

## **Foreword: Progressive Constitutionalism Considered**

MARC SPINDELMAN\*

Theories of progressive constitutionalism have long since passed the point of achieving critical mass. The term “progressive constitutionalism” now rings familiar in many ears. But does it yet describe a discernible method of constitutional interpretation? Certainly, there are shared impulses found in efforts that characterize themselves in relation to the concept. One is the active consideration, and in some cases, reconsideration, of judicial review by the U.S. Supreme Court in particular, especially when practiced as constitutional supremacy. Another is deep doubt about the normativity, not to forget the internal coherence and consistency, of the anti-progressive constitutional “originalist” program. But how, if they are, are these shared impulses causing new conceptual ground to be broken? Is progressive constitutionalism, in fact, something new? Or is it better understood as a variation within the long established, if also intensely charged, idea of “a living Constitution”?

Other law journal symposia have usefully been organized around particular strands of work claiming a progressive constitutionalist mantle. Scholarship in the area richly deserves the attention it has received. But the articles in the pages that follow respond to a different call, this one focusing on progressive constitutionalism itself. If not strictly the first, this is certainly among those that are.

In an important sense, the questions that animated the decision to convene and publish this Symposium were quite basic. If progressive constitutionalism states a theory of the Constitution or constitutional interpretation, what is it? What are its constitutive parts? What is it for and what is it against? Can it be described in friend/enemy terms or is it better understood as a loose congeries of more or less casually allied projects that happen to position themselves politically in relation to “progressivism” on the left?

On another level, the questions behind the Symposium were more affirmatively programmatic in their aims. Are diagnostic assessments of progressive constitutionalism and where it stands now possible, either as their own end or instrumentally, as part of a larger effort to gain a handle on where it might go next? Does progressive constitutionalism supply a field of and for new work in constitutional theory when, to some and perhaps to many, it seems stuck dwelling in the long shadows that the giants of twentieth-century constitutional law continue to cast? Could this, finally, be a way out—or forward, of guiding constitutional law theory toward a new light? Along similar lines, does progressive constitutionalism potentially present fresh opportunities for intellectual collaborations that defy standard articulations and

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\* Copyright © 2011, by Marc Spindelman. All rights reserved. Professor of Law at The Ohio State University Moritz College of Law, and Faculty Advisor for the Symposium, titled “Reflections on Progressive Constitutionalism: Theory, Practice and Critique.”

understandings of what's politically "right" and what's politically "left"? Does it have hopes for institutional arrangements and politics in relation to them that Americans across the political spectrum might embrace?

No less significant were questions about how progressive constitutionalism, if not as program then as theme, was (and is) being received and processed in the legal academy, the institutional domain in which it has set down roots. What do liberal legal academics, whose commitments it sometimes shares but sometimes attacks, make of progressive constitutionalism? Have conservative law professors even noticed this new form? If asked about progressive constitutionalism, what might they (or some of them) say? At the same time, curiosity about progressive constitutionalism's position in the larger political culture also deserved thought. Has this work found its way into the hands of those at the front lines of politics—particularly constitutional politics, broadly defined—who might do something with and for it? Have progressive constitutionalism's interlocutors managed to operationalize their thinking in the "real world" in ways that, as yet, have broadly gone unnoticed, and if so, how? What might progressive constitutionalism gain from back-and-forth with the lived vitality of the political realm? If progressive constitutionalism has hopes of transforming politics, might its development as an intellectual project be stunted by too much hands-on engagement with the political world too soon? Returning to progressive constitutionalism inside the academy, if taking the thought in different directions, what lessons from other disciplines—or for them—might collective deliberation about progressive constitutionalism yield? Might progressive constitutionalism productively be put into conversation with fields inside law where thinking is not so centrally bound up with court-centered processing and disposition of disputes, like new governance or alternative dispute resolution? What about fields and disciplines in the humanities outside law schools? Are there lessons from political theory and philosophy, for instance, which should be explored? What about history: If progressive constitutionalism is to have a future, should it be understood, maybe genealogically, in relation to the past? If so, which one or ones? Progressivism's? Constitutionalism's? Congress's? What? What kind of historical conversations might prove most useful either in the shorter or the longer term: engagements with intellectual, political, economic, or social history? What about all of them?

If the questions that were behind this Symposium on progressive constitutionalism were varied and vast, so, not surprisingly, are the answers found in the commentary that those who have generously given of themselves to contribute to this endeavor ultimately returned. Is there *a* progressive constitutionalism? No, there are many. There may be impulses and attitudes shared by work being done as progressive constitutionalism, but they do not yet unify the project into a simple, single whole. As for progressive constitutionalism itself, commitments to it variously found among the contributions—which, starting with the Keynote, should not be overlooked and cannot be missed—must be weighed against the reservations and doubts about it

that are also expressed. They are powerful and run deep, including the thought that conjoining “progressivism” with “constitutionalism,” as “progressive constitutionalism” does, does more than spike a tension into the idea right at its roots. It could be that this combination renders it oxymoronic or worse, a conceptual impossibility, with who knows what following that as a practical result. It is impossible not to wonder if progressive constitutionalism can survive and overcome a challenge like that. Can it answer the other challenges—direct and indirect—found throughout this issue?

If anything becomes clear in relation to the wonderful, thoughtful, and engaging articles that follow, which themselves came in after a live event held at the Michael E. Moritz College of Law on April 15, 2011, it is that those who wish to work in and on progressive constitutionalism, for all the incredibly significant work that has already been done to date, still have plenty more to do. It is not too much to say that the challenges for progressive constitutionalism found in this collection are, fully parsed, not only deep and powerful but also, in their way, dizzyingly complex. Perhaps nothing captures the experience that reading this issue start to end may produce better than the elegant simplicity of a question that David Bosak, one of the terrifically bright and talented student editors of the *Ohio State Law Journal*, asked, breaking a brave silence during a question-and-answer session after a full day’s convocation on progressive constitutionalism. With perfectly modulated Midwestern pitch—humble and with all due respect—he asked: “Sorry, what *is* progressive constitutionalism?” Part of what was so utterly beautiful about the question, even in retrospect after all this time, was the desire it reflected to still the mind against the bracing force of the hard-hitting interrogation conducted throughout the day, a desire, too, for proponents of progressive constitutionalism to find a simple and direct way to express its essential commitments. Not to falsely reduce it to something that it is not, not to deliver it in the register of a slogan or sloganeering, but as a means of capturing its heart, its spirit, in order to give and amplify its voice, in order, as well, to create a context—the context—within which its theoretical architecture can be seen, revealed, fully elaborated in all the complexity it turns out, it actually entails. Heart or spirit in pure form, then the draping of theoretical regalia and its corresponding ornamentation. When David asked his question, the sense of relief and release in the crowd assembled in the auditorium could be both heard and felt. Everyone seemed to know, somehow, just how he was feeling. In its way, his question’s openness, its wish for a framework for understanding progressive constitutionalism, was a perfect close to an exciting day at a place like the Moritz College of Law dedicated to ideas of and about and in relation to law. As tremendous as the engagements of the topic were, and as productive, and they were both, there were more questions by day’s end than when it began. More questions. Ever more questions. And a persistent insistence on attention to basics. What else could one want?

Although the articles presented here collectively suggest that a considerable amount of work remains for progressive constitutionalism (again, if it can even be thought of in the singular like this at this point), the suggestion may be

understood as nothing so much as an incredible gift: a great feast of ideas in a series of thoroughly engaging and engaged essays that break their own, important ground in different sorts of ways, attending to what they attend. They themselves, in turn, deserve consideration and serious consideration if progressive constitutionalism, whatever it now is, is to have a present, much less a future.

Before that phase in the work begins, important thanks must be registered: to Jim Fondriest, Symposium Editor extraordinaire, first and foremost, for seeing the potential for an entire symposium on progressive constitutionalism and dedicating himself to making it happen, and in whose able hands the event came off with nary a hitch, and, of course, to Jessica Kim, his Editor-in-Chief, who deserves applause for giving Jim the room to make the event happen and for dedicating space in the *Journal* she shepherded to fit his vision. Additional and enthusiastic thanks also go to Jaci Wilkening, Jessica's successor as Editor-in-Chief, and Michael Corey, the *Journal's* current Executive Editor, for overseeing the work-filled transition from idea and live event to reality on the published page. Helping them in this process, special thanks also to Richard Muniz, the *Journal's* Chief Managing Editor, as well as to a number of Managing Editors who worked with the contributors at various stages of the process. To name some names: Chelsea Berger, Stefan Blum, Thomas Creegan, Stephanie Fitos, Andrew Fontanarosa, Joshua Hurtuk, Andrea Isabella, Jacob Rhode, Joseph Wenger, and Whitney Willits, who, as the contributors know, handled their tasks with great professionalism and sense. This is not to forget all the other thanks that must be given to the *Journal's* staff, the students who, behind the scenes, stoke the engines of the machine that holds forth from the basement of Drinko Hall. A debt is also owed to the Administration of the Moritz College of Law, particularly Dean Alan Michaels, Associate Dean Garry Jenkins, who also serves as one of the *Journal's* advisors, and Tim Meager. Without their support, the Symposium could not and would not have taken place. And finally, for all their time and efforts and care in working on the ideas in the contributions that fill and fill out these pages, making them be what they are, a special thanks to the contributors to this Symposium: Amy J. Cohen, Willy Forbath, Alex Gourevitch, Jamal Greene, Simon Lazarus, Bill Marshall, Sai Prakash, Elizabeth Sanders, Melissa Schwartzberg, Mark Tushnet, Robin West, and Rebecca Zietlow.

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