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RESEARCH IN THE HISTORY OF ECONOMIC THOUGHT
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RESEARCH IN THE HISTORY OF ECONOMIC THOUGHT AND METHODOLOGY: INCLUDING A SYMPOSIUM ON NEW DIRECTIONS IN SRAFFA SCHOLARSHIP

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REFLECTIONS ON THOMAS C. LEONARD'S *ILLIBERAL REFORMERS*

Charles R. McCann, Jr.

Thomas C. (Tim) Leonard's *Illiberal Reformers: Race, Eugenics and American Economics in the Progressive Era* is an important new telling of the history of American Progressive-era's economic and social thought. For the most part, the book is a collection of essays previously published in *History of Political Economy*, along with new material, documenting the emergence of attitudes among social scientists, politicians, and intellectuals in general on questions of race and immigration, the role and status of women in work and society, measures directed to the alleviation of poverty, and the treatment of the disabled and infirmed (the "unfit"). Specifically, the focus is on the rise of the expert in the formation and execution of public policy, promising solutions the aim of which was the more efficient functioning, or rationalization, of society. The promise, however, remained unfulfilled, the outcomes of their endeavors proving more harmful than beneficial.

The book is divided into two parts, "The Progressive Ascendancy" and "The Progressive Paradox." The first part traces the beginnings of Progressivism among economists, reviews the appearance of the social scientist as an agent uniquely qualified to communicate to the public the need for reform and the means to its achievement, and finally addresses the development of the administrative state as the mechanism by which to facilitate reform. The second part

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presents evidence of the unintended consequences of the policies advocated by Progressive social scientists and their political patrons.

A thorough review of the material in this book would require an essay of substantial length. With that in mind, and given the limitations imposed by the editors, I have elected to concentrate on but four areas in need of greater elaboration: the scope of Progressivism, that is, the use of the term itself; the administrative State; Progressive jurisprudence; and finally, unions and racial politics.¹

THE SCOPE OF PROGRESSIVISM

Before one can begin to understand any political, social, or economic "movement," one must first come to terms with a definition and depiction of basic principles. Peter Filene, for one, denied there ever was any such thing as a "Progressive Movement," characterizing the label as an oversimplification and rejecting what he termed assertions of a "collective identity" of otherwise disparate individual beliefs. Agreement on one or even several issues need not have demanded belief on other, perhaps unrelated, issues. "To speak of a 'progressivism' or 'the progressive era' is to wrap the entire period within an undifferentiated ideological embrace without saying anything about the diversity within the period. One thereby overwhelms the very distinctions which are crucial to an understanding of the conflicts and changes that took place" (Filene, 1970, p. 33). Yet Filene did not object to the identification of a Progressive Era, a period "characterized by shifting coalitions around different issues, with the specific nature of these coalitions varying on federal, state and local levels, from region to region, and from the first to the second decades of the century" (p. 33). Leonard, to his credit, appears to acknowledge such a distinction, as he takes care to distinguish Progressive types and not engage in sweeping generalizations.

Whether or not one accepts the description, there are certain core elements that can be identified among the disparate factions. Leonard identifies in the "discontent" of the Progressive intellectuals three elements of a "shared, recognizable, and historically specific set of intellectual understandings." Chief among these "understandings" are, first, a focus on the welfare of the community over that of the individual; second, a concern with efficiency in government, economy, and society, in contradistinction to the "waste" associated with capitalism; third, an objection to the corrupt and anti-democratic influence of monopoly (this latter a belief not held by all Progressives). The concerns manifested in the promotion of an administrative State, a technocracy of experts who would identify the common good and prescribe policies to its fulfillment, shaping economy and society through the employment of scientific methods in a more efficient and "fair" direction (Leonard, 2016, pp. 8–9, 25).

These aspects of Progressive ideology had been noted quite early among contemporary writers, and Leonard throughout presents the reader with glimpses of their intuitions and arguments. To elaborate, it is instructive to mention the depictions of the Progressive philosophy through the works of but three such notables. In *The Progressive Movement: Its Principles and Its Programme* (1913), a tract describing the principles of the "movement" in the midst of its development, historian Samuel John Duncan-Clark offered a summary evaluation of the ideals of the Progressive movement. First, Duncan-Clark appreciates that the United States is possessed of an "undeveloped ... abundance of wealth to supply amply the need and comfort of every man, woman and child." There as well "exists the machinery for the production and distribution of this wealth in sufficient volume for the demands of the whole population." Yet that prosperity had, it seemed, been amassed by only a few, with the vast majority of the population denied access to the abundance. Thus was the American dream left unfulfilled. What is needed to fulfill the promise of American abundance is "[a] rational system of production and distribution, that recognizes the principle of social obligation, will make possible the elimination of all occasion for want and poverty on the part of those willing to engage in honest toil of brain and brawn." Such a reorganization of production "will secure to capital stability and a reasonable reward; it will give labor a fair wage and to every man a chance to work under conditions conducive to health and general welfare; it will free women from excessive hours of labor and assure them decent remuneration; it will emancipate childhood from the bondage of mill and mine and factory, and, finally, it will protect the consumer against exploitation by such methods as unlawful price agreements and restriction of output" (Duncan-Clark, 1913, pp. 14–15).

In politics, the Progressive acknowledges the supremacy of democratic governance through constitutional means, while at the same time holding that the people are the ultimate source of power: "freedom and justice can be conserved only by a self-controlled democracy acting through its chosen representatives," yet "the people must be the court of last resort on legislation involving constitutional interpretation as it affects the police power of the individual states," and "they must be given the power to veto or to initiate laws directly when their representatives fail to act in accordance with their wishes." An understanding of the primacy of the people in a Constitutional order as the ultimate source of State power requires modifications to the current procedures of governance. Direct nomination and election of all representatives as well as universal suffrage are imperatives (Duncan-Clark, 1913, pp. 15–16).

Socially, "human rights are superior to property rights," justice trumps charity "and can be translated into the relations of the mart and factory," honesty takes precedence over success "and can be enforced upon those whose code omits it," cooperation is a more powerful instrument for the promotion of welfare and competition "and needs only wise direction in the interests of all to make it a mighty factor for the common good" (Duncan-Clark, 1913, p. 16).

Given the above, Duncan-Clark posited a "fundamental principle" of Progressivism:

The nation constitutes a social organism of vitally inter-related and interdependent functions. In order to conserve its healthful vigor, promote its peace and prosperity, and assure its steady growth toward a larger measure of life's enjoyment for all its people, these functions must recognize their mutual responsibility — their obligation to one another and to the organism as a whole. (Duncan-Clark, 1913, p. 17)

To Duncan-Clark's understanding of Progressivism, in other words, society has an existence and an interest independent of the interests of the individuals of which it is comprised. Progressivism, "emphasizing all that is constructive in modern tendencies and preaching the doctrine of a social organism, depending for its health and growth upon the harmonious adjustment of all its functions," demands centralized social control. The authority of the State is paramount, "as the center from which the life of the organism may be most readily nourished, directed and treated for those conditions which need remedy" (Duncan-Clark, 1913, p. 35).

Herbert Croly, at the time editor of the *New Republic*, regarded Progressivism as expressive of the vitality of the "national will," which he identified as "the custodian and the creator instead of the servant of the national ideal," consisting "not in the specific formulation of legal and economic individualism which was wrought in our constitutions, but in a much vaguer demand for a righteous political and social system." Righteousness, social and political, was at the very core of the foundation of the American nation, its expression in the "popular will" guaranteed "by a permanent definition of the fundamental principles of right, by incorporating these specific principles in the fundamental law and by imposing obedience to these principles on the organs of government whereby the popular will was expressed" (Croly, 1914, pp. 208–210).

Yet this method, "the innocent yet pedantic rationalism of the eighteenth century," proved insufficient to the preservation of the ideals of social righteousness and social justice. The people, "the nation," as Croly preferred, can no longer be instructed as to its duty "by the Law and the lawyers," but must instead be inculcated "in collective action and by virtue of the active exercise of popular political authority its ideals of social justice." Social righteousness can only be achieved in a democratic society, and then only through the "popular will ... brought about by frank and complete confidence in its own necessary and ultimate custodian." The achievement of the "better society" can be had, "but only in so far as better men and women are called forth by the work" (Croly, 1914, p. 211).

Progressivism views *political* democracy and *social* democracy as "mutually dependent and mutually supplementary," since "political democracy is unnecessary and meaningless except for the purpose of realizing the ideal of social justice." To realize "the ideal of social righteousness," political democracy must account for the social or collective will (Croly, 1914, pp. 211–212). The social

will cannot be merely *assumed* to exist; it must be forged. The continuity between the social will and social righteousness to the end of social justice is the hallmark of Progressivism.

Finally, in *The Progressive Movement* (1915), Benjamin Parke De Witt, professor of government at New York University, concluded that Progressivism seeks, above all else, an expression of the welfare of the *community*. While the purpose of the book was to distinguish varieties of Progressive philosophy as interpreted by the leading political parties of the time — Republican, Democratic, Socialist, and Progressive — De Witt as well discussed such topics as corporate control, governmental control, the electoral process, and social and economic policies, while focusing on the application to city and municipal government. Yet at the very end he identified, in one sentence, the desires of the Progressive reformer. These are

[t]o extend the community's activities; to provide community control of the community growth and development by means of a city plan; to provide community ownership and operation of community utilities; to provide community use of community values for community purposes; and, finally, to provide community regulation of community recreation; — these are the extensions of the functions of government for which the progressive movement in the city stands. (De Witt, 1915, p. 363)

In sum, the advancement of the social will, the promotion of social justice, the organization of efficiencies in government, and the rationalization of the economy, directed to the ends of productive efficiency, distributive equity, and the eradication of poverty, are defining characteristics of the first wave of American Progressive thought.

THE ADMINISTRATIVE STATE

Two of the architects of the administrative State, Theodore Roosevelt and Woodrow Wilson, promoted the ideal of a beneficent State, so designed as to further both individual liberty and the social welfare. Yet their definitions of "individual liberty" and the necessary constraints to its flourishing were, in the Progressive ideal, far from the traditional liberal perceptions. For both, individual liberty could only be secured through the actions of an expansive administrative apparatus, setting parameters within which the individual would be free to act.

While the Constitution of the United States was designed to promote individual freedom through restraints on government — "negative liberty" — for the Progressive, the Constitutionally-prescribed structure of government was (and is) far too limiting.² Government in fulfillment of its role as the mechanism through which may be secured the promise of the expansion of personal freedom and the achievement of a more just society must promote "positive liberty." The role of the State must be not be confined merely to providing a

political climate conducive to human flourishing, setting parameters to governmental action, but must be so construed as to allow that government takes an active role in establishing the conditions which allow each citizen to progress to the best of his ability. As such conflicts with the form of government established under the Constitution, what was required was the construction of a parallel administrative branch, a fourth branch of government.

The fulfillment of true liberty may, to the Progressive, require restraints on personal freedom so as to ensure the efficient functioning of economy and society. These restraints may include the regulation of business, necessary to address the excesses of the trusts and the large business combinations. Theodore Roosevelt was an early and avid proponent of State control, and a forceful advocate of the philosophy underlying Progressivism, a proselytizer of the regulatory State. Throughout his two administrations – 1901–1909 – always in his mind desirous of promoting the public welfare, Roosevelt extended regulation into areas previously thought outside the domain of the national government. Early in his first administration, he supported efforts to create the Department of Commerce and Labor, which would encompass a Bureau of Corporations, an especially effective administrative unit, the purported function of which was to gather and to publish information respecting the activities of corporations operating across state lines so as to assist in the process of legislating regulatory reform. The President had the discretion as to the release of this information, and so it was up to Roosevelt to determine whether a corporation or combination had been acting in support of or in opposition to the public interest.

There were, as may be expected, constitutional challenges to Roosevelt's claim of authority to regulate interstate commerce, even if done so indirectly. In response, Roosevelt sought additional regulatory measures to expand the role of the Bureau. In his Annual Message of December 5, 1905, Roosevelt made the case for affirmative action, objecting to the limitations on his ability to attack what he regarded as illegal and socially harmful business combinations.

It has been a misfortune that the national laws on this subject have hitherto been of a negative or prohibitive rather than an affirmative kind, and still more that they have in part sought to prohibit what could not be effectively prohibited, and have in part in their prohibitions confounded what should be allowed and what should not be allowed. ... What is needed is not sweeping prohibition of every arrangement, good or bad, which may tend to restrict competition, but such adequate supervision and regulation as will prevent any restriction of competition from being to the detriment of the public – as well as such supervision and regulation as will prevent other abuses in no way connected with restriction of competition. (Roosevelt, 1906a, p. xii)

Roosevelt expressly rejected the idea of “the Government undertaking any work which can with propriety be left in private hands.” Yet at the same time the State should not relinquish its role of “overseeing any work when it becomes evident that abuses are sure to obtain therein unless there is governmental supervision” (Roosevelt, 1906a, p. xiii).

The extent of Roosevelt's push for regulation can best be seen in his defense of restrictions on the individual in respect of environmental conservation. At a White House Conference of Governors, May 13–15, 1908, Roosevelt identified governmental restrictions on the use of natural resources as tantamount to a moral duty:

We are coming to recognize as never before the right of the Nation to guard its own future in the essential matter of natural resources. In the past we have admitted the right of the individual to injure the future of the Republic for his own present profit. In fact there has been a good deal of a demand for unrestricted individualism, for the right of the individual to injure the future of all of us for his own temporary and immediate profit. The time has come for a change. As the people we have the right and the duty, second to none other but the right and duty of obeying the moral law, of requiring and doing justice, to protect ourselves and our children against the wasteful development of our natural resources, whether that waste is caused by the actual destruction of such resources or by making them impossible of development hereafter. (Roosevelt, 1909, p. 10)

Roosevelt especially gave voice to the communitarian nature of Progressivism. In his speech at Osawatimie, Kansas, “The New Nationalism” (August 31, 1910), he expressed the idea that the interest of the community outweighs the interests of the individuals. Promotion of the general interest demanded “a policy of a far more active governmental interference with social and economic conditions in this country than we have yet had” (Roosevelt, 1910, p. 20). Property rights, for example, are not sacrosanct; the right of property is instead “subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.” The promotion of the social good must be the end to which government regulatory policy strives. Roosevelt made the argument for the primacy of the social good again on moral grounds:

The object of government is the welfare of the people. The material progress and prosperity of a nation are desirable chiefly so far as they lead to the moral and material welfare of all good citizens. Just in proportion as the average man and woman are honest, capable of sound judgment and high ideals, active in public affairs – but, first of all, sound in their home life, and the father and mother of healthy children whom they bring up well – just so far, and no farther, we may count our civilization a success. We must have – I believe we have already – a genuine and permanent moral awakening, without which no wisdom of legislation or administration really means anything; and, on the other hand, we must try to secure the social and economic legislation without which any improvement due to purely moral agitation is necessarily evanescent. (Roosevelt, 1910, p. 29)

Coincident with the “welfare of the people” was the welfare of the race. Here Roosevelt readily accepted the “race suicide” thesis advanced by Edward Alsworth Ross. In his address “To a Committee of the Inter-Church Conference on Marriage and Divorce,” held at the White House on January 26, 1905, Roosevelt opined that “One of the most unpleasant and dangerous features of our American life is the diminishing birth rate and the loosening of the marital tie among the old native American families. It goes without saying that, for the race as for the individual, no material prosperity, no business growth, no artistic or scientific development will count if the race commits suicide” (Roosevelt,

1906b, p. 548). This theme appeared in several of Roosevelt's popular writings and speeches. In his 1911 essay, "Race Decadence," he expanded on the theme, despairing over the future of the white race:

We can say that, if the processes now at work for a generation continue to work in the same manner and at the same rate of increase during the present century, by its end France will not carry the weight in the civilized world that Belgium now does, and the English-speaking peoples will not carry anything like the weight that the Spanish-speaking peoples now do, and the future of the white race will rest in the hands of the German and the Slav. Are Americans really content that this land of promise, this land of the future, this abounding and vigorous Nation, shall become decrepit in what ought to be the flower of its early manhood? (Roosevelt, 1911, p. 765)

Good citizenship meant accepting one's duty to procreate. Yet merely having children was not sufficient — the *quality* of children counted as much if not more so as the *quantity*. The community should be mindful to promote child-bearing by the "right" people. "Criminals should not have children. Shiftless and worthless people should not marry and have families which they are unable to bring up properly. Such marriages are a curse to the community. ... What we most need is insistence upon the duty of decent people to have enough children..." (Roosevelt, 1911, p. 768).

H. L. Mencken, summarizing Roosevelt's Progressive philosophy of governance, put quite succinctly his understanding of Roosevelt's view of the role of government, one not necessarily out of the mainstream of Progressive thought. Mencken says of Roosevelt,

He didn't believe in democracy; he believed simply in government. His remedy for all the great pangs and longings of existence was not a dispersion of authority, but a hard concentration of authority. He was not in favor of unlimited experiment; he was in favor of a rigid control from above, a despotism of inspired prophets and policemen. He was not for democracy as his followers understood democracy, and as it actually is and must be; he was for a paternalism of the true Bismarckian pattern, almost of the Napoleonic or Ludendorffian pattern — a paternalism concerning itself with all things, from the regulation of coal-mining and meat-packing to the regulation of spelling and marital rights. (Mencken 1920, pp. 123–124)

As important as Theodore Roosevelt may have been to the promotion of a Progressive political and social agenda, it was Woodrow Wilson to whom credit must be given as the architect of the administrative State. His 1889 classic *The State: Elements of Historical and Practical Politics* and his 1913 *The New Freedom* serve as blueprints for a rational social order under the direction of an omnipresent, activist government. Government is seen as an essential bulwark against the vicissitudes of modern society, the great preserver of individual liberty and equality. Wilson maintains,

The hope of society lies in an infinite individual variety, in the freest possible play of individual forces: only in that can it find that wealth of resource which constitutes civilization, with all its appliances for satisfying human wants and mitigating human sufferings, all its incitements to thought and spurs to action. It should be the end of government *to accomplish the objects of organized society*: there must be constant adjustments of governmental assistance

to the needs of a changing social and industrial organization. (Wilson, 1889, pp. 660–661; emphasis in original)

As Wilson defines it: "Freedom to-day is something more than being let alone. The program of a government of freedom must in these days be positive, not negative merely" (Wilson, 1913, p. 284). To be truly "free" as an individual is to recognize one's place in the community:

We must see to it that there is no overcrowding, that there is no bad sanitation, that there is no unnecessary spread of avoidable diseases, that the purity of food is safeguarded, that there is every precaution against accident, that women are not driven to impossible tasks, nor children permitted to spend their energy before it is fit to be spent. The hope and elasticity of the race must be preserved: men must be preserved according to their individual needs, and not according to the programs of industry merely. (Wilson, 1913, pp. 275–276)

Wilson's view of the State is as "the organic body of society," without which "society would be hardly more than a mere abstraction." Government, as distinct from the State, is a natural constraint, with "its rootage in the nature of man, its origin in kinship, and its identification with all that makes man superior to the brute creation." As the common welfare may best be secured through centralization of authority, Wilson contended that "we ought all to regard ourselves and to act as *socialists*, believers in the wholesomeness and beneficence of the body politic" (Wilson, 1889, p. 658; emphasis in original). The State, as Wilson perceived it, was to be regarded as the instrument through which society and the individuals of which it is comprised may advance towards perfection:

Every means, therefore, by which society may be perfected through the instrumentality of government, every means by which individual rights can be fitly adjusted and harmonized with public duties, by which individual self-development may be made at once to serve and to supplement social development, ought certainly to be diligently sought, and, when found, sedulously fostered by every friend of society. Such is the socialism to which every true lover of his kind ought to adhere with the full grip of every noble affection that is in him. (Wilson, 1889, p. 659)

Among the roles played by the State is the socialization of the individual, directing him to his "proper" role in society, instilling a sense of morality and obedience, and in general reorienting individuality, "in order that that individuality may add its quota of variety to the sum of national activity" (Wilson, 1889, p. 666). Absent a plan for universal education, including instruction in moral virtue to facilitate the development of sociality and social obligation, "no government that rests upon popular action can long endure" (p.667).

As President, Wilson established the model for presidential governance, usurping what had been regarded as the prerogative of the legislative branch and expanding the scope of the bureaucracy. The federal income tax, the Federal Reserve, and the Federal Trade Commission all came into being during the first Wilson administration. He also nationalized the railroads during the World War, ostensibly to create scale efficiencies. (The railroads reverted to private management in 1920.) Wilson had little regard for what he viewed as a

static and too-restrictive Constitution, drafted in an era steeped in the tradition of Newtonian science. He held that "[t]he Constitution was founded on the law of gravitation" (Wilson, 1913, p. 47). The nineteenth-century development of the scientific theory of evolution and the philosophy of evolutionary development called for a reconsideration of the role of the State and the nature of government, as well as a reinterpretation of the Constitution. Here he seems to have reaffirmed Holmes' assertion that "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics" (Holmes, 1881, p. 1). Within the evolutionary view of society, the Constitution and the role of the government could be viewed as organic and mutable, alterable when circumstances and social mores demand change, a document capable of being "modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life" (Wilson, 1913, p. 47).

PROGRESSIVE JURISPRUDENCE

The Progressive jurisprudential philosophy is, to put it charitably, pragmatic. It is to the needs of the community that judicial decisions should focus. Deference should be given to the acts of the legislatures, even if the legislation may conflict with personal liberties. The "police power," for instance, was explicitly acknowledged by Progressive jurists and legal scholars, as well as Progressive economists and sociologists, to justify the grant to the State of broad regulatory control.³ As Associate Justice Henry Billings Brown, notorious for his authorship of the majority opinion in *Plessy v. Ferguson*, wrote in *Lawton v. Steele* (1894, 152 US 133, 136), the police power

is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

The Supreme Court's decision in *Plessy v. Ferguson* (1896, 163 US 537) is representative of the Progressive expansion of the police power. As the legal

scholar Richard Epstein noted, "The sad but simple truth is that the Jim Crow resegregation of America depended on a conception of constitutional law that gave property rights short shrift, and showed broad deference to state action under the police power" (Epstein, 1998, p. 791). Associate Justice Oliver Wendell Holmes, Jr., in his oft-quoted dissent in *Lochner v. New York* (1905, 198 US 45, 75), insisted that the Court had, in numerous instances, ruled "that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical." The Constitution is not bound to any socioeconomic philosophy — "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." The decision in *Muller v. Oregon* (1908, 208 US 412) affirming the right of a state to impose limits on working hours of women, offers as well a paternalistic justification for State action. In his opinion, Associate Justice David Brewer explained that "It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract" (1908, 208 US 412, 421).⁴ In addition, the law must, where possible, address the priority of the welfare of the collective over the rights of the individual and recognize as paramount the individual's obligation to the community. In his majority opinion in *Noble State Bank v. Haskell* (1911, 219 US 104, 111), Holmes again is instructive — "It may be said in a general way that the police power extends to all the great public needs. ... It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." This position was by no means unique to Holmes. Finally, in his dissent in *Duplex Printing Press Co. v. Deering et al.* (1921, 254 US 443, 488), Associate Justice Louis Brandeis reasserted the claim of the primacy of the collective welfare as essentially a moral duty: "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community."

Leonard's primary concern in this book is with the ideals and policy prescriptions of the Progressive Era economists, although he ranges well beyond to give flavor to the era. One area that receives little attention is that of the legal system, which after all gave structure and substance to Progressive policies. Of particular importance in this regard is the contribution of a major figure, Roscoe Pound. Roscoe Pound, a botanist by training who became dean of the law school at the University of Nebraska (1904–1907) and later dean of Harvard Law School (1916–1936), introduced the concept of sociological jurisprudence, an idea that served well the needs of the American Progressive philosophy. Sociological jurisprudence acknowledges the limitations of the common law, specifically its granting of priority to the rights of the individual

and the need for attention to rules over discretion. The rights of property, contract, and due process, fundamental protections of *personal* liberties, were transplanted wholesale from English common law into the American legal system. Consider the doctrine of contract. Pound laid blame with the Classical political economists — specifically, Adam Smith, David Ricardo, and John Stuart Mill — alongside the sociology of Herbert Spencer, for transforming the doctrine in such a way that “it became a chief article in the creed of those who sought to minimize the functions of the state, that the most important of its functions was to enforce by law the obligations created by contract.” The desired end “was to abolish a body of antiquated institutions that stood in the way of human progress,” a process that coincided with the emergence of an individualistic common law tradition, one “which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal” (Pound, 1909, pp. 456–457).

Pound believed the United States to be fundamentally heterogeneous, a society “divided into classes with divergent interests, which understand each other none too well, containing elements hostile to government and order, containing elements ignorant of our institutions, on the one hand unable to understand our tenderness of individual liberty and on the other hand suspicious of authority and of magistrates.” Yet the existing judicial framework was best suited to a more homogeneous community. In the “modern city,” in which “law requires sanction and must do much of the work of morals,” the legal *status quo* is unacceptable (Pound, 1913a, p. 311). The appeal to the primacy of individual rights and privileges relegates the concerns of society, the larger community, to secondary importance. To Pound, the law must be made transformative, serving the *social* interests; it must acknowledge the existence of a social morality and not merely seek to preserve existing inequalities in the name of property and contract. Only through this concern with the promotion of the social welfare can the rights and liberties of the individual be secured:

We no longer hold that society exists entirely for the sake of the individual. We recognize that society is in some wise a co-worker with each in what he is and in what he does, and that what he does is quite as much wrought through him by society as wrought by himself alone. To parody a well-known formula, we are not so much concerned with the liberty of each limited only by the like liberties of all, as with the welfare of each, achieved through the welfare of the whole, whereby a wider and surer liberty is assured to him. (Pound, 1905, p. 346)

Pound’s suggestion to transform the legal system to account for the social welfare instead of the protection of individual rights and liberties is an abandonment of reliance on precedence in the common law and instead focuses on legislative action and the rule of administrative experts to place the law “in the hands of a progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a higher level” (Pound, 1907, p. 612). Government, then, may be viewed as “an

instrument of securing social interests which are endangered by individual freedom of action” (Pound, 1913a, p. 325). To this end, Pound advanced two principles that should underlie legislative enactments: (1) “individual interests are to be secured by law only because and to the extent that they are social interests,” and (2) “secure at all times the greatest number of interests possible, with the least possible sacrifice of other interests” (Pound, 1913b, pp. 765–766). To achieve such security, he argued for “an engineering interpretation of jurisprudence,” by which judges and legislators identify “means to be employed in conscious construction to achieve definite ends” (Pound, 1917, p. 724). Positive action is essential “in order to defend society against the anti-social,” and demands “a legal science which constructs as well as observes,” as it “observes in order that it may construct” (p. 725). While sociological jurisprudence rejects the idea of individual rights, Pound held that freedom of action would not necessarily be negatively affected; just “[a]s military organization and military control may be achieved without stifling individual spontaneity and initiative, so intelligent social control does not intrinsically and inevitably involve paralysis of individual free action” (pp. 727–728). Efforts at social control through State-mandated restraints may in fact result in an infringement of individual liberty and autonomy, yet one is still free to act within those constraints. It is ultimately the duty of the Progressive jurist and legislator as members of the enlightened elite to employ their positions to the end of setting such limitations in the pursuit of a more perfect social order.

Enter the economists. Pound was a colleague of Edward Alsworth Ross⁵ at Nebraska, and commented on Ely’s (1914) book, *Property and Contract in Their Relation to the Distribution of Wealth*.⁶ In his 1902 essay, “Industrial Liberty,” Ely addressed the “infelicitously termed” police power, which he defined as “the general welfare power of the state, restricting and limiting contract in the interests of freedom” (Ely, 1902, p. 70). The legal system, in Ely’s view, had proven slow to adapt to the changes wrought by the economic development of the country; as industrialization progressed, the courts seemed largely incapable of acknowledging the need for restrictions on the right of contract, restrictions “demanded by the interests of a larger and truer freedom.” Gradually, however, the courts discovered in the police power a new means by which to approach the subject, with state courts upholding legislated restrictions on hours of work (pp. 71–72). Ely even quoted Oliver Wendell Holmes, Jr., then the Chief Justice of the Supreme Court of Massachusetts, as to “the right of the state to regulate free contract in the interests of a larger freedom.” Wrote Holmes: “In my opinion, economists and sociologists are the people to whom we ought to turn more than we do for instruction in the grounds and foundations of all rational decisions” (p. 72, n. 2). For Ely, the police power is significant in that it is “the peculiarly flexible element in our legal system,” one offering an extra-Constitutional means of effecting change. The police power offers possibilities that “cannot be limited,” a means of adapting law to the needs of industrial society (p. 74). By taking an active role in submitting contracts and property rights to scrutiny in

an effort to determine the degree to which they may infringe upon the freedom of the individual, the State is simply exercising its duty to preserve the sanctity of the contractual relationship itself (p. 75).

In his 1914 *Property and Contract in Their Relations to the Distribution of Wealth*, Ely revisited the issue, devoting an entire chapter to the police power and property. Ely here accepts that private property "is permanent, inviolate, sacred," yet at the same time "it must serve social interests and the welfare of society must come first." This *social theory of property* "is brought about by the power of the judge to declare what private property carries with it, and what it does not carry with it." This is the police power, "the center of socio-economic conflict in the United States." While the police power is "primarily a legislative power," the fact that the Constitution endowed the courts with a "controlling influence" means that it has become transformed into a judicial power. Thus, the police power is defined as "*the power of the courts to interpret the concept property, and above all private property; and to establish its metes and bounds.*" It is, to be more specific, "the power to interpret property and especially private property and to give the concept a content at each particular period in our development which fits it to serve the general welfare" (Ely, 1914, pp. 205–207; emphasis in original). It is, in addition, "the general welfare power of the state under which all property is held, all contracts are made and liberty is interpreted; and in accordance with which comparatively small invasions of property and contract rights may be made even without compensation" (p. 701). There is no absolute, inviolable, right to property; the State retains the right, under the authority of an "elastic" police power, to define property in such a manner as comports with the general social interest. The police power is, in effect, a guiding principle of social policy, as it extends beyond the economic domains of property and contract to insinuate itself into all aspects of life. Liberty is defined not with respect to the individual, but with respect to society, and the Constitutional protection of liberty is through the use of the police power:

Freedom, liberty, is a social product. It is found in proper adjustments of social relations. It exists for the sake of society, which is here dominant as elsewhere, but it is only in a free society based on right social relations, regulated according to principles of mutuality, that the individual finds a sphere for growth and attains liberty in the positive constructive sense. Through the police power the courts construe liberty. The written Constitutions of the United States put in their charge this precious treasure; and the courts will for the first time be equal to their task, when they work away from doctrinaire abstractions which grew out of primitive economic conditions and attain to the social theory of liberty. (Ely, 1914, p. 821)

UNIONS AND RACIAL POLITICS

Racial politics was especially pervasive throughout the American labor movement. The American Federation of Labor consistently resolved to exclude

Asians not only from the union but from the United States, pledging its continued support for the Chinese Exclusion Act. At its Convention in 1901 it was noted that the Chinese Exclusion Act was set to expire on May 5, 1902, and should it fail to be extended, "our country will be overrun with countless hoards of Chinese, Japanese, and other Asiatic laborers equally objectionable," causing "incalculable injury to our miners, mechanics, and unskilled laborers and wage-earners generally throughout the length and breadth of the land by reason of the grinding competition to which they would be thereby subjected, the lower standard of comfortable living to which they would be reduced and the numerous other evils of a most calamitous nature that would be entailed upon them." Not only should the Exclusion Act be reenacted, but its scope should be enlarged so as to include "the Japanese and all other Mongolian or Asiatic races in the same manner as to the Chinese, and to be furthermore so modified as to be unlimited in their period of operation" (1901, pp. 63–64). A second resolution concurred, noting that Asians comprised

a people entirely out of harmony and training with the American comprehension of liberty and citizenship, alien to our customs and habits, as different from us in political and moral ideals as it is possible for two peoples to be, so thoroughly grounded in race characteristics that even the generations born and reared amongst us still retain them, can not but exercise a most demoralizing effect upon the body politic, social life, and civilization of the people of our nation, now and for all time. (American Federation of Labor, 1901, p. 63)

Leonard makes reference to a pamphlet published by the American Federation of Labor entitled *Meat vs. Rice: American Manhood against Asiatic Coolieism. Which Shall Survive?* This pamphlet, reprinted as a US Senate document⁷ and later (1908) published with Introduction and Appendices by the Asiatic Exclusion League of San Francisco, was written in an effort to persuade the United States Congress to extend the Exclusionary Act restricting Chinese immigration. The action requested was not, the authors insisted, "alone a race, labor, and political question," but rather one that "involves our civilization and interests the people of the world." The historical parallels were simply too obvious to avoid: "As Attila and his Asiatic hordes" had once threatened European civilization, so "[t]he free immigration of Chinese would be for all purposes an invasion by Asiatic barbarians...." To maintain "our inheritance ... pure and uncontaminated" demands the restrictions set forth in the Act be extended (American Federation of Labor, 1902, pp. 29–30).

At its 1909 Convention, the delegates passed a resolution again demanding limits on Asian immigration. While accepting that the Chinese Exclusion Act had been successful in reducing the "menace" of Chinese labor, nonetheless "an evil similar in its general character, but much more threatening in its possibilities" had as yet been unattended, this being "immigration to the United States and its insular territory of large and increasing numbers of Japanese, Koreans and other races native of Asia." Not only would the Asian immigrant laborers accept wages much lower than those of the American worker, but their

standards of living were deemed "dangerous to, and must, if granted recognition in the United States, prove destructive of the American standards." In addition, Asians in general were held to be racially incompatible with Americans, which created "a problem of race preservation, which it is our imperative duty to solve in our own factor, and which can only be thus solved by a policy of exclusion." Legislative action was urgently needed to extend the Act to include "all races native of Asia other than those exempted by the present terms of that Act" (American Federation of Labor, 1909, pp. 231–232).

CONCLUSION

The above remarks are meant to expand upon some of the important but somewhat neglected (perhaps glossed-over is a better term) topics in Tim Leonard's fascinating book. In addition to the comments above, I would have wished to see a more extensive discussion of the racial and eugenic writings of Lester Ward, Richard T. Ely, Charles Horton Cooley, and Edward A. Ross, whose publications in economics and sociology and even the popular press were widely read and served to stimulate public debate and influence political thought and even legislation, and "public intellectuals" such as Margaret Sanger, who advocated racial eugenic policies that eventually became mainstream. Yet such digressions would have made a thoroughly readable and engrossing work as this quite unwieldy.

NOTES

1. Much of the material in this review derives from McCann (2012, especially Chapter 1).

2. Cf. Cass Sunstein in his support for a "second" Bill of Rights: "[T]he most negative of liberties require an affirmative government," and "freedom requires government's presence, not absence" (Sunstein, 2004, pp. 200–201).

3. Although this power is not explicitly granted in the Constitution, Article I, Sec. 8 has been interpreted by Congress to provide a mandate in the promotion of the general welfare. "In short, Congress exercises a generous police power not because that power is placed directly in its hands but because it has the power to regulate commerce, to lay taxes, and to control the mails, and uses that authority for the broad purposes of the general welfare" (Cushman, 1919, p. 291).

4. He continued, expressing his judgment that women are especially in need of State protections: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman

becomes an object of public interest and care in order to preserve the strength and vigor of the race" (1908, 208 US 412, 421).

5. Ross dedicated his 1920 *Principles of Sociology* "To Roscoe Pound, Dean of the Harvard Law School, Prince of Law Teachers, and Builder of Sociological Jurisprudence."

6. Wrote Pound: "I am sure the great value of this monumental work will make itself felt more and more as those who study the subject are compelled by the necessity of the case to make use of it. There is nothing else on the subject worth talking about."

"I may say also that in my seminar in jurisprudence here [Harvard Law School], I am using the book and that five or six teachers in law schools, who are here studying with me this year, will go out at the end of the year thoroughly familiar with it, to make use of it in their work" (Ely, 1917). The blurb appeared on the back jacket cover of *Exercises in Ely's Property and Contract in Their Relation to the Distribution of Wealth* (1917).

7. US Senate, 57th Congress, 1st Session, document no.137.

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FAITH AS POLITICAL EPISTEMOLOGY: A REVIEW OF THOMAS C. LEONARD'S *ILLIBERAL REFORMERS*

Scott Scheall

I confess at the outset that I will commit here the cardinal sin of the book-review writer: rather than addressing the merits and demerits of the text as received, I will mostly criticize the author for failing to write the book that I would have preferred to read. In the process, I will likely reveal more about myself and my own academic predilections than anything for which the author is responsible. In effect, my main complaint will be that the work of Professor Thomas C. Leonard in his excellent *Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era* is insufficiently attuned to what I find interesting in the subject material. Of course, this is at worst faint criticism and more probably high praise. Like Professor Leonard, I am a historian of economic thought; however, my own training is in philosophy, not economics, so it is perhaps to be expected that I approached the subject material with philosophical concerns foremost in mind and was more disappointed than surprised that Professor Leonard's primary interests lie elsewhere. Nonetheless, the criticism of *Illiberal Reformers* that I offer here is, I think, ultimately valid regardless of one's background and expectations.

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