

2006

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Weinstein, Jack Russell (2006) "On the Meaning of the Term Progressive: A Philosophical Investigation," *William Mitchell Law Review*: Vol. 33: Iss. 1, Article 1.

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ON THE MEANING OF THE TERM PROGRESSIVE: A PHILOSOPHICAL INVESTIGATION

Jack Russell Weinstein[†]

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The purpose of this essay is to investigate the nature of the term “progressive” both in its historical context and as a political concept. I do so by combining political history, the history of ideas, and political philosophy, with the goal of elucidating key themes that lie at the core of contemporary progressive politics.

The essay has four main sections. The first provides an account of progressivism as it has been understood in the recent history of the United States.¹ The second offers a discussion of the development of the modern concept of “progress.”² The third uses the work of John Rawls to explore the roles of neutrality and context in political policy and rationality—a theme that runs throughout much progressive literature.³ The fourth examines the relationship between morality and the free market with special attention to Adam Smith, the eighteenth-century progenitor of modern capitalism.⁴ I conclude with a brief and tentative definition of “progressive” that I hope will spark further discussion.⁵

A great deal has been left out of this essay, not the least of which is the progressive educational movement, as typified by John Dewey and others. I am selective in my approach in order to emphasize those issues that are the most relevant to contemporary discourse. My discussion covers a great deal of ground and relies upon methodologies from a range of disciplines. For this reason, I have, in most cases, presented centrist and moderate interpretation of the thinkers I cite. I have also eschewed frequent reference to secondary literature so as to avoid getting mired in subtle issues of interpretation.

I make no claims as to the definitive nature of my observations and conclusions. This discussion should be seen as preliminary at best, and on the occasion of this special issue of the *William Mitchell Law Review*, my intent is to present an introductory exploration that helps explicate themes that are found throughout the essays that follow.

I. PROGRESSIVISM IN THE UNITED STATES

The term “progressive” is not straightforward. The more one delves into its history in the United States, the more evident it

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1. *See infra* Part I.
 2. *See infra* Part II.
 3. *See infra* Part III.
 4. *See infra* Part IV.
 5. *See infra* Part V.

becomes that there is no one set of principles or single ideology that unifies those who fall under its moniker. Today, American progressives are on the political left; that much is clear.⁶ But how far left on the spectrum they fall is uncertain. They are not revolutionaries. They seek change, not social upheaval, although sometimes this change is significant and can be traumatic. Nor are progressives so far to the extreme that they are in bed with the right.⁷

Progressives are strongly attached to the government; they tend towards state intervention. Yet, they also believe in citizen participation and grassroots action. Perhaps more than any other political classification, progressives hold onto the ideal of direct democracy. They heartily embrace the tensions between what Isaiah Berlin called negative and positive freedoms, or freedom from and freedom to, respectively.⁸ For Berlin, the freedom from hindrance, or “negative” liberty, trumps the freedom to self-actualize, but progressives disagree.⁹ Today’s progressives might argue that, while liberty is important, it is incoherent without entitlements. The state must provide social, political, economic, and cultural assistance to those who are denied access to an equal playing field. Progressives claim that one cannot have liberty without cultivating capabilities.

The role of progressivism is further complicated by the contemporary political climate. In a post-Willie Horton world, the word “liberal” is deemed by many to be political suicide. The term “progressive” is the most likely candidate to fill its role. As one Democratic activist in North Dakota reported to me, she uses the term precisely because it sounds more *centrist* to her audience than the term liberal. The tragic death of Paul Wellstone, Minnesota’s most promising liberal, was portrayed as the death of a Minnesota progressive.¹⁰ His memorial service, a political event used by the right to further delegitimize its opponents, occurred a few years

6. This is in contrast to Canada, for example, where the Progressive Conservative Party is right of center.

7. This odd convergence is the purview of libertarians (and, on occasion, single-issue interest groups such as those who oppose pornography).

8. Isaiah Berlin, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 194–206 (Henry Hardy & Roger Hausheer eds., 1998). Berlin regards a commitment to positive freedom as a dangerous form of Hegelian proto-fascism.

9. *Id.* at 212–16.

10. Jack Russell Weinstein, *Democrats Must Stop Apologizing for Liberal Beliefs*, *THE GRAND FORKS HERALD* (N.D.), Nov. 13, 2003, available at <http://www.und.nodak.edu/instruct/weinstei/gfheraldnov13.htm>.

before the passing of the elder icon of Minnesota progressivism, Eugene McCarthy.

A. *Twentieth Century Progressivism*

McCarthy's Minnesota Progressive Party—the party formed to support his 1988 bid for president—was not the first to bear the name. The first national Progressive Party ran Theodore Roosevelt for president in 1912.¹¹ But Roosevelt's party did not have a monopoly on progressive thought. The descriptor was used by a disparate group of political movements responding to and inspiring large scale political and institutional changes during the early twentieth century: two decades that saw the women's suffrage movement, the labor movement, an active conservation movement, increasing industrialization, a large scale increase in government regulations, education reform, and increased urbanization, to name some of the more major political concerns. “Despite the Republican capitalist approach, there was also a strong and successful socialist movement during much of the early Progressive Era.”¹² This tension between socialism and capitalism foreshadows contemporary progressive attachment to both governmental regulation and direct political participation.

As corporate interests in America became more powerful, historians of the Progressive Era point to a widespread realization that these businesses were a corrupting force on American politics.

11. Roosevelt ran as a progressive after the Republican Party refused to nominate him. This was Lincoln's Republican Party, not George W. Bush's G.O.P. They supported women's suffrage, labor reform, farm relief, health insurance in industry, and taxes on inheritance. Early twentieth-century Democrats were still associated with the depression of the 1890s and were minorities in all but some southern states, whereas the Republicans, although they “spoke for and endorsed the work of the nation's capitalists,” did so through “advocacy of governmental action to promote economic growth,” and inspired a “broad coalition of prosperous farmers, urban workers, and businessmen.” Lewis L. Gould, *Introduction to THE PROGRESSIVE ERA* 1, 5–6 (Lewis L. Gould ed., 1974).

12. Socialists won mayoral races in:

Massachusetts, Wisconsin, and other industrial states; party members sat in state legislatures, and a handful went to the House of Representatives. The perennial presidential candidate of the Socialist Party, Eugene V. Debs, saw his vote increase from 94,000 in 1900 to nearly 900,000 in 1912. A variety of daily and weekly newspapers carried socialism's message into all sections of the nation. Ranging from the Industrial Workers of the World to the moral political aims of Debs, socialism was a genuine third force of the American political landscape.

Id. at 7.

By the close of Roosevelt's presidency, "[one] percent of American companies . . . turned out nearly [forty-five] percent of the nation's manufactured goods. Smaller businessmen and idle-class professionals . . . spearheaded an emerging effort to tame business giants through strengthened regulatory legislation."¹³ In turn, the very structure of American society shifted to follow the dominant business model: "The United States became an organized, bureaucratic society whose model institution was a large corporation."¹⁴ Simultaneously, though, "interest-group organizations of all sorts successfully forged permanent, non-electoral means of influencing the government and its agencies."¹⁵ The more bureaucratic social organizations became, the more the population sought to find methods of political participation outside the bureaucracy.

There is a strong strand of populism here, but there is also a reworking of procedural democracy that was both a factor in, and a reaction to, a fundamental shift in American governing policy:

Where nineteenth-century policy had generally focused on distinct groups and locales (most characteristically through the distribution of resources and privileges to enterprising individuals and corporations), the government now began to take explicit account of clashing interests and to assume the responsibility for mitigating their conflicts through regulation, administration, and planning.¹⁶

American students are generally taught that politics is the negotiation of compromise among numerous conflicting special interest groups, but this was not always the case. The focus on allocating resources to groups rather than to regions is an outgrowth of progressive political participation. On the one hand, progressivism saw an increase in grassroots political participation, returning authority to the individual citizen. On the other, it endorsed an increase in power centralization. For progressives, the government takes the primary role in creating the rules of political and, perhaps, social engagement. It also negotiates minimal standards of living and working. It is therefore fair to argue that

13. *Id.* at 2.

14. Richard L. McCormick, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 248 (1981).

15. *Id.* at 251.

16. *Id.*

progressivism initiated the next stage in “the modern American liberal state . . . with its bureaucratically centralized structure and concern for social welfare.”¹⁷ The disparate causes, methods, and philosophical and political aims of the period make it impossible to classify all these groups as sharing any substantive commonalities larger than the desire for change itself. What unified the Progressive Era was the spirit of reform.

B. Nineteenth Century Reforms

Once again, however, we have to go farther back in history to understand the early twentieth century reformist outlook. In 1879, Henry George’s influential *Progress and Poverty* argued that suffering and poverty were not necessary components of the modern world, particularly since the nation’s wealth continued to grow.¹⁸ Building on Christian principles, he argued that “social justice and Christianity were synonymous.”¹⁹ This marked a significant change in religious politics. Churches at the time were “largely for the mutual insurance of the prosperous families, and not for the upbuilding of the great under-class of humanity.”²⁰ In response, socially conscious Christians participated in the Social Gospel Movement, a political force moved forward by Charles Sheldon’s influential novel *In His Steps*.²¹

This concern for poverty proved to be widespread. The Social Gospel Movement, combined with secular settlement houses such as the Henry Street Settlement in New York City in 1886 and the famous Hull House in Chicago in 1888, resulted in “more than a hundred settlements in 1900 and four hundred by 1910.”²² Religious activists’ interaction with the poor led them to advocate for “cleaner streets, more play grounds, and better schools . . . new child labor laws, factory inspection, regulation of working hours, taxation of inheritance, and strict regulation, or even confiscation of natural monopolies like public utilities.”²³

17. William G. Anderson, *Progressivism: An Historiographical Essay*, 6 HIST. TCHR. 427, 427 (1973).

18. Stanley P. Caine, *The Origins of Progressivism, in THE PROGRESSIVE ERA* 11, 11 (Lewis L. Gould ed., 1974).

19. *Id.* at 13.

20. *Id.*

21. Perhaps for the first time in such a context, this novel asked the question “What Would Jesus Do?” *Id.*

22. *Id.* at 14.

23. *Id.*

Religious movements were supplemented by an academic movement: scholars of the time challenged the dominant *laissez faire* doctrine that governed economic thinking and argued that the new social sciences provided evidence that “science and the ideal of human brotherhood were complementary.”²⁴ At the time, economist Richard T. Ely argued that “the widening and deepening range of ethical obligations rests upon the basis of solid facts.”²⁵ These university scholars grew in importance as the progressive movements grew in power. They offered European solutions to social difficulties, including, especially, advocating the German notion that the state could be an instrument of social change.²⁶

In his essay *The Origins of Progressivism*, Stanley P. Caine outlines numerous other influences and tensions that lead to the Progressive Era—many of which stem from decades before the reformist spirit took hold. Among them was the strength of populism and its counter-force, the mugwumps,²⁷ who “mourned the absence of character, breeding, and the ideas that had characterized American society in an earlier era.”²⁸ Additionally, the economic crises of the 1890s²⁹ influenced many, including the muckraking journalists that were essential to the Progressive Era.

Caine argues that the 1890s was “a decade in transition,” an “indecisive” period that led to the more assertive progressive years that followed. The combination of socialism, capitalism, and populism intersected³⁰ to form the “three categories” that Caine concludes lay at the heart of progressivism: “more direct democratic control over government, new forms of taxation to eliminate privilege and assure more equitable distribution of

24. *Id.* at 16. See also *infra* Part IV for further discussion.

25. Caine, *supra* note 18, at 16.

26. For example, “[t]he settlement idea, the eight-hour day, public ownership of utilities, public housing, unemployment insurance, and old-age pensions were all tried first in Europe, then brought by progressives to America.” *Id.* at 17–18.

27. “Mugwumps” were Republicans who supported Democrat Grover Cleveland in his 1884 presidential bid.

28. Caine, *supra* note 18, at 19.

29. Extensive newspaper and magazine coverage chronicled the economic suffering of the time, such as the twenty percent unemployment rate and the violent end to the Pullman walkout when twelve people died after President Cleveland ordered federal troops to break the strike.

30. Populism is not an economic theory in the same category as socialism and capitalism. However, as each of these theories carry within them presumed and preferred political structures, as well as implications for political participation, it seems reasonable to understand populism as a counter-force to the other two.

society's benefits, and the strict control (if not public ownership) of monopolies."³¹ In other words, although the Progressive Era is identified as roughly the first two decades of the twentieth century, it must be understood as the continuation of political conflict that significantly predates reformist political activism.

C. *Historians on Progressivism*

Historians' descriptions of progressivism differ sharply, at least in part because many who claimed to be progressive were only pretending to be so, and because individual, business, and collective interests all influenced and benefited from progressive reforms. In the 1920s and 30s, historians described the Progressive Era as "the successful culmination of a long just struggle by 'the people' against big business."³² However, this ignored the vast commercial and corporate benefits that resulted from progressive causes; businesses continued to make money and corporations continued to increase in size even when incorporating regulatory changes.³³ In the 1950s, it was argued that progressivism was partially responsible for American entry into World War I because progressivism sought to "extend democracy and to prevent war from occurring again,"³⁴ but this too only tells part of the story.

Despite its socialist and populist roots, some historians argue that progressivism was not a significant change in national outlook at all. They argue that America has always lacked significant ideological conflict since all Americans, liberal and conservative alike, are disciples of John Locke.³⁵ Instead, they suggest, progressives were merely "defenders of the genteel tradition . . . defending Victorian beliefs in absolute morality, manners, and culture from the new intellectual rebels."³⁶ However, this approach

31. Caine, *supra* note 18, at 31.

32. Anderson, *supra* note 17, at 427.

33. McCormick, *supra* note 14, at 251.

34. Anderson, *supra* note 17, at 430.

35. This is a questionable assertion. While it is true that American political theory is largely Lockean, it is unclear that it is universally and solely so, especially amongst those who seek reform. The pessimistic liberalism of Hobbes tends to govern international relations, especially post September 11, 2001, and Rousseau's naturalism was likely an important element in nineteenth-century transcendentalism. Furthermore, it is unclear whether adherence to Mill's account of liberty, for example, is a *de facto* adherence to Locke or simply Millian in itself.

36. Anderson, *supra* note 17, at 437.

runs afoul of what is likely the most dominant view. Famously, after considering a variety of definitions of progressivism, Peter Filene offered “An Obituary for ‘The Progressive Movement’”: “It is time to tear off the familiar label [of progressivism] and, thus liberated from its prejudice, see the history between 1890 and 1920 for what it was—ambiguous, inconsistent, moved by agenda and forces more complex than a progressive movement.”³⁷ A few years later, however, Daniel Rodgers labels Filene’s approach “a pluralistic reading of progressive politics,” and declares it simply another questionable interpretation.³⁸

D. *Contemporary Issues in Progressive Theory*

As ought to be clear, what it means to be progressive, at least historically, is very much a muddle. Whereas contemporary progressive attitudes seem, at first blush, to be more focused, one cannot help notice that even today’s progressives neglect to offer a coherent account of their core philosophy: the term progressive remains undefined. This lack of definition is only further complicated by progressivism’s *de facto* role as the opposition to the contemporary mainstream; progressivism is identified more often by what it is not than by what it is. For example, Roberto Mangabeira Unger and Cornel West, in a 1998 article in *The Nation* titled “Progressive Politics and What Lies Ahead,” call for an “institutional experimentalism,” the purpose of which is to counter the “rigid ideological grids” of past progressivism that “overlook the complexity and experimental impulse of American life.”³⁹ It is unclear what rigidity they refer to, although they likely mean the unwillingness to compromise that many would suggest characterizes the left.⁴⁰

Once again, West and Unger never define the progressive outlook. The closest they come is their observation that

progressives, if not yet many of their fellow Americans, see problems with how money and moneyed interests exert an

37. Peter G. Filene, *An Obituary for “The Progressive Movement”*, 22 AM. Q. 20, 34 (1970).

38. Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113, 114 (1982).

39. Roberto Mangabeira Unger & Cornel West, *Progressive Politics and What Lies Ahead*, THE NATION, Nov. 23, 1998, at 11.

40. It was precisely his willingness to compromise that made many on the left dissatisfied with President Bill Clinton.

inordinate influence upon the outcome of elections and the direction of policy, an influence occasionally sanctified by the judiciary as if the ability of money to talk, magnifying the voices of the few, crowding out the voices of the many, were a principle rather than a wrong.⁴¹

This description echoes some of the progressive assertions of the early twentieth century: the corrupting influence of money and big business on American politics and the exclusion of individual non-moneyed voices in the political process. More regulation and more grassroots participation is once again the clarion call of the progressive.

For our purposes, it is worth investigating progressivism in a legal context as well. Many of Unger and West's sentiments are shared by David Kairys in his introduction to the revised edition of *The Politics of Law: A Progressive Critique*.⁴² Once again, offering no clear definition what it means to be progressive, Kairys distinguishes his approach from "traditional jurisprudence"⁴³ and "mainstream legal thought,"⁴⁴ hoping to locate his method in opposition to the methodology of legal adjudication and research.⁴⁵

Kairys first attacks the idealized decision-making process that governs the establishment and practice of law. Second, he calls for democratic reform to allow for more popular participation in political decision making, particularly in those decisions that affect the courts. Third, he rejects the notion that either the law or the state are "neutral, value-free arbiters, independent of and unaffected by social and economic relations, political forces and cultural phenomena."⁴⁶ Fourth, he calls for a reexamination of the legitimization function for law, arguing that "the law's ultimate mechanism for control and enforcement is institutional violence, but it protects the dominant system of social and power relations against political and ideological as well as physical challenges."⁴⁷

Kairys' rich and interesting discussion shares with Unger and West's article numerous themes that have been passed on from the earlier twentieth-century progressives: the passion for reform, the

41. Unger & West, *supra* note 39, at 12.

42. DAVID KAIRYS, *Introduction* to *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1 (David Kairys ed., rev. ed. 1990).

43. *Id.* at 9.

44. *Id.*

45. *Id.* at 6.

46. *Id.*

47. *Id.* at 7.

call for a more direct democracy, the appeal of populism, and an understanding of the political and legal process as the adjudication of disputes among particular competing groups.⁴⁸ Yet Kairys' introduction adds a few new themes to the mix. In particular, his rejection of abstract contextless procedure and his attack on the (in Kairys' view) false claim of political neutrality that characterizes legal and political procedure.⁴⁹

In many ways, these two new critiques are extensions of the older concerns. A political procedure that adjudicates between groups cannot be neutral; it must look at the particulars of circumstance. Furthermore, any reformist movement cannot be purely theoretical. It must look at actual circumstances and determine how to convert institutions from one form to another.

The remainder of this essay will examine these and several other progressive themes in themselves. Rather than continue the historical focus of this first section, I shift to a philosophical investigation of the meaning of neutrality and group relations, and of the relationship between morality and the free market. However, I shall begin with the proverbial elephant in the room: the concept of progress itself.

II. THE CONCEPT OF PROGRESS

A. *Worldviews Before "Progress"*

Progress as it is currently understood is primarily an enlightenment concept. Throughout most of the human experience, people regarded history as either static or cyclical. Parents expected their children's lives to be very much like their own, and basic knowledge remained the same over many generations. The archetypical modern experience of children rejecting their parents' attitudes as naïve, inadequate, or corrupt is the product of a rapidly changing world; it is not human nature manifested through inevitable adolescent rebellion.

When radical change did take place, it was usually viewed as the result of accident, the consequence of a particular political will, or the effect of intervention by a divine figure. In fact, change, when it did occur, was more apt to be seen as regressive than

48. *See id.* at 1–7.

49. *See id.*

progressive; things got worse, not better. The expulsion from Eden is a primary example of a story glorifying an unsullied past. Every day takes people farther away from perfection, this worldview tells us, and redemption is only possible outside the confines of human history. One may be redeemed in the afterlife, but in nature, the will fails, the body deteriorates, and human society collapses.

Classical Greek thought also assumed the degeneration of human society. The Greeks spoke of a Golden Age, a time without strife or toil. Hesiod described history as moving from the age of gold to the age of iron; Plato saw society as degenerating along political organizational lines—from aristocracy, to timocracy, oligarchy, democracy, and then, ultimately, despotism.⁵⁰ Aristotle suggested that human nature was stagnant if not wicked, and that change in the political order in itself was undesirable.⁵¹ The Greeks saw society is a fragile bulwark against chaos.

B. *The Earliest Uses of the Term*

The word progress is etymologically Latin, a combination of *pro* and *gradi*. Literally, it means to walk forward. The first use of the term is likely by Lucretius in *De Rerum Natura*. In his description of humans distinguishing themselves over time from the beasts of nature, he writes: “practice and the experience of the unresisting mind have taught mankind as they have progressed from point to point.”⁵²

For the Roman poet, however, growth is no more; we may have progressed but we do not progress any longer. As far as Lucretius was concerned, whatever advancement humanity had managed was already complete. Only the possibility of destruction was ever present.⁵³ Progress, which contemporary minds understand as a continuous movement forward that provides society and inquiry with direction, was absent from his picture of the future.

This is not to suggest that contemporary visions of progress must offer a narrative that is uninterrupted, without temporary setbacks, or that is absolutely secure. Instead, progress can be complicated and is often fragile. The twentieth century is a prime

50. Plato, *The Republic*, Book VIII.

51. Aristotle, *Politics*, Book II.

52. Sidney B. Fay, *The Idea of Progress*, 52 AM. HIST. REV. 231, 234 (1947) (quoting TITUS LUCRETIUS CARUS, *DE RERUM NATURA*, Book V, ll., 1452–53 (H.A.J. Munro ed., London 1920)).

53. James H.S. Bossard, *The Concept of Progress*, 10 SOC. FORCES 5, 6 (1931).

example of a time fraught with unlearned lessons and rife with degeneration, but one could certainly make the case that significant progress was made in the midst of the century's horrors.

During times of significant growth and complexity, progress can be particularly hard to spot. As Willson H. Coates writes: "Since there has always been in periods of rapid social change a dual process of breaking down and building up, it is possible to regard the disintegration of moral and social traditions as a necessary part of the moral and social reconstruction which the twentieth century demands."⁵⁴ In other words, despite the destruction of institutions and the chaos and barbarism of the twentieth century, a bird's eye view—perhaps the only view that permits an unfettered glimpse of progress—allows one to see advancement: "Progress may be no less progress for its being precarious, for it has never been, and by definition can never be, identified with stasis."⁵⁵

The intellectual shift leading to the contemporary concept of progress began during the sixteenth and seventeenth centuries with the introduction of the modern scientific method and attitude. Science assumed predictability and coherent explanation. To describe nature was to describe *logos*: "man had to see that it was not fortune but general causes that govern the world."⁵⁶

In 1566, for example, Jean Bodin argued against the classical image of a golden age. Summing up Bodin's argument, Sidney B. Fay said: "the powers of nature have always remained the same; and . . . it would be illogical to suppose that nature could at one time produce the men and conditions postulated by the Golden Age theory, and not produce them at a later time."⁵⁷ Bodin argued that it is human attitudes and experiences that fluctuate over time:

History . . . depends largely on the will of men, which is always changing: every day new customs, new laws, new institutions come into being, and also new errors, resulting in a series of oscillations. Rise is followed by fall, and fall by rise. But, on the whole, through the series of oscillations, there has been a gradual ascent from the time when men lived like wild beasts to the social order of

54. Willson H. Coates, *What is Progress?*, 45 J. PHIL. 67, 69 (1948).

55. *Id.* at 71.

56. Bossard, *supra* note 53, at 8.

57. Fay, *supra* note 52, at 235.

sixteenth century Europe.⁵⁸

This approach to nature is preeminently modern: the laws of nature are timeless, and, as such, different outcomes are the result of human intervention, not a fluctuating physics. Yet, like Lucretius, Bodin paid little attention to the future. The development that he described was the progress that led *to* his age, not *from* it. It would be another sixty years before Francis Bacon would introduce the teleological optimism of the modern scientific method: explication of the gradual and intentional forward movement that is necessary to overcome human error in its four dominant forms.⁵⁹ Bacon's systematic account of an error-free empiricism recognizes that scientific knowledge was not complete when it articulated all that was currently known.⁶⁰

Bacon writes of scientific revolutions and of knowledge beyond the imagination of his contemporaries, familiar tools of progress to the modern mind. However, the *New Atlantis* was postulated by Bacon as being physically and not temporally far away from the England that he knew.⁶¹ Bacon, along with Bodin, was irrevocably attached to the classical texts as authorities, and both thinkers preserved the place of providence in the unfolding of historical events.⁶² None of these attitudes jibe with contemporary notions of progress.

It was Descartes who detached modern scientific thinking from

58. *Id.*

59. Francis Bacon, *Novum Organum*, in 30 GREAT BOOKS OF THE WESTERN WORLD 107 (Encyclopedia Britannica, Inc., 1952) (1620). Bacon classified errors as stemming from four sources, he terms them idols. They are: Idols of the Cave, limitations of any given individual caused by experience, culture, or allegiances to ideologies or false systems; Idols of the Tribe, imperfections in human nature such as the unreliability of the senses; Idols of the Marketplace, mistakes caused by interaction with others, specifically resulting from the limitations of language; and, Idols of the Theater, similar to the Idols of the Cave, errors caused by complex systems that inaccurately mimic the truth. Here he had in mind false philosophical systems.

60. *Id.* Building off of recent discoveries, he writes: "There is therefore much ground for hoping that there are still laid up in the womb of nature many secrets of excellent use, having no affinity or parallelism with anything that is now known, but lying entirely out of the beat of the imagination, which have not yet been found out. They too no doubt will some time or other, in the course and revolution of many ages, come to light of themselves, just as the others did; only by the method of which we are now treating they can be speedily and suddenly and simultaneously presented and anticipated." *Id.* at 128–29.

61. Rush Welter, *The Idea of Progress in America: An Essay in Ideas and Method*, 16 J. HIST. IDEAS 401, 402 (1955).

62. Fay, *supra* note 52, at 235.

the authority of the classics.⁶³ His famous foundationalism permitted each inquirer to reach the moment of the indubitable. *Cogito Ergo Sum* was as much a break from the past as it was the reaffirmation of science as he understood it. One did not need Aristotle to establish certainty; one needed only the rationality present in all mature minds. Descartes provided the contemporary world with intellectual tools that functioned independently of the divine. His famous *Meditations on First Philosophy* provides a universally accessible foundation for scientific knowledge that allows individuals to collectively build, free of doubt, on the discoveries of others. Purely rational inquiry can, for Descartes, be free from error, and the sciences can therefore be regarded as a reliable source of increasing knowledge.⁶⁴

Consider, in summation, the following account of the historical prerequisites for the concept of progress:

First to appear was a monistic and synthetic view of history, as opposed to that cyclical view which had characterized late Greek and Roman thought; this was provided by the Hebraic and Christian assumption of a long-range meaning and direction in historic change. Second of these prerequisites to appear was a willingness after the first flush of Renaissance classicism to turn to natural facts rather than ancient classics for an understanding of the contemporary world; in times such a willingness would imply that the present world was quite as important as the past, and might even have progressed beyond it in knowledge. A third factor, also a function of the Renaissance, was secularization of thought, which would ultimately enable men to break free of the Christian view of history so far as it tended to deprecate progress in this world in favor of that to be achieved by transition to another. Coupled with it was a growing belief in the immutable laws of nature, which by definition excluded the arbitrary workings of a divine

63. See Rene Descartes, *Discourse on the Method of Rightly Conducting the Reason*, in 31 GREAT BOOKS OF THE WESTERN WORLD 41 (Elizabeth S. Haldane & G.R.T. Ross trans., Encyclopedia Britannica, Inc. 1952) (1637) [hereinafter Descartes, *Discourse on Method*]; Rene Descartes, *Meditation on First Philosophy*, in 31 GREAT BOOKS OF THE WESTERN WORLD 69 (Elizabeth S. Haldane & G.R.T. Ross trans., Encyclopedia Britannica, Inc. 1952) (1641) [hereinafter Descartes, *Meditation*].

64. Descartes, *Meditations*, *supra* note 63, at 75–81. It is therefore quite appropriate, as Fay reminds us, that Descartes's *Discourse on Method* was originally titled "The Project of a Universal Science Which Can Elevate Our Nature to its Highest Perfection." Fay, *supra* note 52, at 235.

Providence from the course of historic development, and thus made progress if it existed at all implicit in history itself.⁶⁵

C. *The Eighteenth Century Conception of Progress*

Progress is not a simple idea. It requires a background culture and a network of social, epistemological, and metaphysical assumptions that provide explanations of the human place in the world, the nature and limits of inquiry, the role (or lack thereof) of the divine, and, of course, a complex and sophisticated account of the nature of history itself. It also requires background conceptions of justice and the good life in that a history that progresses must progress towards something. The Enlightenment identified what that something might be.⁶⁶

For eighteenth-century thinkers, beginning with the influential writings of Turgot and Condorcet, progress includes social, political, and moral components. It was not just scientific knowledge that advanced as history unfolded. The human character and circumstance bettered itself. In *A Philosophical Review of the Successive Advances of the Human Mind*, Turgot postulated that human society moved back and forth from barbarism to civilization, the latter being characterized by the centrality of reason while the former is more closely identified with thought governed by superstition.⁶⁷ While still cyclical, in a certain sense, Turgot contributes a stage theory that will be of immense importance to Adam Smith and his commentators (especially Marx), and supplies the essential notion that one stage can be identified as *morally better* than another. Without such gradations, progress becomes indistinguishable from chronology. The teleology inherent in the advancement of history assumes that the closer one gets to the goal of history, the higher the moral value of the current moment is.

Ultimately, though, is it the Marquis de Condorcet who offers

65. Welter, *supra* note 61, at 401–02 (citing J.B. BURY, *THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH* (1920)).

66. It is worth interjecting that even this essay presumes that a description of progress in terms of *progression* is the most informative means of communicating the narrative of meaning behind a specific concept.

67. A. R. J. Turgot, Second discours en Sorbonne. Sur les progrès successifs de l'esprit humain, in 2 *ŒUVRES DE TURGOT* 597–611 (Eugène Daire & Hippolyte Dussard eds., Guillaumin Libraire 1844) (1750).

us the most dramatic account of moral progress, placing its identification at the center of his treatise, *The Progress of the Human Mind*. The “aim” of this work, he writes, is to show that “nature has set no term to the perfection of the human faculties; that the perfection of man is truly indefinite; and that the progress of this perfectibility, from now onwards independent of any power that may wish to halt it, has no other limit than the duration of the globe upon which nature has cast us. This progress will no doubt vary in speed, but it will never be reversed.”⁶⁸

Condorcet’s comment that progress can never be retrograde makes explicit its adherence to the principles of nature. It is not simply that forward movement describes the execution of these principles. Progress is itself one of the principles; that the human mind progresses is part of its nature.

The concept of “progress”—as it developed through the Enlightenment—is collective in two important ways. The first is that these thinkers refer to progress as a monolithic activity: either humanity progresses or it does not. There is not any room for more sophisticated claims such as, “humanity has progressed in its respect for the individual person, but it has not progressed in its attitude towards women.”⁶⁹

The second way in which progress is collective is more troubling for the American progressive agenda. Humanity progresses as a whole, but individuals might not.⁷⁰ One might suggest that the human condition has bettered significantly—humans now have the technological capacity for shelter, advanced medicine, and high-speed communication—but that does not

68. ANTOINE-NICOLAS DE CONDORCET, SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND 4 (June Barraclough trans., Weidenfeld & Nicolson 1955) (1795).

69. This inadequacy would correct itself in the beginning of the twentieth century during which progress’s “concrete application and its decentralization . . . [were identified] with differing kinds of change.” Bossard, *supra* note 53, at 11. Given two world wars, the depression, and the failure of the League of Nations, “civilization seemed to be turned back several centuries.” Fay, *supra* note 52, at 240. There was a renewed sense of allegiance to Turgot’s cycle-theory of progress, and “more attention was focused on the stages where [history] halted or slipped back.” *Id.* Science seemed to advance significantly while morality seemed to degenerate. Progress had to be compartmentalized.

70. This is not to suggest that education cannot make a person morally better; such a concept was central to many Enlightenment thinkers’ systems. Furthermore, in the nineteenth century, Hegel would argue that certain “world historical” individuals (Alexander the Great, Napoleon, etc.) do move history forward.

mean that even the majority of people actually see the benefits of these advances. Vast numbers of people have no access to shelter, medicine, or the technologies of communication, and, as such, the forward progress of those who do might actually make them worse off rather than better.⁷¹ Immanuel Kant, the paradigmatic enlightenment philosopher and the philosophical progenitor of not only the dominant contemporary political theory, but also the role of subjectivity in the modern experience, will help us to focus on this notion of collectivity in more detail.⁷²

D. *Kant on History and Progress*

In *An Answer to the Question "What is Enlightenment?"*, Kant identifies the purpose of human history as enlightenment, or "man's release from his self-incurred tutelage."⁷³ According to Kant, the motto of enlightenment is "*Sapere aude!* [Dare to know]" or, "Have courage to use your own reason!"⁷⁴ Reason is the key to freedom, although freedom is limited in the Kantian sense. It is not Isaiah Berlin's liberty, but rather, "the public use of one's reason." According to Kant, "it alone can bring about enlightenment among men."⁷⁵

For Kant, freedom is scholarly. It denotes the ability to criticize when one speaks in one's own voice, but does not entitle a person to speak critically when he or she represents a particular office.⁷⁶ For example, a clergyman must teach catechism on the pulpit even if he works as a scholar to challenge the doctrine via theological journals.⁷⁷ For Kant, to deny this scholarly freedom is

71. *See infra* Parts III and IV.

72. This requires some explanation. As we will see in section three, Kant's moral and political theories lie at the core of contemporary liberal political philosophy, the most influential proponent of which is John Rawls. In a related but different area, Kant is largely responsible for the subjective turn in modern epistemology. Kant's *Critique of Pure Reason* argues that the mind actively filters information in order to understand it. This subjectivism is a radical departure from the epistemologists who came before him.

73. Immanuel Kant, *An Answer to the Question "What is Enlightenment?"*, in *ON HISTORY* 3, 3 (Lewis White Beck ed., Bobbs-Merrill Co. Inc. 1963) (1784).

74. *Id.* at 3.

75. *Id.* at 5.

76. This may not seem like much, but in fact, in contemporary politics, we are often in danger of losing this freedom. For example, corporate officials are often restricted from making political statements because even if they disavow association with their employers, the risk of associating a particular company with a controversial position is too great.

77. Kant, *supra* note 73, at 6.

to bind people to the present time. It is “to shut off all further enlightenment from the human race,” and is “a crime against humanity,” because “the proper destination . . . [of humanity] . . . lies precisely in this progress.”⁷⁸ Kant adds by way of explanation: “For himself (and only for a short time) a man may postpone enlightenment in what he ought to know, but to renounce it for posterity is to injure and trample on the rights of mankind.”⁷⁹ Thus, we have a duty to pursue our own improvement, not for ourselves, but for its universal importance. Each of us is a contributor to the human project.⁸⁰ The nature and limitations of this contribution are elaborated upon in his *Idea for a Universal History from a Cosmopolitan Point of View*, published the same year.⁸¹ He explains:

Whatever concept one may hold, from a metaphysical point of view, concerning the freedom of the will, certainly its appearances, which are human actions, like every other natural event are determined by universal laws. However obscure their causes, history, which is concerned with narrating these appearances, permits us to hope that if we attend to the play of freedom of the human will in the large, we may be able to discern a regular movement in it, and that what seems complex and chaotic in the single individual may be seen from the

78. *Id.* at 6–8.

79. *Id.* at 8.

80. Kant concludes the essay by writing,

But only one who is himself enlightened, is not afraid of shadows, and has a numerous and well-disciplined army to assure public peace, can say: “Argue as much as you will, and about what you will, only obey!” A republic could not dare say such a thing. Here is shown a strange and unexpected trend in human affairs in which almost everything, looked at in the large, is paradoxical. A greater degree of civil freedom appears advantageous to the freedom of mind of the people, and yet it places inescapable limitations upon it. A lower degree of civil freedom, on the contrary, provides the mind with room for each man to extend himself to his full capacity. As nature has uncovered from under this hard shell the seed for which she most tenderly cares—the propensity and vocation to free thinking—this gradually works back upon the character of the people, who thereby gradually become capable of managing freedom; finally, it affects the principles of government, which finds it to its advantage to treat men, who are now more than machines, in accordance with their dignity.

Id. at 10.

81. Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View*, in ON HISTORY 11 (Lewis White Black ed., Bobbs-Merrill Co. Inc. 1963) (1784).

standpoint of the human race as a whole to be a steady and progressive though slow evolution of its original endowment.⁸²

The essay on cosmopolitan history consists of nine theses describing the relationship between human action and history, and includes elaborations on their meaning. Ultimately, the theses lead to the goal of nature, which is “the achievement of a universal civic society which administers law among men.”⁸³ This is “the most difficult and the last [problem] to be solved by mankind”:⁸⁴

The history of mankind can be seen, in the large, as the realization of Nature’s secret plan to bring forth a perfectly constituted state as the only condition in which the capacities of mankind can be fully developed, and also bring forth that external relation among states which is perfectly adequate to this end.⁸⁵

The relevant difficulty for our discussion lies in the second thesis: “In man (as the only rational creature on earth) those natural capacities which are directed to the use of his reason are to be fully developed only in the race, not in the individual.”⁸⁶ Kant argues that reason itself progresses, but because it:

requires trial, practice, and instruction in order gradually to progress from one level of insight to another . . . a single man would have to live excessively long in order to learn to make full use of all his natural capacities. Since Nature has set only a short period for his life, she needs a perhaps unreckonable series of generations, each of which passes its own enlightenment to its successor in order finally to bring the seeds of enlightenment to that degree of development in our race which is completely suitable to Nature’s purpose.⁸⁷

This, in a nutshell, is the modern conception of progress. Each generation contributes to the progress of the whole by being one link in a chain. While individuals may experience the fruit of improvement along the way, they will never achieve the *telos* that drives progress.

On its own, this seems optimistic, but more detail reveals the

82. *Id.* at 11.

83. *Id.* at 16.

84. *Id.* at 17.

85. *Id.* at 21.

86. *Id.* at 13.

87. *Id.*

tension implicit in the procedure Kant outlines: it is human antagonism that drives history forward. Humans have both social and unsocial elements in their personalities. A person wants to be in society “because in society he feels himself to be more than man, i.e., as more than the developed form of his natural capacities.”⁸⁸ Yet, at the same time, a person wants to be alone, “because he finds in himself at the same time the unsocial characteristic of wishing to have everything go according to his own wish.”⁸⁹ Humans therefore live in conflict with one another, negotiating, as Berlin would later call it, their freedom from others and their freedom to actualization that can only occur in social circumstances. Kant’s vision is nowhere as extreme as Hobbes’s war of all against all; nevertheless, the human experience is still one of opposition.⁹⁰

Again, we see the modern notion of progress. Conflict and individual desires bring improvement because the competition for goods and the tension between individuals are the means by which individuals improve their powers. This improvement moves the human race forward. Particular people win or lose, but collectively, history ensures that the human race wins overall.

E. Progress During and After the Nineteenth Century

For Kant, progress contributes to the realization of human potential. At the core of his account is a glorification of the human capacity. Enlightenment for Kant is the point where humankind can finally do whatever it was that it was intended to do.

88. *Id.* at 15.

89. *Id.*

90. Kant writes:

This opposition it is which awakens all his powers, brings him to conquer his inclination to laziness and, propelled by vainglory, lust for power, and avarice, to achieve a rank among his fellows whom he cannot tolerate but from whom he cannot withdraw. Thus are taken the first true steps from barbarism to culture, which consists in the social worth of man; thence gradually develop all talents, and taste is refined; through continued enlightenment the beginnings are laid for a way of thought which can in time convert the coarse, natural disposition for moral discrimination into definite practical principles, and thereby change a society of men driven together by their natural feelings into a moral whole Thanks be to Nature, then, for the incompatibility, for heartless competitive vanity, for the insatiable desire to possess and to rule! Without them, all the excellent natural capacities of humanity would forever sleep, undeveloped. Man wishes concord; but Nature knows better what is good for the race; she wills discord.

Id. at 15–16.

Nineteenth-century theorists modified this meaning. For Hegel, historical progress is aimed at achieving freedom, but his conception of freedom is inherently tied together with access to truth, universal culture, and political and metaphysical identity. The end of history for Hegel is Absolute Spirit: collective self-actualization, self-aware total knowledge of the whole as a collectivity.⁹¹

Marx would challenge Hegel, arguing that his forerunner's conception of freedom did little for the individual and that his conception of history was so focused on principle that it ignored particular events.⁹² He would substitute communism—political equality, universal political participation, and true command of one's own labor—for Kant's enlightenment. John Stuart Mill would emphasize a different area of Kant's essay, arguing that political liberty is necessary for free inquiry.⁹³ Darwin's biological theories would weave the notion of progress into even the seemingly accidental (he provides the security of providence without the necessity of the divine: we are, by nature, a species that advances). The pragmatists—C.S. Pierce, John Dewey, and others—would develop a progressivist theory of truth that defined truth in part as that which the community of inquiry would converge upon in the long run.⁹⁴

All of these variations on Kant and his commentators, and on Condorcet, Smith, and Turgot, become elements within the negotiations of the American Progressive Era. In *The Idea of Progress in America*, Rush Welter shows clearly that in America, during the nineteenth century, “both ‘conservatives’ and ‘liberals’ subscribed to the doctrine of a systematic and presumably perpetual

91. Hegel, as an idealist, saw reason as the ultimate reality, so physical distinction between individuals were of lesser concern in his system. At most, he was concerned about the interaction of peoples—nations the interaction of which drove history forward.

92. See Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER (Robert C. Tucker ed., W.W. Norton & Company Inc. 2d ed. 1978) (1844).

93. See JOHN STUART MILL, ON LIBERTY 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

94. Herbert Spencer would “identify progress with evolution. Organic evolution is organized progress and the law of organic progress is the law of all progress.” Bossard, *supra* note 53, at 9. Spencer extended “the survival of the fittest’ to biology, psychology, sociology, and ethics,” creating “the gigantic Synthetic Philosophy which was to explain the development of the universe.” Fay, *supra* note 52, at 237.

improvement of the human estate,” but that there was significant satisfaction in the way things were: “progress . . . would be a continuation of the present.”⁹⁵ As Welter explains, during that period, almost universally, for Americans, “the United States . . . both *had* progressed and *was* progress.”⁹⁶ Yet, at the same time, Americans regarded their nation as “an experiment.”⁹⁷ They appreciated change, but wanted it “orderly,” against the revolutionary roots of the experiment itself.⁹⁸

Before the Progressive Era, then, Americans rejected Kant’s presumption of conflict:

On the classic European view, the conflict of opinions produce truth; in the light of the idea of progress truth will be constantly accruing new meanings. But in the United States neither conflict nor innovation was deemed necessary. Indeed all that was necessary, according to a commonly held view, was the education of all children in the accepted truths of their parents.⁹⁹

As we saw in the first section, this approach changed in the Progressive Era, and many of these tensions can be witnessed in the conflict between the different reformists that epitomized the period. If society is made up of different groups, every group might not be as capable of teaching the dominant values, values that are no longer universally agreed upon. Instead, groups must fight for their values to be realized and they may therefore have to rely on the government to protect their ability to do so.

Contemporary progressives are still struggling with these nuances, especially the tension between the collective nature of progress and the need for advancement of the individual. What makes a collective and how close to the individual person do the benefits of progress penetrate? Is collectivity economic, ethnic, religious, or gendered? Are the needs of an individual group member subordinate to the needs of the group in general? To what extent can the law address social realities? These issues, as we have seen, are touched upon in Kairys’ introduction to *The Politics of Law: A Progressive Critique*. They become some of the central foci of American politics during the second half of the twentieth

95. Rush Welter, *The Idea of Progress in America: An Essay in Ideas and Method*, 16 J. HIST. IDEAS 401, 401, 404 (1955).

96. *Id.* at 406.

97. *Id.*

98. *Id.* at 410.

99. *Id.* at 413.

century.

III. CONTEXT AND BUREAUCRACY

In this section, I focus on the use of an ideal as a guiding force in progressive politics. As we have seen, in the introduction to *The Politics of Law*, David Kairys attacks the idealized decision-making process that governs the establishment and practice of law. He questions whether the state can ever be neutral or value-free, with a legal system independent of social, political, economic, or cultural forces. Progressives, it seems, regard individual circumstance as relevant to political decision making, and they acknowledge that the current political structure and its inequities affect these decisions. The playing field is not equal, a contemporary progressive would likely argue, and since this inequality influences public and legal policy, one can fairly question the legitimacy of the current legal system.

The fact that money and special interests significantly influence American governance is so widely accepted that commenting on it has reached the level of platitude.¹⁰⁰ Kairys' concerns cut deeper. He asks, not only whether finance affects *realpolitik*, but whether social and economic inequalities are interwoven into the very core of the American vision of justice. Does ignoring particularities subvert the pursuit of justice at the outset?

A. John Rawls's Proceduralism

Kairys' concerns are shared by many in political philosophy, and his comments contribute to a debate that has reached its zenith in the last thirty years. At the epicenter of this discussion lies the work of the late Harvard Professor John Rawls, whose 1971 book *A Theory of Justice*¹⁰¹ renewed interest in political philosophy, moving it from a stagnant sub-field to perhaps the most active and vibrant area of philosophy today. The contrast between Rawls's two most important books¹⁰² highlights precisely what any legal system

100. At the same time, there is a parallel grassroots movement aimed at circumventing this control of business. The internet-based political action group MoveOn.org is, perhaps, the most successful.

101. JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999) (1971).

102. I have in mind Rawls's *A Theory of Justice* and *Political Liberalism*. See generally *id.*; JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996).

gains or loses by prioritizing neutrality and an idealized reasoning structure, factors that we must consider if we are to take Kairys' critique seriously.

Rawls is a proceduralist. In other words, he believes that focusing on the process of governing rather than the people who are to be governed is the best way to treat individuals equally. This is an outgrowth of Kant's claim that only ethical precepts which consider reason alone are truly moral. Categorical principles reach universal conclusions, and if one's act is moral in all circumstances, it is moral in any circumstance.¹⁰³

When a political system is built in accordance with the categorical imperative, as Kant famously calls it, moral agents enter into membership in the Kingdom of Ends: a just political structure that treats its members as ends-in-themselves. In more contemporary terms, systems of justice that follow Kant's model articulate rights and duties that apply to all people in all situations so that they can be equally and justly applied to individual people in specific circumstances. Each person, therefore, is politically equal to every other and fully consenting and participatory in the governance process.

Rawls struggled with all of this as early as 1958. In his groundbreaking paper *Justice as Fairness*, he considers justice, not as "a virtue of particular persons" but rather, as a "virtue of social institutions."¹⁰⁴ He writes that principles of justice "are regarded as formulating restrictions as to how practices may define positions and offices, and assign thereto powers and liabilities, rights and duties."¹⁰⁵ In philosophical terms, Rawls prioritizes the right over the good, or the legal process over both people's particular aims in life and the state's notion of what makes a good person. Despite its liberal character,¹⁰⁶ the institution comes first, and the individual

103. According to Kant, all people, by nature of their own reason, can assent to a universal moral rule. In doing so, they act out of duty rather than simple inclination, and, in return, they are treated with equal and absolute respect (but even if they were not, Kant would argue, moral actors are still morally obligated to follow the rule since it is the right thing to do).

104. John Rawls, *Justice as Fairness*, in *COLLECTED PAPERS* 47–48 (Samuel Freeman ed., 1999).

105. *Id.*

106. The term liberal, unless otherwise indicated, refers to the classical liberal tradition: a society is liberal if it prioritizes the individual over the collective and preserves an area of human life that cannot be infringed upon by the state. In American politics, both Democrats and Republicans are liberal in this sense.

later.¹⁰⁷ As he wrote almost half a century later, “[n]either political philosophy nor justice as fairness is . . . applied moral philosophy.”¹⁰⁸ For Rawls, to understand what people want to be, one must first understand the institutions that enumerate their possibilities. Freedom is first and foremost access; liberty is primarily institutional possibility. Like the progressives, Rawls sees government intervention as a key to individual liberty.

Rawls’s words are representative of their time. Whatever he meant by individuality and personal freedom was mired in a world whose politics were about to change. Immersed in the cold war, political philosophy of the 1950s was informed by World War II, McCarthyism, and the Korean War. Rawls’s essay does not anticipate the cultural conflict that would soon refocus his ideas.¹⁰⁹

B. *Bureaucracy in A Theory of Justice*

By 1971, Rawls made identity conflict a central component in his work. He was seeking, along with many in the United States, a mechanism for erasing racial and ethnic politics from political decision-making procedures.¹¹⁰ In *Theory*, he presents a full-scale proceduralist conception of justice, one in which the proper functioning of institutions guarantees both just circumstances and necessary access to good.

For Rawls, the key to justice is found in the formation of the political structure. He argues that the rules of justice—the principles that outline the goals and structures of political institutions—ought to be decided upon in a situation of total fairness, otherwise the principles themselves will be inherently

107. In *Justice as Fairness: A Restatement*, Rawls offers two reasons for his prioritizing the “basic structure” of institutions. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001). First, because political theory needs, “an institutional division of labor between principles required to preserve background justice and principles that apply directly to particular transactions between individuals and associations,” *id.* at 54; and, second, because of its “profound and pervasive influence on the persons who live under its institutions.” *Id.* at 55.

108. *Id.* at 14.

109. The civil rights movement, the sexual revolution, the construction of the Berlin Wall, and the mainstreaming of ethnic studies may possibly have been in the air in the 1950’s, but they were far from being realized. They are, however, essential to *A Theory of Justice*.

110. See MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE (1999) (chapter 2, “The Feminist Critique of Liberalism,” is particularly relevant to this point). Whether Rawls is fully conscious of gender difference is a matter of debate.

corrupt; he is trying to avoid criticisms of the sort Kairys puts forth from the start.

Building on the social contract tradition and adding elements from Kant's ethics, Rawls postulates a hypothetical ideal decision-making procedure called "the original position" in which all interlocutors are placed under a "veil of ignorance" and are therefore made unaware of their particular circumstances: they do not know their own social status, abilities, ethnicities, genders, capabilities, or personal aims.¹¹¹ Instead they are encouraged to recognize that whatever the worst social position turns out to be, they might end up being in it. For Rawls, only by being ignorant of one's own personal circumstance can one be truly impartial. Without this ignorance, Rawls implies, people will necessarily choose principles of justice that privilege their personal circumstance.

Rawls argues that all people, so situated, will choose the same principles of justice, the same claim Kant makes about the categorical imperative. This ensures not only equal respect, but universal consent. The agents in the original position are essentially identical to one another and are adequate stand-ins for those who do not participate, since any person can be placed in the original position and will then consent to the same two principles.¹¹² In other words, equal civil liberties cannot be compromised and equal opportunity must be cultivated in all cases unless their existence compromises the civil liberties established by the first principle.

Rawls argues that in the original position, agents will necessarily choose institutions in which the lowest rung is the most beneficial of all possible lowest rungs; economic inequality is permissible only insofar as the inequality contributes to the increased well-being of the least fortunate. He calls this the *maximin* principle, or the principle that seeks the maximum minimum position.¹¹³ Despite the vast range of social difference in

111. RAWLS, *supra* note 101, at 17–22.

112. In order of priority, the principles of justice are:

(1) Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. (2) Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

Id. at 60.

113. *Id.* at 152. For example, imagine two societies, one egalitarian, one

the hierarchical society, Rawls argues that agents in the original position will still choose the hierarchical society because having the lowest rung at position $w+1$ is better than having it at w . Upward mobility is not an issue; neither is a sense of community, and Rawls explicitly precludes envy as a motivating factor.¹¹⁴ Rawls only concerns himself with the worst-case scenario; he wants the worst off as well off as possible. It is important to note that since no economic concerns can trump the basic liberties guaranteed by the first principle of justice, the concern that vast social inequalities will result in a limitation on the ability of the least well-off members of society to participate in governance is unfounded. Such limitations would be regarded as interfering with the basic liberties and would preclude that possibility of such a social arrangement from being chosen by the members of the original position.

We see already how Rawls struggles with many of the themes discussed by the progressives. He is concerned about the least well-off in society. Additionally, he is seeking a way for universal participation in the formation of the principles of justice, yet he is also wedded to seeking a means by which the collective can intervene when regulation or intervention is required.

Perhaps the two most problematic issues in Rawls's theory are the ideal nature of the reasoning process and the aim for neutrality between people. Taking the exact opposite position as Kairys, Rawls concludes that true justice can only exist in circumstances where the decision-making process governs each person precisely as it would any other, while context is rejected as a relevant factor in the establishment of the rules of justice. Since, according to Rawls, ethnic, racial, or other such factors impair decision making, he suggests that the only fair move is to exclude them from consideration.¹¹⁵ Such characteristics are accidental, not essential,

hierarchical. Suppose that the status of every member of the egalitarian society is some level that I will call w , whereas the status of the members of the hierarchical society ranges from level $w+1$ to level $w+100$. Here, w in this phrase means simply wellness. I am using it as a composite for all those factors that influence quality of life in a society. This includes economic well-being, health, happiness, etc. The nature of wellness is controversial and I wish to avoid that discussion for the time being. I only use this in an attempt to illustrate Rawls's *maximin* principle.

114. Rawls writes, "the most extreme disparities in wealth and income are allowed provided that the expectations of the least fortunate are raised to the slightest degree. But at the same time similar inequalities favoring the more advantaged are forbidden when those in the worst position lose by the least amount." RAWLS, *supra* note 101, at 157.

115. *Id.* at 137-42.

in Rawls's view of humanity, and are therefore irrelevant to political decision making.

Of course, there is a major difference between Rawls's approach and Kairys' approach; whereas the scholars in *The Politics of Law* are working within a pre-existing and, perhaps, inherently flawed system, Rawls is working to create a new system that once established will hopefully avoid the flaws existent in our own. Nevertheless, his critics argued that human rationality was simply not possible in the original position, a criticism that echoes the critiques of neutrality and ideality leveled against contemporary legal procedure. People cannot make decisions about what political circumstance is to be preferred if they have no sense of their own identity or goals.¹¹⁶ Reasoning requires a tradition and strong sense of self to have rational justification, otherwise what Rawls calls consent is really arbitrary preference.

C. Liberalism and Neutrality

The aftermath of *A Theory of Justice* is complicated (as is the book, the surface of which I have only grazed here). Political theorists either accepted Rawls's framework or criticized it; they could not ignore it. For our purposes, though, the most important consequence is the prevalence of the concept of neutrality in liberal theory, most precisely articulated by Ronald Dworkin in 1978 when he defined a liberal society as one in which "government must be neutral on what might be called the question of the good life."¹¹⁷

Dworkin used the term amidst a general defense of equality, arguing that liberalism seeks to rectify the fact that "natural talents are not distributed equally,"¹¹⁸ a notion he inherited from Rawls. In other words, if one person is born smarter, stronger, or better looking than another, then he or she cannot be said to deserve the fruits of these talents. Just as group identification is not an essential quality for Rawls, neither are talents. This is a problematic

116. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). See also CHANDRAN KUKATHAS & PHILLIP PETTIT, *RAWLS: A THEORY OF JUSTICE AND ITS CRITICS* (1990) (containing a useful overview of Rawls's theory and critiques of it).

117. Ronald Dworkin, *Liberalism*, in *LIBERALISM AND ITS CRITICS* 60, 64 (Michael Sandel ed., 1984), originally published in *PUBLIC AND PRIVATE MORALITY* (Stuart Hampshire ed., 1978).

118. *Id.* at 68.

notion for a variety of reasons, not the least of which is that it makes one wonder what counts as personhood after someone is stripped of their most dominant characteristics. Dworkin's insight is Kantian in that it makes moral agents accountable for things that they can control rather than the consequences of any particular act or capacity. It also makes individuals morally relevant as rational creatures alone.

The virtue of Dworkin's essay was not simply that it was an accurate portrayal of liberalism at the time, although it was. The most important feature was his precise and clear execution of a core and intuitive political idea. A good analytic, and a good philosopher of law, Dworkin articulated clear and bounded terminology upon which to center relevant discourse. His argument was made well, with strong justification, and he thereby provided an irresistible target for his critics. The main issue, it turns out, is that his notion of neutrality is incoherent.

Put simply, for a government to remain neutral on conceptions of the good life it must not take any position as to whether one end is more valuable than another. Under liberalism, this is a private matter. But the government must also protect its citizens from others. Thus, the government must legislate against, for example, murder. The prohibition of this act presumes, however, that the good life is a life not prematurely ended by another. At its absolute minimum, a liberal government must be committed to protecting its citizens from unjustified violence, but if so, the liberal government cannot be neutral.¹¹⁹

At issue are the nature of neutrality and the priority of the right and the good.¹²⁰ The role of neutrality was never dominant until the late 1970s. Since Rawls and Dworkin, liberalism is presumed to be neutral, and many liberals return to the priority of

119. It is worth adding, as William Galston does, that the commitment to neutrality is itself not neutral; it is a substantial moral position. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991) (emphasizing this point particularly in part three of the book). This is Kairys' insight as well, although *The Politics of Law* goes further to suggest that neutrality might actually be harmful to the state and its people. See KAIRYS, *supra* note 42, at 1–9.

120. These characteristics were originally used to describe certain aspects of liberalism, but have tended to serve as an essentialist definition instead. Neutrality was anticipated by Locke in his remarks on toleration, and the term was used once by James Madison. See Richard C. Sinopoli, *Liberalism and Contested Conceptions of the Good: The Limits of Neutrality*, 55 J. POL. 644, 646 (1993).

the right over the good in one form or another.¹²¹

D. The Later Rawls's Limitation of Bureaucracy

Rawls's response to this comes in his next book *Political Liberalism*, in which he calls the term neutrality "unfortunate."¹²² Although Rawls himself regards the two books as consistent, his assurances are unconvincing. In the latter work, and in apparent response to claims that his conception of the political self was too "thin" to provide an adequate foundation for deliberation, Rawls removes the emphasis from the original position and rests his theory on an "overlapping consensus."¹²³ He claims instead that the original position was meant simply as a "device of representation," but in doing so, he shakes the normative foundation presented in *A Theory of Justice*.¹²⁴ The original position offered an objective ideal outside the political structure that provided guidance and direction for public policy, but without this objective standard there are no standards with which to judge the change.

The necessity of a standard is a key issue in any discussion of progress, one that makes Sidney Fay suggest that the concept itself is "logically meaningless."¹²⁵ There is nothing inherent in progress itself that provides an end, Fay argues. If all that makes an end is one person or group's opinion, than one person's progress may be another person's arbitrariness. This is why the enlightenment and nineteenth-century philosophers tended to see progress in terms of nature—a natural *telos* was normative, binding, and inherent in

121. See generally BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987) (both works defending forms of neutralist liberalism).

122. RAWLS, *supra* note 101, at 191.

123. *Id.* at 15, 39.

124. *Id.* at 24.

125. Fay writes:

Ideas, no matter whether true or false, are often potent factors in social change. Ideas are also apt to reflect the color and pattern of an era. This is notably true of the idea of progress—that "civilization has moved, is moving, and will continue to move in a desirable direction." It depends on subjective value-judgments, which in turn often depend on the individual's emotional inclination toward optimism or pessimism. No one can prove scientifically that birth control, the New Deal, or the atomic bomb denote progress in a desirable direction, because it is impossible to control and measure objectively all the facts involved. Judgments differ sharply. There is hardly any social change that is not called progress by somebody. The concept is logically meaningless.

Fay, *supra* note 52, at 231.

progress itself.

In the latter book, Rawls replaces the original position with an area of overlapping doctrinal commonality that all members of society share, although they may defend or justify it in different ways.¹²⁶ He makes a distinction between a “comprehensive moral doctrine” and a “political conception of justice.”¹²⁷ A comprehensive moral doctrine includes “conceptions of what is valuable in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct[.]”¹²⁸ It is their comprehensive moral doctrine that people refer to when making substantive life decisions. A political conception of justice is described by Rawls as a “module, an essential constituent part that in different ways fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it.”¹²⁹ A political conception of justice is like a missing puzzle piece that can fit into and be the last piece needed for completion in a variety of jigsaw puzzles. It is the political conception of justice that all members of society share and that serves as the overlapping consensus, the replacement for the original position.

In short, Rawls’s argument is as follows: given the fact that modern society is pluralistic, one must organize it in such a way that difference and disagreement do not destabilize society itself. The pluralism of a well-ordered society lies in the diversity of its comprehensive moral doctrines. Since the modern state is a representative democracy, various people, all of whom may hold different opinions on fundamental matters, must interact in order to make decisions. Those engaged in deliberation must have some common ideas, otherwise interaction would be impossible, unproductive, and chaotic. That which citizens share is the overlapping consensus and it defines the standards by which citizens *qua* citizens actually interact. Citizens refer to and debate the details of the political conception of justice, but they believe in it because their comprehensive moral doctrine justifies them in

126. Rawls defines an overlapping consensus as follows: “Such a consensus consists of all of the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is the political conception itself.” RAWLS, *supra* note 101, at 15.

127. *Id.* at 145.

128. *Id.* at 175.

129. *Id.* at 145. *See also id.* at 12 (using nearly the same language).

doing so.¹³⁰

There are two qualifications. The first is that public discussion regarding the political conception of justice cannot be framed in terms of beliefs that the society does not have in common. People can challenge American law in terms of legal precedent or central texts such as Martin Luther King, Jr.'s *Letter from a Birmingham Jail*,¹³¹ for example, but they cannot do so by invoking denominational beliefs.¹³²

The second qualification is that the blueprint of the political conception of justice begins with a public political culture.¹³³ Individuals in a society share certain beliefs and develop political philosophies based upon what they already hold in common as a society.¹³⁴ In other words, the device of representation that is the original position comes from an already existing picture of what is assumed to be just. It does not stand on its own; it describes already existing social expectations.

The consequences of these two qualifications are problematic. First, if the initial qualification is to be taken seriously, then only those who share the commonality of the political conception of justice are permitted to participate in society. This prevents political change, since it limits social membership to those who already agree with one another. I would argue that this really is not

130. For example, a Christian might believe that it is proper to pay taxes because Jesus remarked that one should give Caesar what he is due, while a capitalist might believe that it is proper to pay taxes because the money supplies the government the means to regulate contracts and the free market. Both have radically different justifications for paying their taxes, but both share an authentic overlapping belief that one has a duty to do so.

131. Martin Luther King, Jr., *Letter from a Birmingham Jail*, in LET FREEDOM RING: A DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT (Peter D. Levy ed., 1992). Rawls references the shared content of the public political culture in *Political Liberalism*. RAWLS, *supra* note 102, at 8, 14, 25, 43, 175.

132. Of course, King's letter invokes very specific denominational beliefs, and one is forced to conclude, problematically, that for Rawls, it would be excluded in public debate. One might argue that all King was doing was calling upon Aquinas' theory of natural law, and therefore cites a text central to the democratic public political culture, but Aquinas' work also cited denominational beliefs and as such would likely be excluded. Or, to use my previous example, the Christian is prohibited from citing Jesus in a political context to persuade the capitalist.

133. RAWLS, *supra* note 102, 8–9.

134. For example, a case might be made that American citizens believe, almost uniformly, that a constitutional democracy is the proper and ideal basic structure for society. Rawls would then argue that any development of any theory which came out of this public political culture would inevitably begin with the forming of, or the intent to form, a constitution. Rawls's work appears to be no exception to this rule.

pluralism at all. The consequence of the second qualification is that the device of representation known as the original position is reduced to a product of the dominant political culture. It is neither necessary nor does it have a normative impact in anything other than a liberal democratic society.¹³⁵

Political Liberalism does contain a variety of progressive ideas just as *A Theory of Justice* does. First, it regards contemporary liberal politics as a conflict of groups rather than of individuals. Civil rights are awarded to the individual, but each person is understood as being a member of a tradition or belief system that provides rational justification for his or her beliefs. Second, it sees day-to-day political decision making as a product of public persuasion and constructed to ensure that all reasonable groups have the means and vocabulary for participation in governance. Third, it recognizes that changes in society are matters of reform rather than revolution—this is an important and rarely discussed difference between the two books. The public political culture changes over time, theoretically changing the comprehensive moral doctrines that share it. Excluded groups may eventually enter the arena of reasonable discourse if they change their intolerant cores, but this involves stepping away from central beliefs and key texts that are incompatible with modern liberal democracies.

Rawls has a point, of course. Absolute tolerance of the intolerant is likely impossible; even though *Political Liberalism* is not as inclusive as *A Theory of Justice*, it still offers a significantly free society—one with more liberty than most. Nevertheless, the relevant question is whether or not acknowledging a possibly unachievable ideal necessitates giving up all attempts at normative standards. Kairys faces exactly this quandary regardless of which period of Rawls we attach him to.

135. I defend and provide much more detail regarding these in the first chapter of my dissertation. Jack Russell Weinstein, *Adam Smith and the Problem of Neutrality in Contemporary Liberal Theory* (Apr. 24, 1997) (unpublished Ph.D. dissertation, Boston University) (on file with author). For our purposes, we should emphasize that Rawls has no claim to universality in his new argument. That which justifies the overlapping consensus is the tradition or comprehensive moral doctrine of the defender. That which makes the overlapping consensus legitimate is simple commonality. One can certainly imagine numerous political beliefs that may be held in common over a long period of time that are conducive to neither freedom nor equality. Part of what makes a liberal society normatively compelling is its ability to allow for new and radical ideas, like those put forth by the American progressives a century ago.

Suppose, for example, Kairys subscribes to the latter argument in *Political Liberalism* and argues that only by being aware of particular cultural and economic realities can the legal process be fair. He then has to ask whether any individual circumstance or belief system is worthy of being excluded from the process and which circumstances have priority. To make determinations, however, he has to appeal to some objective standard. Otherwise, legal decision making becomes reduced to prejudice, tradition, or habit. One would think that contemporary progressives would be opposed to this approach even if, in the end, it is their prejudices, traditions, or habits that set the standard.

It is worth remarking that even though a constitutional system of law is built on precedent, it is rarely immediately clear whether legal decisions are based on prejudices, tradition, or habit. Lack of precedent may make legal decisions arbitrary,¹³⁶ but the establishment of precedent still needs objective grounding in order to have normative power. The debate about the existence of natural law is essentially about providing this normative foundation; natural law plays the role in American constitutionalism that the original position plays in *A Theory of Justice*.

Suppose, then, that Kairys sees his comments as consistent with Rawls's earlier book. In this case, he would likely argue that the *interpretation* of the principles of justice and the test of their efficacy are necessarily built on comparing their standards with the actual lifestyles of those who are governed by them. Those who live in squalor, for example, are not being treated properly according to the principles of justice and are therefore subject to government assistance in reaching the minimal acceptable standard, whatever *w* turns out to be in that society.

The late philosopher would have likely endorsed this approach without concern. I suspect that this is what Kairys would have had in mind had he discussed progressivism from within a Rawlsian framework, although he clearly would have sympathies with the group dynamic of *Political Liberalism* as well. Nevertheless, this approach presupposes that although the actual workings of the legal system consider context, the process that leads to the formation of the principles of justice cannot. Context is only a

136. This is why then-U.S. Supreme Court Chief Justice Harlan Stone called the Nuremberg trials a "high-grade lynching party." ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 716 (Archon Books 1968).

temporary measure, as, for example, the Supreme Court ruled in *Bakke*.¹³⁷ This approach negates any criticism that ignoring circumstance *inherently* invalidates the political system. In short, for Kairys to be a progressive, he has to believe in progress. To believe in progress, he has to have a compelling normative aim to progress towards, and as Rawls's career shows, although context may provide a test for determining whether progress is being made, it only seems to impair the identification of what it is that progress hopes to achieve.¹³⁸

IV. MORALITY AND THE MARKET

Included in the concept of social progress is the idea of economic justice; many of the progressive reforms were about workplace issues and access to the material necessities of life. As the history of progressive reform reminds us again and again, there is a significant tension between the individualism of the democratic process and the centralized nature of political philosophies and policies that rely upon the state for the maintenance of an equal playing field. Add to this the suspicion progressives tend to have towards corporate interests, and one is forced to ask about the role of capitalism in the progressive agenda.

Unger and West's article—*Progressive Politics and What Lies Ahead*—offers us three elements of a progressive agenda for contemporary politics. They argue that “society should be independently organized outside the government,” in order to strengthen, among other things, unions to better integrate corporate “insiders” and “outsiders.”¹³⁹ This non-bureaucratic approach to change, as we have repeatedly seen, has a long history for progressives. They also argue that “the law should develop

137. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–97 (1978) (noting that, although civil rights legislation has often resulted from particular kinds of discrimination against as few as one minority group, the universal language of this legislation makes clear Congress' intent to protect in equal measure the civil liberties of all persons).

138. An attentive reader might be tempted to suggest I am guilty of creating a false dichotomy, and argue that there are other forms of liberalism than just Rawls's two attempts. While I am sympathetic to this approach, I do not suggest in this article that these are the only two options for contemporary liberal theory. Instead, I am arguing that Rawls's two positions are useful in articulating the specific issue of context and its relationship to bureaucracy in progressive thought. Insofar as this bifurcation stops being useful, I suggest a more nuanced discussion of liberalism is called for.

139. Unger & West, *supra* note 39, at 15.

standards to give a central push in schooling and employment . . . to those who suffer from an accumulation of forms of disadvantage,” once again relying on the state to mitigate those factors that popular political adjudication cannot.¹⁴⁰ Third, they assert that “we should develop a broad based market-friendly effort to lift up the economic rearguard,” offering specific plans for independent management of diversified investments to “broaden[] . . . access to finance and technology.”¹⁴¹ They suggest that “[t]he outcome of such experiments is not the suppression of the market; it is the democratizing and diversification of the market.”¹⁴²

This last recommendation may seem out of place because of its “conservative” elements. While we have already encountered Rawls’s attempt to raise the economic bottom rung, doing so by relying on the market, as Unger and West suggest, might seem counter-intuitive to many on the left. Quite the contrary, though, this approach is representative of the progressive tendency towards reform rather than revolution. Any political theory that wants to be taken seriously in today’s world must begin with capitalism, especially in the short run. Completely rejecting free-market solutions is to reject virtually all modern political arrangements. It may also—and this point is controversial—run counter to human nature. As Adam Smith wrote in 1776, whether we consider advanced institutions of finance or the earliest forms of trade, it may be that there is a “necessary, though very slow and gradual consequence of a certain propensity in human nature . . . to truck, barter, and exchange one thing for another.”¹⁴³ Exchange is a progressive practice that may be the “necessary consequence of the faculties of reason and speech,” unique to humans alone.¹⁴⁴

At the core of much skepticism about market solutions is the modern view that the free market is somehow separate from moral considerations. While there are many theorists working to develop theories of a more moral marketplace, few, if any, on the left, regard the market as itself inherently moral. At most, they may regard it as a neutral tool reflecting the individual moralities of economic agents. This section will focus specifically on the case of

140. *Id.* at 13.

141. *Id.*

142. *Id.*

143. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, I.ii.1–2, 25 (R.H. Campbell and A.S. Skinner eds., Oxford Univ. Press 1976) (1776) [hereinafter SMITH, WEALTH OF NATIONS].

144. *Id.*

Adam Smith. What I hope to show, first, is that for Smith, relying on the free market was, by design, a moral solution: what would later be called capitalism was for him a system of morality. Second, Smith argued that a well-structured free market can, by design, raise the bottom rung of society.¹⁴⁵ While I will not go so far as to suggest that Smith himself was a progressive, I will argue that Smith's theories share many elements with progressive political approaches and that the identification of Smith as a conservative icon is the result of a separation of morality and market that runs counter to his own vision.

A. *Adam Smith on Universal Opulence*

For Smith, the free market is itself the consequence of progress. Building on Turgot and heavily influencing Marx, Smith sees political organization as dependent on economic arrangements. Human history has witnessed the unfolding of four economic stages beginning with the age of hunters, and moving through pastoral, agricultural, and finally commercial societies.¹⁴⁶ There is no doubt that Smith sees this as progress.¹⁴⁷

Like many before him, Smith saw his epoch as the highest stage, but unlike earlier notions of progress, he recognized that his period was not the end goal. Instead, he was very much concerned with the progress of "opulence," as he called it, and argued that the division of labor was the cause of "that universal opulence which extends itself to the lowest ranks of people," the result being that, "a general plenty diffuses itself through the different ranks of the society."¹⁴⁸

His major concern is the refutation of mercantilism, an economic theory that argued that the wealth of a nation was to be measured by the amount of money in its borders at any given moment.¹⁴⁹ Smith argued instead that it is the amount of labor in any given society that adequately measures its wealth.¹⁵⁰ Wealth as

145. See generally *id.* at 1–60.

146. See *id.* at V.i.a.1–8, 689–94; ADAM SMITH, LECTURES ON JURISPRUDENCE, (A)I.27 I, 14 (R.L. Meek et al. eds., 1978) (1766) [hereinafter LECTURES].

147. His description begins with the classification of hunter-gatherers as "the lowest and rudest state of society," and refers to the middle stages as "more advanced." SMITH, WEALTH OF NATIONS, *supra* note 143, at V.i.a.1–8, 689–94.

148. *Id.* at I.i.10, 22.

149. See generally *id.* at Book IV, 428 *passim*.

150. The very first sentence of the book argues that labor supplies a nation with "all the necessaries and conveniences of life," both through the product of

seen from a mercantilist perspective is concentrated in the wealthy, but when seen via Smith's approach, all workers benefit from economic advancement. Smith shared the progressive concern (and Marx's concern) for the laborer's well being.

For Smith, economic growth was a matter of justice, not simply the profit motive: "Servants, labourers and workmen of different kinds, make up the far greater part of every great political society. But what improves the circumstances of the greater part can never be regarded as an inconveniency to the whole."¹⁵¹ He adds that exceptionally low wages must be supplemented by other means of sustenance in order to be "consistent with common humanity."¹⁵² He explains:

A man must always live by his work, and his wages must at least be sufficient to maintain him. They must even upon most occasions be somewhat more; otherwise it would be impossible for him to bring up a family, and the race of such workmen could not last beyond the first generation.¹⁵³

Here, Smith is offering a precursor to Rawls's *maximin* principle—the assertion that agents in the original position will seek the maximum minimum standard of living. The justification for an economic system is whether it betters the living standard for all its members, not just the wealthy. Comparing societies in different economic stages, Smith insists that the difference in economic circumstance between a European prince and the "industrious and frugal peasant" is much less than that between an African king and those tribal members over which he is, "absolute master."¹⁵⁴

In amplifying his critique of mercantilism, and against the

the labor and the goods exchanged with other countries, an exchange that could not take place without labor. *Id.* at Intro.i.1, 10.

151. *Id.* at I.viii.36, 96. Smith adds,

No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, cloath and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, cloathed and lodged.

Id.

152. *Id.* at I.viii.16, 86.

153. *Id.* at I.viii.15, 85. Smith adds, "Thus far at least seems certain, that, in order to bring up a family, the labour of the husband and wife together must, even in the lowest species of common labour, be able to earn something more than what is precisely necessary for their own maintenance." *Id.* at I.viii.15, 85–86.

154. *Id.* at I.i.10–11, 22–24.

physiocrats—those who believed that economic growth was the result of agricultural development¹⁵⁵—Smith argued that economic development was to a large extent the result of the interaction between “the inhabitants of the town and those of the country.”¹⁵⁶ Despite the obvious competition, Smith is explicit that the town and country share in a reciprocal relationship.¹⁵⁷ Nevertheless, Smith argues, because “subsistence is, in the nature of things, prior to conveniency and luxury,” when necessary, the country must take precedence over the town when there is conflict: food comes first.¹⁵⁸

We see that like Kant, Smith sees progress as the result of interaction and tension.¹⁵⁹ In short, Smith sees economic advancement as the aggregate of individual activities, and he famously argues for a limited government to protect this sphere of autonomy.¹⁶⁰ Nevertheless, Smith’s government is not as limited as is generally assumed. There are only three duties of the sovereign: to protect the society from “violence and invasion” by other societies; to protect “every member of the society from the injustice or oppression of every other member”; and to erect and maintain public works and institutions the cost of which are too great with too few consequent benefits or profits for an individual or small group to finance.¹⁶¹ These public goods include armies, police, public works, public schools, and general and religious education.¹⁶²

155. Turgot was a physiocrat.

156. ADAM SMITH, WEALTH OF NATIONS, *supra* note 143, at III.i.1, 376. He explains: “The country supplies the town with the means of subsistence and the materials of manufacture. The town repays this supply by sending back a part of the manufactured produce to the inhabitants of the country.” *Id.*

157. *Id.* “[T]he division of labour,” he explains, “is in this, as in all other cases, advantageous to all the different persons employed in the various occupations into which it is subdivided.” *Id.*

158. *Id.*

159. *Id.* Smith, along with Turgot and the other physiocrats, thought that all else being equal, individuals would prefer the tranquility and beauty of the country and would always prefer to use their capital for agricultural purposes. But, he adds “[i]f human institutions had never thwarted those natural inclinations, the towns could nowhere have increased beyond what the improvement and cultivation of the territory in which they were situated could support.” *Id.* at III.i.3, 377. Cultivation of the ground is, according to Smith, “the original destination of man.” *Id.* As a result, “in every stage of his existence he seems to retain a predilection for this primitive employment.” *Id.* at III.i.3, 378.

160. *Id.* at IV.ix.51, 687–88.

161. *Id.*

162. Of course, the term “public goods” is itself a matter of great controversy,

Smith sees the state as contributing to the overall betterment of society: it plays an important role in childhood and adult education, it promotes literacy and attention to the arts, and it cultivates social interaction to minimize loneliness and alienation, to name just a few of its roles.¹⁶³ How deep the state's responsibilities towards these ends are for Smith is a matter of controversy, but most contemporary Smith scholars ought to agree that the discussion is infinitely more controversial than it should be as a result of a major misstep in nineteenth- and early twentieth-century commentary on Smith. What I argue here is that the inaccurate view of Smith as a strict *laissez faire* conservative can be remedied by taking a progressive point of view and by recognizing that the architect of modern free-market theory recognized, as Unger and West did two centuries later, that morality and the marketplace are significantly intertwined and interdependent.

B. *The Market as a Moral Influence*

Famously, economist Joseph Schumpeter argued that *The Wealth of Nations* did not contain one original idea.¹⁶⁴ It is certainly the case that Smith was well-versed in the literature of his time and built heavily on the research of those who came before him; this is of course what scholars do. But Schumpeter misses the point: Smith's great achievement was not his individual conclusions, but his elegant and compelling system.¹⁶⁵ It is therefore not surprising that the most enduring impediment to understanding Smith's work is the stubborn attempt to push aside those elements of his system that are incompatible with the *laissez faire* caricature of Smith. This

but Smith has no particular attachment to a minimalist conception of it. Smith's theories are perfectly compatible with a more inclusive notion of public good. As Jeremy Z. Muller explains, Smith, "argued against government involvement less as a matter of *principle* than as a matter of *strategy*, and he was willing to depart from that strategy when there were compelling reasons." JERRY Z. MULLER, ADAM SMITH IN HIS TIME AND OURS 140 (1993) (emphasis in original).

163. I have argued elsewhere, in great detail, about the role of the state in providing non-economic support for individuals in society. See, e.g., JACK RUSSELL WEINSTEIN, ON ADAM SMITH (2001); Jack Russell Weinstein, *Sympathy, Difference and Education: Social Unity on the Work of Adam Smith*, 22 ECON. & PHIL. 79 (2006) [hereinafter Weinstein, *Sympathy, Difference and Education*]; Jack Russell Weinstein, *Adam Smith's Philosophy of Education*, 3 ADAM SMITH REV. (forthcoming 2006).

164. JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 184–85 (Elizabeth Booddy Schumpeter ed., Oxford University Press 1954).

165. Schumpeter does recognize the value of Smith's system, but he underestimates, in my view, its overall impact. See generally *id.*

includes Book Five of *The Wealth of Nations*, which continues the important discussion of the role of the state in a market economy; but even more so, fidelity to the caricature necessitates the complete rejection of Smith's first and highly successful book *The Theory of Moral Sentiments*.

First published in 1759 while Smith was Chair of Moral Philosophy at Glasgow college, the stated purpose of *The Theory of Moral Sentiments* is to investigate the nature of virtue and how it is to be acquired.¹⁶⁶ Unlike Kant, who is ultimately a rationalist, Smith sees virtue as acquired through our senses. By observing others, entering into their very specific perspectives, and developing an impartial conscience to be the final judge of our own action, moral actors discover general rules of morality that then guide their actions.¹⁶⁷ Essential to this experience what Smith calls sympathy—the process of fellow feeling with another person.¹⁶⁸ A spectator observes a person's act, endeavors to understand the context that

166. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* VII.i.2, 265 (D.D. Raphael & A.L. Macfie eds., Liberty Classics, 1992) (1759) [hereinafter SMITH, *MORAL SENTIMENTS*].

167. *Id.* at III.4.8, 159–60.

168. Social and moral unity is also enabled through sympathy, which Smith distinguishes quite explicitly from its standard usage denoting sharing only “the sorrow of others.” *Id.* at I.i.1.5, 10. Sympathy allows for the “original passions” that makes one person's happiness “necessary” to another, and makes people “naturally” interested “in the fortune of others,” even though a person “derives nothing from it except the pleasure of seeing it.” *Id.* at I.i.1.1, 9. It is the natural capacity that allows for moral judgment, although Smith is less than precise in his definition of this central concept. He defines sympathy as a “fellow-feeling with any passion whatever” aroused in a spectator, but then spends much of the rest of the text qualifying and investigating its limits. *Id.* at I.i.1.5, 10. Smith is an empiricist, coping with the fundamentally separate nature of human beings. Our physical separation therefore requires a moral theory derived from sensations and events occurring to others. See Henry J. Bittermann, *Adam Smith's Empiricism and the Law of Nature I*, 48 J. POL. & ECON. 510 (1940). Sympathy is a “cognitive process,” inspiring both change of “circumstances” and “personhood” with others. Philippe Fontaine, *Identification and Economic Behavior: Sympathy and Empathy in Historic Perspective*, 13 ECON. & PHIL. 261, 264 (1997). According to Smith, sympathy, through observation of a moral actor, causes “an analogous emotion” to “spring up” in the “breast” of an “attentive spectator.” SMITH, *MORAL SENTIMENTS*, *supra* note 166, at I.i.1.5, 10. It is, by “changing places in fancy with the sufferer, that we come either to conceive or to be affected by what he feels.” *Id.* at I.i.1.3, 10. This adoption of the perspective of another is, according to many commentators, an attempt to, “temper the self-centeredness of our perspective.” Russell Nieli, *Spheres of Intimacy and the Adam Smith Problem*, 48 J. HIST. IDEAS 611, 617 (1986). It is also an effort to “deflect the criticism that sympathy is founded on self-love.” Robert Sugden, *Beyond Sympathy and Empathy: Adam Smith's Concept of Fellow-Feeling*, 18 ECON. & PHIL. 63, 75 (2002).

gave rise to the act, and then makes a moral judgment as to whether the person was acting appropriately to the cause. If the spectator judges that a particular act was appropriate—if the spectator is able to determine, while taking the specific and unique perspective of the actor, that he or she would act in the identical manner—then the spectator is said to sympathize with the person. This harmonization of sentiments is the arbiter of that which is ethical.

The Theory of Moral Sentiments begins with the assertion that although it is often assumed that human beings are purely selfish, there are natural inclinations within each person to care about others.¹⁶⁹ Smith is explicit that human beings are not egoistic, they are not only concerned about others, and that their identities are largely constructed by the society that raises them.¹⁷⁰ Moral judgments, like judgments of beauty, are impossible outside of society.¹⁷¹ He writes:

We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them. Whatever judgment we can form concerning them, accordingly, must always bear some secret reference, either to what are, or to what, upon a certain condition, would be, or to what, we imagine, ought to be the judgment of others. We endeavour to examine our own conduct as we imagine any other fair and impartial spectator would examine it. If, upon placing ourselves in his situation, we thoroughly enter into all the passions and motives which influenced it, we approve of it, by sympathy with the approbation of this supposed equitable judge. If otherwise, we enter into his disapprobation, and condemn it.¹⁷²

Here Smith prefigures Rawls's critics. Substantive judgments must be contextual. To know yourself is to know how others see

169. SMITH, MORAL SENTIMENTS, *supra* note 166, at Li.1.1, 9.

170. *See generally* Jack Russell Weinstein, ON ADAM SMITH (2001) (chapter three is particularly relevant to his point); Weinstein, *Sympathy, Difference and Education*, *supra* note 163.

171. SMITH, MORAL SENTIMENTS, *supra* note 166, at III.i.2, 109–10.

172. *Id.* at III.i.2, 110.

you. A word of caution is necessary, however. Even though Smith is striving for some form of impartiality, it is not an Archimedean perspective. There is no God's-eye view and there can be no original position. Individuals need self and social knowledge to morally adjudicate matters.

Foreshadowing twentieth-century identity politics, Smith spends a great deal of time discussing how group identity such as gender, class, and race (as represented by a discussion of slavery) inhibit understanding amongst people.¹⁷³ He also offers an extended discussion of how the desire to be rich and the community's celebration of those who are rich, distort moral judgment.¹⁷⁴

The sympathetic core of this first book, combined with Smith's critical attitude towards the wealthy, makes for an uneasy partnership between *The Theory of Moral Sentiments* and *The Wealth of Nations*, according to some. Citing the so-called "Adam Smith Problem," scholars have repeatedly argued that the two books are, simply put, inconsistent.¹⁷⁵ The first is based on altruism, they argue, and the second is based on egoism.

This view, in its contemporary manifestation, is one of the great barriers to progressive thought. Since morality and the market are assumed to be incompatible, it is argued, the progressive philosophy that relies on both must be self-contradictory. Altruistic morality cannot, the argument continues, be compatible with selfish economic motive, by definition. However, as is the case for those who make this argument against progressives, those who argued against Smith in this manner were deeply mistaken.

173. See generally Weinstein, *Sympathy, Difference and Education*, *supra* note 163.

174. Smith explains:

This disposition to admire, and almost to worship, the rich and the powerful, and to despise, or, at least, to neglect persons of poor and mean condition, though necessary both to establish and to maintain the distinction of ranks and the order of society, is, at the same time, the great and most universal cause of the corruption of our moral sentiments.

SMITH, *MORAL SENTIMENTS*, *supra* note 166, at Liii.3.1, 61.

175. See, e.g., JAMES R. OTTESON, *ADAM SMITH'S MARKETPLACE OF LIFE* (2002); VIVIENNE BROWN, *ADAM SMITH'S DISCOURSE: CANONICITY, COMMERCE AND CONSCIENCE* (1994); PETER MINOWITZ, *PROFITS, PRIESTS, AND PRINCES: ADAM SMITH'S EMANCIPATION FROM POLITICS AND RELIGION* (1993); KENNETH LUX, *ADAM SMITH'S MISTAKE: HOW A MORAL PHILOSOPHER INVENTED ECONOMICS AND ENDED MORALITY* (1990).

Sometimes described as a translation mistake, the motivation of the Adam Smith Problem was as political as it was philosophical.¹⁷⁶ The German thinkers saw Smith's philosophy as a threat in two ways. First they feared that the "Adam Smith School" sought to "monopolize manufacturing in England" and were threatened by the individualistic emphasis they viewed as "opposition to the older cameralistic tradition that assumed that society and its members needed guidance."¹⁷⁷ Second, they "conflated the ideals of the French revolution with Smith's legacy" and hoped to "overcome" Smith and Rousseau's "rationalistic Enlightenment."¹⁷⁸ Only in the past thirty years have scholars collectively challenged its legitimacy, reasserting that sympathy is not altruism and that self-interest is neither the single motive for economic activity nor purely egoistic.

The short solution¹⁷⁹ to the Adam Smith Problem is as follows: first, making oneself more moral and living in a more just and more ethical community is a form of bettering oneself, and Smith never suggests that betterment is entirely economic. Second, and perhaps more importantly, sympathy is not a form of altruism at all and *The Wealth of Nations* is not built entirely on selfish behavior. As we have already seen, Smith's treatise on political economy is rife with ethical considerations.

C. *The Butcher, the Brewer, the Baker, and the Invisible Hand*

Smith's two most famous assertions are often cited as the basis for the incompatibility. First: "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages."¹⁸⁰ Smith's argument here is that economic activity is governed by self-interest, an assertion that has developed into a modern unquestionable truth. Commercial activity advances as individuals pursue their own

176. See BRUNO HILDEBRAND, *DIE NATIONALÖKONOMIE DER GEGENWART UND ZUKUNFT* (1848); CARL G. KNIES, *DIE POLITISCHE OEKONOMIE VOM STANDPUNKTE DER GESCHICHTLICHEN METHODE* (1883); WITOLD VON SKARZYNSKI, *MORALPHILOSOPH UND SCHOEPFER DER NATIONALOEKONOMIE* (1878).

177. LEONIDAS MONTES, *ADAM SMITH IN CONTEXT* 20–24 (2004).

178. *Id.* at 24–28.

179. See Jack Russell Weinstein, *Review: James W. Otteson's "Adam Smith's Marketplace of Life"*, 113 *MIND* 202 (2004) (discussing this point in more depth).

180. SMITH, *WEALTH OF NATIONS*, *supra* note 143, at I.ii.2, 27.

needs, this approach assumes.

This was a revolutionary assertion. Theorists who argued versions of it before Smith were often condemned, largely because of Christian attitudes towards selfishness.¹⁸¹ While there is no doubt that Smith's intent was to tout the economic benefits of self-interest, these were not his only intentions. The second assertion is that "[n]obody but a beggar chuses to depend *chiefly* upon the benevolence of his fellow-citizens."¹⁸² The beggar relies on benevolence sometimes but on barter at other times. People's motivations change. Sometimes they are altruistic, sometimes they are not. According to Smith "[w]e address ourselves, not to [the Butcher's, Brewer's, and Baker's] humanity but to their self-love."¹⁸³ However, we *could* choose to do otherwise, because in each of these agents, Smith is clear, "their humanity" is present.¹⁸⁴ For Smith, "man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be *more likely* to prevail if he can interest their self-love in his favour."¹⁸⁵

Smith comes to a pragmatic and not a philosophical conclusion here. We *can* appeal to people's benevolence, and sometimes it will result in our assistance, but we will be *more likely* to succeed if we appeal to their commercial instincts. The comment about the self interest of the butcher and the baker is ultimately a comment about persuasion.¹⁸⁶

Smith is also famous for referencing the invisible hand: the metaphor he uses to describe the economic progress of a market economy.¹⁸⁷ In both of his books, the phrase is meant to indicate

181. See BERNARD MANDEVILLE, *THE FABLE OF THE BEES: PRIVATE VICES, PUBLIC BENEFITS* (F.B. Kaye ed., Liberty Classics 1988) (1705). This is the most significant work arguing this point before Smith. It was first published as one volume in 1732, but published separately in pieces starting with *The Grumbling Hive* in 1705.

182. SMITH, *WEALTH OF NATIONS*, *supra* note 143, at I.ii.2, 27 (emphasis added).

183. *Id.*

184. *Id.*

185. *Id.* at I.ii.2, 26 (emphasis added).

186. STEVEN J. MCKENNA, *ADAM SMITH: THE RHETORIC OF PROPRIETY* 134 (2006). In fact, as we have already noted, commercial activity is itself, for Smith, "the necessary consequence of the faculties of reason and speech." SMITH, *WEALTH OF NATIONS*, *supra* note 143, at I.ii.2, 25. It is built on "the natural inclination everyone has to persuade." SMITH, *LECTURES*, *supra* note 146, (A) vi.57, 352. As a result, according to Smith, "everyone is practicing oratory on others thro the whole of his life." *Id.*

187. Smith uses the phrase three times: The two times mentioned below, and a third time as a reference to primitive religions. ADAM SMITH, *ESSAYS ON*

that individuals' economic self-interest results in adequate distribution of goods for most members of the society. The metaphor serves two purposes. First, it highlights the role of unintended consequences, as in *The Wealth of Nations*:

By preferring the support of domestick to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.¹⁸⁸

In contrast, in *The Theory of Moral Sentiments*, Smith complements his comment about the economic differential between European princes and their serfs. He writes:

The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.¹⁸⁹

It is noteworthy that Smith's use of the invisible hand in his economic treatise is really about politics and social engineering, and its use in his treatise on morality is largely about economics.¹⁹⁰ This latter claim, that because of the rapacity of the rich, the poor have what they require, seems *prima facie* false.¹⁹¹ However, two things might be said in his defense. The first is that Smith did not anticipate modern shifts in the accumulation of capital or revolutionary technologies like refrigeration that enable the

PHILOSOPHICAL SUBJECTS 29 (W.P.D. Wightman & J.C. Bryce eds., Liberty Classics 1982) (1795).

188. SMITH, *WEALTH OF NATIONS*, *supra* note 143, at IV.ii.9, 456.

189. SMITH, *MORAL SENTIMENTS*, *supra* note 166, at IV.1.10, 184–85.

190. This comes with one qualifier, as I shall indicate later.

191. Weinstein, *On Adam Smith*, *supra* note 163, at 65–66.

consolidation of wealth and goods in extreme quantities. The second is that Smith is claiming that “necessaries” are distributed fairly, but not luxuries. Smith is little concerned with the latter.¹⁹²

On the other hand, there is a strong element of truth in his approach. The “rapacious” desires of modern day celebrities employ huge numbers of workers and the American and Western European way of life is responsible for vast economic activity around the globe. Smith himself, in an overwhelming and quite beautiful passage, enumerates the thousands of people involved in the manufacture of a simple woolen coat.¹⁹³ From Smith’s point of view, free trade increases labor which increases wealth in all trading nations. Protectionism is simply a modern form of mercantilism.

More important, it is worth noticing that in the midst of his economic discussion is an ethical observation. Smith’s ultimate point in *The Theory of Moral Sentiments* is that material wealth is not the final arbiter of happiness, and that, “in ease of body and peace of mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for.”¹⁹⁴ The invisible hand supplies material goods but the capacity for morality and happiness comes from elsewhere.

There is a romanticism here that must be condemned, of course. Being forced to beg is not pleasurable, and no matter how we read Smith, all of his writing will never be suited to the contemporary sensibilities. Modern notions of justice have progressed, if I may use the word, and our understandings of oppression and inequality have grown significantly more sophisticated. Nevertheless, what is important for our purposes is not whether all of Smith’s claims are empirically correct, but whether his theoretical filter can be of use to us, as I argue that it can. What is most useful about Smith’s work for the modern progressive is his deep understanding of the intimate relationship

192. As we have already touched upon, in *The Theory of Moral Sentiments*, Smith argues that the rich are ridiculously overattentive to luxury and that it is a sign of bad character to be so. SMITH, MORAL SENTIMENTS, *supra* note 166, at I.iii.3.1, 61–62. In *The Wealth of Nations*, he critically claims that, “with the greater part of rich people, the chief enjoyment of riches consists in the parade of riches, which in their eyes is never so compleat as when they appear to possess those decisive marks of opulence which nobody can possess but themselves.” SMITH, WEALTH OF NATIONS, *supra* note 143, at I.xi.c.31, 190.

193. SMITH, WEALTH OF NATIONS, *supra* note 143, at I.i.11, 22–24.

194. SMITH, MORAL SENTIMENTS, *supra* note 166, at IV.i.10, 185.

between economic and moral life. Sympathy regulates behavior between known parties: family members, friends, neighbors, and colleagues. As Smith argues in graphic detail, duty governs behavior between those who have no contact and little sense of a shared world.¹⁹⁵ The market, however, governs the behavior that falls through the cracks between sympathy and duty, and, at least Smith argues, if those who are in need can harness the self-interest of others, each person will have an easier time finding his or her means of survival, as the beggar ultimately received from the butcher, brewer and baker, all of whom, in return, received from the beggar their own lunch.

Ultimately, then, the resolution to “The Adam Smith Problem” necessitates thinking like a progressive. Readers ought to be willing to start from the assumption that morality and the market are not only compatible but complementary. They will understand Smith better if they reject the notion that the market is either neutral or inherently unjust, and progressive points of view will regain a powerful ally in their fight for a more just economic system. Unger and West were not at all inconsistent in looking towards the market to achieve progressive aims. The market, when maintained by the state, when governed under the right conditions, when complemented by education, arts, and a supportive community, can be a useful and moral force for social and economic progress.

V. CONCLUSION: A TENTATIVE DEFINITION OF THE TERM PROGRESSIVE

Reform comes from a myriad of sources.¹⁹⁶ Yet, progressive reforms are of a particular type. They seek fundamental change but hope to maintain the society they critique; they assume a particular end but recognize that their goals may be a long time coming; they demand democratic participation but recognize the centralization and collective nature necessary to support individuals; they idealize the goal of impartiality but understand the necessity of context; and they bridge a spectrum of issues that

195. *Id.* at III.3.4–7, 136–39. To make this point in *The Theory of Moral Sentiments*, he uses the example of the duty a European would have to people in China who are the victim of a terrible earthquake. *Id.*

196. Adam Smith himself referred to *The Wealth of Nations* as a “very violent attack . . . upon the whole commercial system of Great Britain.” ADAM SMITH, CORRESPONDENCE OF ADAM SMITH 251 (E.C. Mossner & I.S. Ross eds., Liberty Classics 1987) (1776).

range over all areas in society. While the American progressive movement has only been identified as such for slightly longer than a century, its philosophical foundation has been evolving slowly for hundreds of years longer.

I began this discussion by lamenting the lack of a straightforward definition for the term progressive. Especially in the American context, the label is complex and nuanced.¹⁹⁷ I am reluctant to offer a definition of the term, despite this lengthy philosophical inquiry. Nevertheless, the nature of this essay demands an attempt on my part to do so, and I therefore offer the following tentative definition: a progressive is a person who believes that social reform is achievable over time with the proper mixture of individual participation and government support. He or she looks to the future not the past for a better time, and recognizes that there is a universal standard for justice while acknowledging that only by understanding particular contexts and circumstances can the adequacy of the progress be measured. All people are equally entitled to the fruits of progress, the progressive believes, but how these fruits are distributed may depend on the nature of circumstance. Group identification is therefore essential to understanding any individual's situation but it should not eclipse an individual's unique situation or perspective. In short, the progressive seeks moderation: moderation in change, moderation in assistance, and moderation in autonomy. Perhaps then, the democratic activist mentioned at the outset of this article was correct after all.

197. For example, even though neither Rawls nor Smith are, strictly speaking, progressives, their insights into social justice and economic life help articulate the philosophical assumptions that provide progressivism its depth and sophistication.