1999

Foreword

Robert Justin Lipkin

FOREWORD

IS AMERICAN PROGRESSIVE CONSTITUTIONALISM DEAD?

ROBERT JUSTIN LIPKIN*

The motivation for this symposium on the future of American progressive constitutionalism stems from the realization that neither the United States Congress nor the Supreme Court has been decidedly progressive for at least twenty-five years, if ever at all. Even if the Court through transformative appointments should become more liberal, the future appears unlikely to contain a truly progressive judiciary, at least as far as one can reasonably predict. Similarly, progressivism is no longer represented in the Congress, nor is it anything but a forgotten voice in American constitutional and political culture. This prompts the question whether progressive constitutionalism is alive at all in American constitutional law, and, if so, whether it is likely to cross that bridge into the twenty-first century.

The symposium has been organized around some central questions concerning the future viability of progressive constitutionalism. First, what is progressive constitutionalism and how, if at all, does it differ from liberal and conservative constitutionalism? Second, what is the relationship between progressivism and religious liberty? Is religious justification of political policies appropriate in a progressive society? Third, how does progressive constitutionalism treat issues of race, gender, and sexual orientation? And lastly, what is the relationship between progressive constitutionalism and democracy?

In this brief essay, let me sketch a general characterization of the contrast between conservative, liberal, and progressive constitutionalism.[1] I do not offer any definitive answers, nor do I claim that any of the other participants

---

* Professor of Law and H. Albert Young Fellow in Constitutional Law, Widener University School of Law.

1. The following description of the differences between conservatism, liberalism, and progressivism should be regarded as only a sketch of the differences and overlapping features of each form of constitutionalism. Pointing out the differences between these theories ought not to obscure the differences within each theory. Describing the differences between and among these forms of constitutionalism as well the differences within each form of constitutionalism cannot be adequately resolved in the space of this brief introduction, and perhaps not even by any single work on this topic. The differences are sometimes not differences between values, (although sometimes they might be) but rather are differences in the significance and ranking of the same or similar values. Some features of these three types of constitutionalism are shared by each theory. Indeed, if there were no commonly accepted values, it would be difficult to understand how they can differ at all.

are necessarily committed to the framework I suggest. I present this framework only as a window through which we can begin considering the issues raised by the ensuing articles.

Different types of American constitutionalism all seek to answer the following overlapping questions.[2] (1) What is the appropriate attitude towards changing the political and constitutional status quo? Specifically, should we encourage self-conscious deliberative change or should we leave change to the dynamics of private interactions, eradicating human suffering only when the societal circumstances for doing so are propitious and most importantly when the people's attitudes support such change? (2) What role do private interests and individual responsibility play in a democracy? And finally, (3) What is the government's role in reducing both public, and especially, private suffering? The answers conservatives, liberals, and progressives give to these questions represent competing visions of democratic self-government.

How does progressivism differ from conservative and liberal constitutionalism? To paint in broad strokes, consider as a test case, the issue of segregation before the decision in *Brown v. Board of Education.* Conservatives typically defended the status quo and were reluctant to begin meddling with the fundamental traditions and institutions in American society. Because these practices have survived the test of history, they should be valued for their practical significance, and we should eschew broad self-conscious designs to systematically render them more just, even if some people in society suffer as a result. Broad-based change often has unintended consequences that can radically damage or bring down the status quo. If change is needed to rectify specific aberrations in the status quo, it should generally occur incrementally, and its source should be the changed needs and attitudes of the populace, not coercive governmental action. For example, a conservative constitutionalist could argue that segregation was necessary to a vital American economy—and most people do well by it—therefore, it should be defended against unrealistic utopians proposals for racial justice. Of course, a conservative could argue equally well (depending upon the empirical facts of the relationship between segregation and a healthy economy) that racial injustice detrimentally burdens economic efficiency. In that case, however, the conservative would expect individual actors (business people, and so forth) to incrementally begin eradicating segregation because it is in their interest to do so. Prior to *Brown,* the conservative was disinclined to oppose segregation merely to implement an untried conception of racial equality.

In those few cases where incremental change is unlikely or impossible,

---

2. I thank Erin Daly for helping me construct the following framework as an organizing principle for comparing these different forms of constitutionalism.

conservatives can invoke the procedures in Art V. To amend the Constitution and thereby remedy the failures in the status quo. The government's role, according to conservativism, is to protect private interests, and it should not be in the business of creating, directing, or regulating social and economic reality. Thus, the conservative typically rejects reforming the status quo through adjudication or legislation unless the majority's interests, needs, and attitudes towards the source of the problem in the status quo has changed. In short, the conservative seeks to privilege the status quo and the American traditions from which it derives. Private, non-governmental actors such as political leaders, clergy, business leaders, and others can rally the people to desegregate public schools if that is the people's will; however, specific legislation or judicial transformation of current constitutional meaning is dangerous and ineffective.

According to this view, governmental attempts to extirpate racist laws without the strong support of the people will be ineffective and illegitimate. Conservatives generally deny that either legislation or adjudication can change the human heart. The constitutional conservative is satisfied only when the people express their changed needs and commitments by replacing those offending elements in the American racial tradition by altering their relationships in the marketplace and in their personal lives. The problem here is that conservatives also are reluctant, to say the least, to recommend curbing powerful private actors through legislation or adjudication when these actors have a significant interest in maintaining the status quo, unless the conservative's high threshold for the need to change has been reached. Thus, conservativism often takes the form of embracing the status quo even when complaints against its legitimacy are beginning to be heard. The conservative believes that the government has minimal responsibilities for bringing about racial justice, and that this goal should be achieved, if at all, by the people in their homes, churches, clubs, workplaces, and businesses. If all else fails, the conservative reluctantly enters the halls of the legislature and supports change if and only if it's consonant with the majority's will and when private minority interests, supporting the status quo, are willing to drop their opposition. The conservative's general distrust of government often renders simple majoritarianism ineffective.

By contrast, liberals are not as averse to altering the status quo as conservatives are and are willing to recognize that the traditions supporting the status quo are not always good or just. Thus, if society begins to detect an incompatibility between segregation and the Equal Protection Clause, government should not be reluctant to alter the status quo by reversing its policy of racial oppression. Liberalism contends that government acts effectively and legitimately when it seeks to remedy racial apartheid through legislation and judicial intervention. Liberals have different reasons for

opposing segregation. Some liberals contend that segregation violates fundamental constitutional rights such as the equal protection clause; others believe that segregation is anathema to American democracy. For my purposes in this introduction, either reason can suffice. Consequently, if the question of remedying racial apartheid were left only to the conservative, no change would occur unless and until the attitudes and private interests of a majority changed, including the attitudes of powerful private actors.[3] Alternatively, although liberals believe that private interests are important, they eschew leaving racial equality to majoritarian control. In this context, majoritarian control is inconsistent with American constitutionalism which must, in their view, guarantee equal protection. Thus, government, according to the liberal, must enter into this arena on the grounds that racism is unjust and unconstitutional.

Once segregation is legally rejected, the liberal believes that the remaining changes necessary for achieving racial justice must be achieved through the private realm of social interaction between the races and through their economic inter-dependence. The liberal is satisfied when no law explicitly burdens African-Americans as members of a distinct legal or constitutional class. Thus, the liberal constitutionalist often restricts the government from reaching into areas of *de facto* discrimination. One reason for the liberal's view is her commitment to state or governmental action as a requirement for constitutional remedies. If segregation exists but is not formally sanctioned by law, then, according to the liberal, constitutional reform is inappropriate. Once the law is racially healthy, so to speak, the remaining ills of African-American society, even if often the vestigial remains of *de jure* discrimination, are no longer cognizable as constitutional wrongs. If the state no longer causes segregation, then there is no reason for the state to continue to be involved in its eradication.

Liberals seek the courts to remedy governmentally sanctioned segregation and legislation to remedy private segregation, but the liberal often stops short of addressing the continuing debilitating effects of racism. If racial injustice is unconstitutional the conservative endorses the proposition that government must refrain from perpetuating it in the governmental arena, but, elsewhere, private actors must determine this issue themselves. As a result, conservatives and liberals may differ on civil rights legislation intended to desegregate the private sector. Liberals believe that racial injustice must be extirpated in both the governmental realm and with the appropriate qualification in the private realm. However, liberals may balk

---

3. Nevertheless some conservatives might oppose even this change in the belief that the present status quo is superior to the proposed change and that the current majority is irresponsible in rejecting it. Or, the conservative might reject change because it stifles her private interests.

at the view that affirmative governmental action should be designed to remedy the vestiges of racism.[4] For conservative constitutionalism, at least prior to *Brown,* only people's changed attitudes can achieve racial justice. In contrast, the government has an obligation, according to the liberal, to encourage the appropriate change in attitudes about racial justice, especially on the part of the government itself, by making certain that the state is free of discriminatory laws.

Progressive constitutionalism, in contrast both to conservativism and liberalism, has a more capacious conception of racial equality and justice. Progressives contend that the Constitution is designed to assist Americans in achieving "life, liberty, and the pursuit of happiness." The progressive conscience seeks to improve the chances of authentic self-definitions for all Americans. Progressives either reject the requirement that government has an obligation to remedy only governmental discrimination, or contend that, concerning the Fourteenth Amendment, states shall neither discriminate themselves nor tolerate the discrimination of private parties in ways that deprive the victim of the "equal protection of the law." Section Five of the Fourteenth Amendment, although rarely used, is potentially a progressive provision permitting Congress to address private discrimination. Similarly, affirmative action is a device through which government can (must?) address the effects the Constitution has in formally denying equal justice and equal citizenship to oppressed people.

Conservatives and many liberals reject affirmative action on the ground that social equality is beyond the government's reach and affirmative action is unfair to white males. Typically, this argument rejects the constitutional significance of the distinction between invidious discrimination and benign discrimination. Progressives, by contrast, believe that the distinction is central to appreciating the complex processes required to remedy two centuries of constitutionally sanctioned racial apartheid. When government acts, it should be aware of the debilitating racial effects of its laws that appear racially neutral laws. Furthermore, the government should not be barred from remedying the effects of past racism. In this latter case, progressives contend that the courts should pay great deference to the will of the majority when it limits its own benefits by endorsing affirmative action. The basic reason is that preventing the effects of invidious discrimination is inextricably tied to the idea of the equal protection of the laws. Thus, according to the progressive's conception of equality, at least with issues as deeply embedded as racial apartheid, the government should

---

4. Of course, some liberals regard affirmative action as compatible with the Constitution, but usually only in the sense that it is at best permissible, never required, and only with standard qualifications that render affirmative action, from the progressive's perspective, as a weak form of remedial treatment.

prevent the private causes of racial division from being perpetuated by fashioning racially sensitive laws and laws designed to positively affect the status of the racial underclass. According to progressivism, it is perverse to simultaneously contend that racial justice and the relief of suffering are important American values while at the same time insisting that government should be disabled from achieving these values.

More generally, the progressive constitutionalist's conscience is driven by the recognition that unequal freedom poses a bar to self-fulfillment for those who are relatively powerless. This conscience seeks to construct a framework through which individuals and their communities can develop free from the arbitrary imposition of powerful public and private interests. For the progressive, history is replete with inequalities, domination, and hierarchies, the first one being the relationship between the Crown and the colonies prior to the Revolutionary War. The progressive constitution was then designed to form an effective government and a constitutional mechanism to reduce inequalities and enable people to achieve a semblance of the good life. In this general sense, American progressive constitutionalism can formally trace itself back to the Declaration of Independence and the Founding. Although the progressive vision was arguably present in the eighteenth century, political realities precluded its realization at that time. Real progressive reform would have to wait for a later period in our constitutional history, if at all.

Progressivism implies moral progress by expanding the rights afforded to members of the relevant political and moral community and by always seeking to make this community more inclusive. Progressive constitutionalism insists that domination and injustice must be addressed by all principal institutions of society; progressive political philosophy encourages nongovernmental institutions and movements to participate in a broad, sustained conversation about political and constitutional justice. In this view, constitutional law should be structured and should change in ways commensurate with providing a continuing conscience for social improvements and political change. Political or constitutional structures that prevent the development of this conscience are antithetical to progressive constitutionalism.

The papers in this symposium represent the perspectives of the participants on the above questions. In one form or other, each paper is ultimately concerned with whether American progressive constitutionalism is dead, or if not, what form progressivism should take in the next millennium. Moreover, since the idea of democracy is so critical to understanding American constitutionalism, we hope that this volume will prompt others to conduct further inquiries into the democratic foundations of conservativism, liberalism, and progressivism.

A project like this requires the cooperation and coordination of many actors, including institutional actors, students, friends, and colleagues. Most notably, I wish to thank all the speakers and participants for making this symposium held in October 1997 such a great success. I also thank Widener University School of Law for providing the resources for this project, and the Law School library for facilitating the acquisition of source materials. The editorial board and staff of volume four of the *Widener Law Symposium Journal*, especially Donald K. Phillips and Avelyn M. Ross, deserve credit for their conscientious work in completing this project sometimes under difficult circumstances. Robert H. Hayman, Jr. helped conceive the symposium's theme and supported the project throughout. David Hodas was invaluable in sharing with me some of his wisdom concerning the symposium and its publication in the *Widener Law Symposium Journal*. As usual, Rod Smith deserves my gratitude for worrying with me over the details of successfully pulling off the symposium. More than anyone else, Erin Daly's role in this project must be highlighted. I sought Erin's counsel on almost every important decision, (and some unimportant ones) and I gratefully thank her for her unfailing commitment to the symposium and its publication. Lastly, on a personal note, I would like to thank the H. Albert Young Foundation and the Young and Douglas families for their support of my future research on progressive constitutionalism and democracy by awarding me a fellowship in constitutional law that recognizes the remarkable career of their father, the late H. Albert Young.