory programs enacted in the early twentieth

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40. See Brief for the Institute of Justice as Amicus Curiae Supporting Respondents at 14–15, *Ashcroft v. Raich*, 545 U.S. 1 (2005), *sub nom.* *Gonzales v. Raich*, 545 U.S. 1 (2004) (No. 03-1454), 2004 WL 2336487 ("The scope of federal power can be rationalized only by taking the simple but critical step of returning Commerce Clause jurisprudence to its settled limits prior to the New Deal developments that culminated in the *Wickard* decision.").

41. *Gonzales v. Raich*, 545 U.S. 1, 15–22, 32–33 (2001) (majority opinion); *id.* at 37 n.2 (Scalia, J., concurring); *id.* at 43–44, 47, 50–51 (O'Connor, J., dissenting).

42. Brief for the Cato Institute as Amicus Curiae Supporting Respondent at 20, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163), 2005 WL 65495 [hereinafter *Lingle* Brief].

43. 256 U.S. 135 (1921); see *Lingle* Brief, *supra* note 42, at 27 n.15 ("Those controls were hastily upheld based not only on an immature takings law but on a poor understanding of the economics of rent regulation.").

44. Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 16, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2802972.

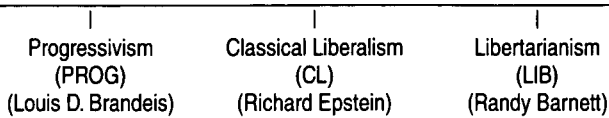
45. *Id.* at 18 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

46. See, *Kelo*, 545 U.S. at 480–82, 484, 489; *id.* at 490, 492–93 (Kennedy, J., concurring); *id.* at 498–500, 504 (O'Connor, J., dissenting). Only Justice Thomas, joined by Justice Scalia in dissent, shared the Cato brief's skepticism about the deference given to *Berman*, in an opinion designed to have the Court rethink the long line of cases that "have strayed from the [Public Use] Clause's original meaning." *Id.* at 506 (Thomas, J., dissenting).

century and the socialism envisioned by Bellamy and others of his ilk. Early in *How Progressives*, Epstein notes that “[c]ritics of the classical liberal position have a field day in thinking that positions such as my own (and others still more modest in their intentions) will ‘turn the clock back’ and so plunge us into some legal Dark Age” (p. xii). He immediately turns to an example of this animosity drawn from the Senate confirmation hearings for Chief Justice John Roberts, during which Senator Arlen Specter “revealed an unsympathetic attitude toward the modest incursions on the New Deal Commerce Clause jurisprudence” (p. xii). Returning the focus to himself and his ideas, Epstein states, without citing any specific sources, that these same critics “happily brand as ‘radicals’ or ‘extreme right-wing ideologues’ anyone who holds views that remotely resemble my own. Their goal is to exclude those views in selecting Supreme Court justices and in framing the constitutional agenda of the next generation” (pp. xii-xiii). If Epstein can convince his readers that his classical liberal principles are not radical or extreme, he is one step closer to achieving the goal of “sound constitutional government in the years to come” (p. xiii).

One important element of Epstein’s strategy, then, is to convey the idea, illustrated in Figure 1, that classical liberalism is a moderate position situated between two extremes: “pure” (also called “hard” or “hard-line”) libertarianism and “Progressivism.” Early in the book, Epstein seeks to “explain how [the classical liberal position] differs from the pure libertarian theory with which it is closely allied” (p. 14). For the purists, it is “difficult, perhaps impossible, to accept any forced exchanges initiated by the state for the common good” (p. 16). Thus, taxation and condemnation fall “out of bounds”; classical liberals are more accepting of government, acknowledging that “some form of state power is needed to preserve the liberties that both groups believe should be protected” (p. 16). Classical liberals’ recognition of “an inherent state police power” in the criminal and nuisance contexts, their knowledge that “self-help and other forms of coordinated voluntary action” are sometimes inadequate to counter “dangerous activities,” and their acceptance of “the proposition that certain forms of market failure require, or at least allow, some form of government intervention” also create distance between the two individualistic, liberty-loving groups (pp. 16–17). Moreover, while the “strong libertarian has little use for anti-trust law,” the classical liberal, following Adam Smith’s lead, “treats cartels as presumptively illegal because in raising prices and lowering output they diminish social utility” (p. 41).

FIGURE I  
AN EPSTEINIAN VIEW OF AMERICAN CONSTITUTIONAL THEORY<sup>47</sup>



In Epstein's version of Supreme Court history, the Old Court justices, who held power before "the Supreme Court's final vindication of Franklin Roosevelt's New Deal legislation in the Court's decisive 1936 term" (p. 1), were also moderates who were more in touch with the classical liberal philosophy of the Constitution than their reformist colleagues.<sup>48</sup> He reminds us that "it is critical to remember that no justice of the Supreme Court has ever held that all forms of state regulation are unconstitutional" (p. 52). He even criticizes the traditionalists for giving "too much leeway to state police power by allowing state regulation in cases in which contracts could work well, and by their willingness to disallow employers the assumption-of-risk defense in many industrial accident cases."<sup>49</sup>

Another way to situate one's position in the middle range, away from the radical fringe, is to portray opposing philosophies and their adherents as dangerously extreme. Such is the case with Epstein's portrayal of the enemy to his left, the agglomeration he calls "Progressives."<sup>50</sup> The chapter he titles

47. Figure 1 is purposely primitive, so the reader should not quibble with the exact location of each position on the scale. What is important is the centrist position of classical liberalism in contrast with the alternatives on its far left and right.

48. For a recent and highly provocative exploration of the debate over the nature and extent of the "Constitutional Revolution of 1937," see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

49. P. 50. This instance is not the first time that Epstein has used his libertarian colleagues as a convenient foil. When Professors Barnett, David Friedman, and James P. Pinkerton responded to his talk on "The Limits of Liberty: Why we need taxation and eminent domain," Epstein's final word was called "A Moderate Responds." After criticizing his colleagues for carrying their libertarianism too far, Epstein commented, "It's nice, just this once, to occupy the odd position of being a moderate." This provocative exchange over the legitimacy of eminent domain under any circumstances and the wisdom of eliminating the state suggests that, in the right company, any position can appear to be middle-of-the-road. Richard A. Epstein, Randy Barnett, David Friedman, & James P. Pinkerton, *Coercion vs. Consent*, REASON, Mar. 2004, available at <http://www.reason.com/news/show/29069.html>.

50. Now that "liberal," the "L-word," is out of fashion, see, e.g., Joe Conason, *Branding Kerry with the L-word*, SALON, Mar. 2, 2004, <http://dir.salon.com/story/opinion/conason/2004/03/02/kerry/index.html> (last visited Nov. 29, 2006), many on the political left, and some on the right, have taken to calling themselves and their causes "progressive." By casting "Progressives" and "Progressivism" in a negative light, Epstein is bucking a trend among ideologues of many persuasions. For examples of erstwhile liberals' attempts to recast themselves as "progressives," see Anthony Howard, "Progressive Democrats flee from the liberal ghosts of conventions past," TIMES (London), Aug. 27, 1996; Progressive Patriots Fund—Russ Feingold, Honorary Chair, <http://www.progressivepatriotsfund.com> (last visited Nov. 29, 2006). Center-left think tanks also engage in this rhetorical shift. See, e.g., Progressive Policy Institute: About the Progressive Policy Institute, [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=87&subsecID=205&contentID=896](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=87&subsecID=205&contentID=896)

“The Progressive Era” includes criticisms of cases decided as late as 1942 and 1943, despite the fact that the historical period known as the “Progressive Era” ended during or shortly after World War I.<sup>51</sup> If this were an isolated instance of mislabeling it would be easy to overlook. A close reading of *How Progressives* reveals, however, that this is just one example of Epstein’s attempts to marginalize a wide range of government regulation and the support of regulation generally by the judiciary.<sup>52</sup> The goal of highlighting the inherent moderation of classical liberalism is enhanced by contrasting it with the most egregious examples of government overreaching and judicial abdication.

In this exaggerated version of Progressivism, there seem few distinctions between the regulatory programs enacted in the early twentieth century and the socialism envisioned by Bellamy and others of his ilk. However, because rhetoric and hyperbole are poor substitutes for historical inquiry, the characterization of Progressivism in *How Progressives* is unsupported and misleading. In reality, history does not supply the support for the nearly wholesale rejection of New Deal–era jurisprudence that Epstein has urged as a decidedly immoderate friend of the Court.

#### IV. WINNER’S HISTORY? NOT QUITE YET

In many ways, *How Progressives* reads like winner’s history: an account of the past, written by the victor at the end of a struggle, that diminishes the

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(last visited Nov. 29, 2006) (“PPI’s mission is to define and promote a new progressive politics for America in the 21st century.”). Even some on the right are not yet ready to concede the term to the opposition. *See, e.g.*, David Brooks, *The Era of Small Government Is Over*, WKLY. STANDARD, Oct. 2, 2000, at 13 (“Americans are progressive in the sense that they also believe in banding together for great leaps into the future.”).

51. *See, e.g.*, ARTHUR A. EKIRCH, JR., PROGRESSIVISM IN AMERICA: A STUDY OF THE ERA FROM THEODORE ROOSEVELT TO WOODROW WILSON 3 (1974) (“The Progressive Era, that transparently optimistic label that historians, almost uniformly, have fastened on the first decade and a half of the twentieth century, may also be considered the climax of the nineteenth century.”); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916, at 2 (1963) (“[T]he period from approximately 1900 until the United States’ intervention in [World War I], [has been] labeled the ‘progressive’ era by virtually all historians.”); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 313 (2003) (noting that, after the 1920 election, “progressive ideas would linger, occasional progressive legislation would still pass; but the Progressive Era was over”).

52. The following is a list of a few of the many “Progressive” evils Epstein includes in the book, with italics provided for the most immoderate phrases that convey the idea that Progressivism is an extreme and irrational, if not dangerous, movement.

- “[The Progressives] were determined that their vision of the managed economy should take precedence *in all areas of life*” (p. 136; emphasis added).
- “Progressives were champions of economic nationalism with its cardinal principle that the extensive interconnection of *all aspects of the American economy* cried out for federal regulation” (p. 8; emphasis added).
- “The Progressives seized on the admitted need for some police power to argue that *just about every form of state regulation* was permissible” (p. 45; emphasis added).
- “[T]he sprawling *Penn Central* test, while highly favorable to government in most cases, represents the kind of *unprincipled ad hoc thinking* that is so congruent with the Progressive Era” (pp. 123–24; emphasis added).

achievements of the losers and makes the winner's triumph somehow seem inevitable. There is a kind of giddy confidence that infuses Epstein's rhetoric, which may explain the book's conflation of Progressivism and socialist state control and the author's assertion that government regulation exacerbated the economic problems of the 1930s and poisoned the constitutional well for decades to follow. The uncritical reader who follows the narrative flow should come to the conclusion that Progressive jurisprudence, at least the decidedly negative version portrayed in the book, deserved to die out.

For the careful reader, however, the author's indifference to essential historical details detracts from the impact of *How Progressives*. Consider these anachronistic, inaccurate, and misleading passages:

- "The Progressives were the self-conscious social and legal reformers who occupied center stage in the period roughly from the onset of the 20th century through the election of Franklin Delano Roosevelt as president in 1932."<sup>53</sup>
- "[M]ost of the innovative, if controversial, domestic programs of the New Deal were in fact direct outgrowths of the Progressive campaign for larger, more active government during the 30-plus years preceding the watershed events of 1937."<sup>54</sup>
- "[T]o achieve their expansive social ends, Progressives adopted a 'realist' jurisprudence that broke sharply from the then-dominant 'formalist' approach to law, which they dismissed as 'blind' to the massive power shifts in social relations that took place with industrialization following the Civil War."<sup>55</sup>

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53. P. 2. In reality, the Progressives were summarily ejected from the "center stage" of American politics and society in the 1920s, the post-war and post-reform period we identify with Warren G. Harding's campaign phrase, "return to normalcy." Moreover, as Epstein himself demonstrates in *How Progressives*, reform-minded justices were not consistently successful in achieving their big-government agenda until Franklin Roosevelt's second presidential term. For a much more subtle account of the shifts that occurred in constitutional jurisprudence in the decades before the judicial triumph of the New Deal, see Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1492–93 (1998).

54. Pp. 2–3. Though not unprecedented among non-historian commentators, Epstein's conflation of Progressives and New Dealers ignores the important differences that caused many older reformers to reject the dramatic growth of federal power embodied in the Roosevelt administration's multi-front war on the Great Depression. For example, Justice Brandeis, in many ways the quintessential Progressive lawyer and judge, jumped off the reform bandwagon in *Schechter Poultry*, a decision celebrated by Epstein. Pp. 64–66; see PURCELL, *supra* note 18, at 135.

Brandeis was far from unique. Fifty years ago Richard Hofstadter drew important distinctions between the waves of reform that swept over the nation beginning at the end of the nineteenth century. See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955). On the continuing impact and import of this monumental work see DAVID S. BROWN, RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY 99–119 (2006). For other works noting the Progressive/New Deal divisions, see ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 8–11 (1995); OTIS L. GRAHAM, JR., *AN ANCHOR FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL* (1967); James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115, 115–16 (2006).

55. P. 3. Epstein is talking not about legal realism, a movement that began in earnest in the 1920s, but its precursor of sorts—sociological jurisprudence. See, e.g., PURCELL, *supra* note 18, at 79; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).



- “[T]he most conspicuous portion of the Progressive platform was its deep conviction that the antitrust law should apply only to ‘ordinary’ businesses, and not to the Progressives’ two favored constituencies—farmers and laborers. The point was made crystal clear in the 1914 modifications of the Clayton Act, which exempted both labor unions and agricultural (and, for good measure, horticultural) activities from the operation of the statute . . . .”<sup>56</sup>

Epstein and his supporters might respond that these are minor quibbles and not major analytical flaws. Yet, when the inaccuracies are corrected, a profoundly different view of Progressivism emerges.

Equally ahistorical and ultimately disturbing is Epstein’s attempt to paint black-and-white portraits of the justices and their ideologies. Subtle hues will not do when one is attempting to separate good “Old Court” (winner) from bad “Progressive” (loser) jurists and the ideas they championed. Figure 2 identifies several figures who are representative of positions in post-1900 American political thought and plots them on a left-to-right scale. This rough representation is by no means intended to fix those positions in a definite spot, but rather to illustrate that at least one major Progressive thinker and reformer, lawyer and then Justice Louis Brandeis, distanced himself at times from committed New Dealers such as future Justice William O. Douglas, who endorsed a much larger role for the federal government during the Great Depression. Moreover, while Douglas would not have been embarrassed by the moniker “liberal,” he (justifiably) would have appreciated the significant distance between his own ideology and that of a devoted Socialist such as Eugene V. Debs. Finally, all three of the figures from the center to the left of the figure would distinguish their pro-government positions from Professors Epstein and Barnett, who view state regulation with a much more jaundiced eye.

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56. P. 85. The real story of the passage of the Clayton Act actually involves a betrayal of Progressivism. See EKIRCH, *supra* note 51, at 234–35 (“Though organized labor . . . protested vehemently that the Democrats had reneged on their campaign promise to exempt labor organizations from the Sherman law, Samuel Gompers optimistically called the modified anti-injunction clause in the Clayton Act ‘labor’s Magna Charta.’”); see also MCGERR, *supra* note 51, at 145 (“the Clayton Act, full of loopholes, was hardly [labor’s ‘Magna Carta’]. As the general counsel of the American Anti-Boycott Association smugly explained, the measure had only ‘slight practical importance.’”).

FIGURE 2  
REPRESENTATIVE FIGURES IN MODERN AMERICAN POLITICAL THOUGHT

Socialist	New Deal Liberal	Progressive	CL	LIB
(Eugene V. Debs)	(William O. Douglas)	(Brandeis)	(Epstein)	(Barnett)

It is equally important to acknowledge that reformers during the first two decades of the twentieth century who identified themselves as “Progressive” advocated a wide range of positions.<sup>57</sup> Moreover, some Progressive causes—such as immigration restriction targeting southern and eastern Europeans<sup>58</sup> and, as Epstein notes (p. 107), eugenics—today seem much less admirable than, say, Jane Addams’s settlement house movement<sup>59</sup> and Lincoln Steffens’s muckraking.<sup>60</sup>

As with many Americans, lawyers and nonlawyers, who were active in various reform movements during the opening decades of the twentieth century, but who sometimes reflected more traditional values, it is difficult to pigeonhole individual Supreme Court justices as “Old Court” traditionalists or “Progressive” radicals, much more difficult than Epstein’s narrative would suggest. Who exactly is a “Progressive” justice? Is it a justice who was appointed by a Progressive President? If so, then Oliver Wendell Holmes,<sup>61</sup> William R. Day, and William H. Moody (appointed by Theodore Roosevelt) would qualify, as would Woodrow Wilson appointees James C. McReynolds, Louis D. Brandeis, and John H. Clarke. If by “Progressive” Epstein instead means a justice who had been active before 1920 in one or more important Progressive causes or who was active as a Progressive politician sometime before appointment, the list would no longer include Holmes and Day, and would still include Moody, McReynolds, Brandeis, and Clarke. We would then add Franklin D. Roosevelt appointees Stanley

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57. For the richness and variety of the causes (admirable and otherwise) championed by what we call the “Progressive movement,” see, for example, EKIRCH, *supra* note 51, and MCGERR, *supra* note 51.

58. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 97–193 (1963); MCGERR, *supra* note 51, at 210–14; BARBARA MILLER SOLOMON, *ANCESTORS AND IMMIGRANTS: A CHANGING NEW ENGLAND TRADITION* 82–209 (1956).

59. See, e.g., JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* (1910); JEAN BETHKE ELSHTAIN, *JANE ADDAMS AND THE DREAM OF AMERICAN DEMOCRACY* (2002); MCGERR, *supra* note 51, at 53–69.

60. See LINCOLN STEFFENS, *THE SHAME OF THE CITIES* (Double Day & Co. 1948) (1904).

61. Professor White has written masterfully and convincingly about the changing reputation of Holmes and the ways in which the “Progressive” mantle is an uncomfortable fit. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 273–76 (2000); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 354–69 (1993); G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

Reed, Felix Frankfurter, and James F. Byrnes, along with Warren G. Harding appointees George Sutherland, William Howard Taft, and Edward T. Stanford (like Taft, a trust-buster), and Charles Evans Hughes, who was appointed by Taft (Associate) and Herbert Hoover (Chief).<sup>62</sup>

In reality, Supreme Court Justices during the early twentieth century aligned and realigned with some frequency, belying the static view of judicial philosophies described by Epstein. Figure 3 provides the voting alignments for the Justices forming the majority in major cases decided between 1895 and 1945 that form the decisional database in *How Progressives*. While it is hard to deny that certain justices, particularly those appointed by Franklin Roosevelt, were much more deferential to government regulation<sup>63</sup> than their predecessors and more senior colleagues, the jurisprudential picture is, upon close examination, more fluid during the years leading up to the “switch in time that saved nine.”<sup>64</sup>

62. For biographical information on the Justices, see BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES (Melvin I. Urofsky ed., 2006).

Presidents can also be hard to place in one camp or another, if we use simplistic litmus tests. For example, what are we to make of the fact that the undeniably Progressive Woodrow Wilson wrote the following federalist-flavored passage in a book that first appeared in 1908?

May [Congress] also regulate the conditions under which the merchandise is produced which is presently to become the subject-matter of interstate commerce? May it regulate the conditions of labor in field and factory? Clearly not, I should say; and I should think that any thoughtful lawyer who felt himself at liberty to be frank would agree with me. For that would be to destroy all lines of division between the field of state legislation and the field of federal legislation.

WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 170–71 (1908).

In the same work, the future President, whom Epstein justifiably criticizes for resegregating the federal civil service, pp. 102–03, observed in opposition to child labor laws, “[i]f the power to regulate commerce between the States can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country.” WILSON, *supra* at 179; see also Mark R. Killenbeck, *The Hand Maid of Liberty?*, 55 ARK. L. REV. 711, 726–27 (2003).

Based on this evidence, should we reclassify Wilson as a classical liberal? Or, does it make more sense to consider whether there were elements of classical liberalism, federalism, conservatism, Progressivism, and pragmatism in this complex political figure?

Given Wilson’s strongly articulated objection to federal child labor legislation, the President was not an easy sell when the Keating-Owen bill was working its way through Congress. Until the summer of 1916, when Wilson faced a tough reelection campaign against Charles Evans Hughes, the President had remained silent in the debate over the bill. Then, “aware of public pressure for immediate enactment, he concluded that . . . victory at the polls could be achieved only by convincing Progressives that the Democratic party was the party of reform.” WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 130 (1970); see also ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA: 1910–1917*, at 226–27 (1954). In this way, political expediency apparently trumped philosophical and jurisprudential objections.

63. There is a reductionist aspect to *How Progressives*, in that Epstein comes to equate “Progressive” jurisprudence with deference, pure and simple. See, e.g., p. 117 (“The central tenet of judicial deference on questions of property rights and economic liberties continues to work itself into the fabric of modern law.”); p. 125 (“Unless there is some clear sense of what counts as right and wrong, the strong element of deference nurtured in the Progressive Era will continue to hold sway in property cases just as it did in economic liberty cases.”).

64. In today’s historical patois, Epstein’s version of the Court’s famous “switch,” p. 1 (“It was then that the Court bowed to the New Deal, shortly after Roosevelt unveiled his infamous

FIGURE 3  
 MAJORITY VOTING ALIGNMENT IN SUPREME COURT CASES  
 DISCUSSED BY EPSTEIN: 1895–1945<sup>65</sup>

GOOD/ BAD	CASE CITATION	JUSTICES IN MAJORITY	SUBJECT	PAGE	YEAR
GOOD <sup>66</sup>	United States v. E.C. Knight Co., 156 U.S. 1 (1895)	BREWER, BROWN, FIELD, FULLER, GRAY, JACKSON(H), SHIRAS, WHITE	Antitrust	34	1895
BAD	Plessy v. Ferguson, 163 U.S. 537 (1896)	BROWN, FIELD, FULLER, GRAY, PECKHAM, SHIRAS, WHITE	Race discrimination	102	1896
GOOD	Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899)	BREWER, BROWN, FULLER, GRAY, HARLAN(I), McKENNA, PECKHAM, SHIRAS, WHITE	Antitrust	34	1899
BAD	Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903)	BROWN, HARLAN(I), HOLMES, McKENNA, WHITE	Anti-Lottery Act	70	1903
GOOD	Swift & Co. v. United States, 196 U.S. 375 (1905)	BREWER, BROWN, DAY, FULLER, HARLAN(I), HOLMES, McKENNA, PECKHAM, WHITE	Antitrust	35	1905
GOOD	Lochner v. New York, 198 U.S. 45 (1905)	BREWER, BROWN, FULLER, McKENNA, PECKHAM	Ten-hour workday	48	1905
GOOD	Clark v. Nash, 198 U.S. 361 (1905)	BROWN, DAY, FULLER, HOLMES, McKENNA, PECKHAM, WHITE	Public use	132	1905
GOOD	Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906)	BREWER, BROWN, DAY, FULLER, HARLAN(I), HOLMES, McKENNA, PECKHAM, WHITE	Public use	133 n.233	1906
GOOD	Adair v. United States, 208 U.S. 161 (1908)	BREWER, DAY, FULLER, HARLAN(I), PECKHAM, WHITE	Labor contracts	48	1908
BAD	Muller v. Oregon, 208 U.S. 412 (1908)	BREWER, DAY, FULLER, HARLAN(I), HOLMES, McKENNA, MOODY, PECKHAM, WHITE	Ten-hour workday	90	1908
GOOD <sup>67</sup>	Second Employers' Liability Cases, 223 U.S. 1 (1912)	DAY, HOLMES, HUGHES, LAMAR, LURTON, McKENNA, VAN DEVANTER, WHITE	Railroad liability	46 n.79	1912
BAD	The Shreveport Rate Cases, 234 U.S. 342 (1914)	DAY, HOLMES, HUGHES, LAMAR, McKENNA, VAN DEVANTER, WHITE	Railroad rates	53	1914
GOOD	Coppage v. Kansas, 236 U.S. 1 (1915)	LAMAR, McKENNA, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Labor contracts	49	1915
GOOD	N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917)	BRANDEIS, CLARKE, DAY, HOLMES, McKENNA, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Workers' compensation	46	1917

Court-packing scheme—his threat to pack a recalcitrant Court with six new members.”), would be characterized as “externalist.” See Kalman, *supra* note 48, at 1054–55 (“Externalists argue for the importance of politics, making the case that Roberts and Hughes, and therefore the Court, dramatically changed course during the “constitutional revolution of 1937” because of the threat posed by the 1936 election and/or the Court-packing plan.”). No matter what label is used (if any), Kalman and other historians have struggled mightily with the difficult question of causation in an effort to understand the complex nature of constitutional change.

65. In Figure 3, “GOOD/BAD” refers to Epstein’s estimation of the case in *How Progressives*, the author of the majority opinion is in bold, and “PAGE” refers to the page in the book at which the reader can find Epstein’s discussion of the cited case.

66. Epstein writes that in *E.C. Knight* “the Supreme Court rightly stated that manufacturing fell outside the scope of the commerce power, but wrongly concluded that a merger of corporations that did business in New York and Pennsylvania should be treated as manufacturing.” P. 34.

67. Epstein does note that courts in cases such as this provided “much deference to the legislature—too much in my view, given the interest-group politics that could lead to the adoption or rejection of certain [tort] rules” (p. 47).

GOOD/ BAD	CASE CITATION	JUSTICES IN MAJORITY	SUBJECT	PAGE	YEAR
GOOD	Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917)	DAY, McKENNA, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Labor contracts	49	1917
GOOD	Hammer v. Dagenhart, 247 U.S. 251 (1918)	DAY, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Child labor	58	1918
BAD <sup>68</sup>	Abrams v. United States, 250 U.S. 616 (1919)	CLARKE, DAY, McKENNA, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Free speech	100	1919
GOOD	Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)	DAY, McKENNA, McREYNOLDS, PITNEY, VAN DEVANTER, WHITE	Antitrust/ Labor	87	1921
BAD	R.R. Comm'n v. Chi., Burlington & Quincy R.R. Co., 257 U.S. 563 (1922)	BRANDEIS, CLARKE, DAY, HOLMES, McKENNA, McREYNOLDS, PITNEY, TAFT, VAN DEVANTER,	Railroad fares	58	1922
GOOD	Child Labor Tax Case, 259 U.S. 20 (1922)	BRANDEIS, DAY, HOLMES, McKENNA, McREYNOLDS, PITNEY, TAFT, VAN DEVANTER	Child labor tax	62	1922
GOOD	Meyer v. Nebraska, 262 U.S. 390 (1923)	BRANDEIS, BUTLER, McKENNA, McREYNOLDS, SANFORD, TAFT, VAN DEVANTER	Foreign language	103	1923
GOOD	Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)	BRANDEIS, BUTLER, HOLMES, McREYNOLDS, SANFORD, STONE, SUTHERLAND, TAFT, VAN DEVANTER	Private schools	103	1925
BAD	Buck v. Bell, 274 U.S. 200 (1927)	BRANDEIS, HOLMES, McREYNOLDS, SANFORD, STONE, SUTHERLAND, TAFT, VAN DEVANTER	Eugenics	107	1927
GOOD	New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	BUTLER, HUGHES, McREYNOLDS, ROBERTS(O), SUTHERLAND, VAN DEVANTER	Ice business regulation	38	1932
BAD	Nebbia v. New York, 291 U.S. 502 (1934)	BRANDEIS, CARDOZO, HUGHES, ROBERTS(O), STONE	Milk price controls	78	1934
GOOD	A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	BRANDEIS, BUTLER, HUGHES, McREYNOLDS, ROBERTS(O), SUTHERLAND, VAN DEVANTER	Fair compensation code	64	1935
GOOD	Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935)	BRANDEIS, BUTLER, CARDOZO, HUGHES, McREYNOLDS, ROBERTS(O), STONE, SUTHERLAND, VAN DEVANTER	Milk price controls	80	1935
BAD	NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	BRANDEIS, CARDOZO, HUGHES, ROBERTS(O), STONE	Unfair labor practices	66	1937
BAD	W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	BRANDEIS, CARDOZO, HUGHES, ROBERTS(O), STONE	Minimum wage	92	1937
GOOD	S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938)	BLACK, BRANDEIS, BUTLER, HUGHES, McREYNOLDS, ROBERTS(O), STONE	State highway regulation	32 n.53	1938
BAD	United States v. Carolene Products Co., 304 U.S. 144 (1938)	BLACK, <sup>69</sup> BRANDEIS, HUGHES, ROBERTS(O), STONE	Filled milk regulation	112	1938
BAD	Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)	BLACK, DOUGLAS, FRANKFURTER, HUGHES, MURPHY, REED, ROBERTS(O)	Flag salute	108	1940
BAD	United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942)	BLACK, BYRNES, DOUGLAS, FRANKFURTER, JACKSON(R), MURPHY, REED, STONE	Milk prices	67	1942
BAD	Wickard v. Filburn, 317 U.S. 111 (1942)	BLACK, BYRNES, DOUGLAS, FRANKFURTER, JACKSON(R), MURPHY, REED, ROBERTS(O), STONE	Wheat crop quota	67	1942

68. Epstein calls Holmes's dissent a "justly praised opinion" (p. 100).

69. Justice Black joined the Court's opinion except for that part of the opinion that contained the famous footnote 4. See *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938).

GOOD/ BAD	CASE CITATION	JUSTICES IN MAJORITY	SUBJECT	PAGE	YEAR
BAD	Parker v. Brown, 317 U.S. 341 (1943)	BLACK, BYRNES, DOUGLAS, FRANKFURTER, JACKSON(R), MURPHY, REED, ROBERTS(O), STONE	Antitrust	84	1943
GOOD	W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	BLACK, DOUGLAS, <sup>70</sup> JACKSON(R), MURPHY, RUTLEDGE, STONE	Flag salute	109	1943
GOOD	S. Pac. Co. v. Arizona, 325 U.S. 761 (1945)	FRANKFURTER, JACKSON(R), MURPHY, REED, ROBERTS(O), STONE	Train length limits	31	1945

Here are some examples of that fluidity: Justices Holmes and McKenna voted with the majority in the following “Good” (that is, classical liberal or Old Court) cases: *Swift*, *Clark*, *Strickley*, *Second Employers’ Liability*, *New York Central*, and *Child Labor Tax*. McKenna, a President William McKinley appointee, who made the “Good” majority possible in *Lochner* and voted with the Old Court majority in *Coppage* and *Hitchman*, seemed to betray classical liberalism with his votes in *Lottery*, *Muller*, *Shreveport*, *Abrams*, and *Railroad Commission*. The “Bad” (that is, “Progressive”) holdings in *Muller*, *Shreveport Rate*, *Abrams*, *Railroad Commission*, and *Buck* would not have been possible without the votes of supposedly “classical liberal” justices. Justices Brandeis and McKenna voted with the “Good” majority in *Meyer*, while Justices Holmes, Brandeis, and Stone voted with the “Good” majority in *Pierce*. Justices Brandeis, Roberts, and Chief Justice Hughes helped make possible the “Good” majorities in *Schechter Poultry*, *Baldwin* (joined by Stone), and *South Carolina State Highway* (joined by Black and Stone). We should not be surprised that, with some regularity, accomplished politicians and experienced judges chose to follow their political instincts rather than abstract, absolutist principles from the eighteenth century.

Despite the urgings of Epstein and his allies, “Progressivism” continues to hold sway with politicians responsible for confirming new justices and with the members of the early twenty-first-century Court. Therefore, we can safely conclude that the winner’s history that typifies *How Progressives* is a bit premature. More time will have to pass. A few more generations of Americans who experienced firsthand the dark side of unregulated business and industry or heard those accounts directly from those who lived them will have to die. And many more of these revisionist accounts will have to appear in credible publications before a large percentage of the informed public rejects what remains the predominant and, I believe, more accurate account of American social conditions and the legal response those conditions triggered during the opening decades of the twentieth century.

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70. Justices Black and Douglas wrote, “We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.” *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 623, 643 (1943) (Black and Douglas, JJ., concurring).

