
PROGRESS AND PROCESS[†]

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INTRODUCTION

Since there is little in *Against Constitutional Originalism* with which I can quarrel, rather than sing the book's well-deserved praises, I will take one of Professor Gienapp's central claims as a point of departure. Professor Gienapp argues that originalists today fail to appreciate just how deeply the Founding generation's understandings of law and constitutionalism differed from our own understandings.¹ For instance, the Founders conceived of the common law not just as a body of doctrine but as a *science* of human nature and society. In fact, some Founders, such as James Wilson, predicted that "legal science" would reflect and facilitate social and moral progress in a way analogous to how the natural sciences had already produced (and been aided by) technological advance.²

With these observations as a starting point, this Essay makes two claims about current constitutional practice. The first claim is about its connection to the Founding. Current constitutional and political practices reflect a belief in human progress that is in many respects continuous with the views of the Founding generation. For that reason, taking the Founders' understandings of law seriously, as originalists purport to do, may be consistent with—indeed, may *require*—precisely the sort of "living constitutionalism" that typically forms the target of originalist attacks.³

However, the Founders ultimately grounded their belief in progress on a faith in Divine Providence.⁴ That does not seem to be true of modern believers in progress. But if that's right, then it raises the question of whether, and if so, how, one can make sense of the idea of progress in a nontheological framework.

This Essay's answer to that question constitutes its second claim. It argues that progress can indeed be understood in nontheological terms but that doing so entails a judgment that a process of *social learning* has taken place.⁵ This means when the Supreme Court is faced with the question of whether some change in social practice requires revising the application of constitutional principles, historical and sociological questions about how and why that practice has changed become relevant to the task at hand.

The implications of this analysis for "living constitutionalism" cut in two directions. On the one hand, in emphasizing continuity with the Founders' understandings, it suggests an originalist validation of a living—indeed a *progressive*—Constitution. On the other hand, insofar as the modern conception of progress depends on claims about how actual social changes transpired,

¹ JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM* 35 (2024).

² See 1 JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON, L. L. D.* 142-43 (Philadelphia, Lorenzo Press 1804).

³ But not all originalists. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 20 (2011) (arguing that living constitutionalism is compatible with originalism).

⁴ WILSON, *supra* note 2, at 142.

⁵ The learning involved is "social" in two senses: (1) large numbers of people learn, and (2) what is learned concerns one's obligations to, and relationships with, others in society.

revising constitutional understandings may entail a more complex and demanding inquiry than is sometimes thought.

These are broad claims on large topics on which much has been written. Yet this Essay only offers a sketch of an argument supporting those claims and barely draws on the vast historical and philosophical literature on progress. Given the short space available, it aims merely to suggest and provoke rather than assert and persuade.

It sets about doing so in three parts. Part I briefly describes the view of progress of one of the most important constitutional framers, James Wilson, and then shows how comparable notions of progress have continued up to the present day. Part II, which constitutes the bulk of the essay, attempts to state more precisely what the modern understanding of progress entails and what it does not. Finally, Part III indicates some of the upshots for constitutional and political practice.

I. LEGAL SCIENCE THEN AND NOW

Professor Gienapp emphasizes in his book that for the Founders, the common law was more than a set of doctrines, or even a particular method of deciding cases—it was a social philosophy or “science.”⁶ The most articulate spokesman for this understanding was James Wilson, who, in his *Lectures on Law*, explicitly characterized the common law as a “science.”⁷ Like natural science (or “natural philosophy,” as it was then called), the common law was a “science founded on experiment,” whose subject matter was the “common dictates of nature.”⁸ Those “common dictates” were reflected in social custom, which was the primary source of material for developing the common law.⁹ As Professor Gienapp explains, legal science was understood to rest on the same empiricist foundation as natural science.¹⁰ The common law was “the law of experience,” a science “founded on experiment.”¹¹

In other parts of his *Lectures on Law*, Wilson expressed his conviction that legal science would achieve progress of the sort that the natural sciences had already achieved. “It is the glorious destiny of man to be always progressive,” he proclaimed.¹² Such progress involved both intellectual advance and political improvement, with each influencing the other: “Where liberty prevails,” he observed, “the arts and sciences lift up their heads and flourish. Where the arts and sciences flourish, political and moral improvements will likewise be made.

⁶ GIENAPP, *supra* note 1, at 81 (emphasizing Founding-era view of common law as matter of reason or logic).

⁷ WILSON, *supra* note 2, at 82.

⁸ GIENAPP, *supra* note 1, at 85 (outlining Wilson’s conception of common law).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 84-85.

¹² WILSON, *supra* note 2, at 142.

All will receive from each, and each will receive from all, mutual support and assistance”¹³

Professor Gienapp emphasizes that the Founders’ understanding of the common law was central to their understanding of constitutionalism.¹⁴ To the extent that the common law was understood to change over time in light of experience, one could say the same about our constitutional tradition since the founding. Perhaps the most famous and oft-quoted sentence in the history of American legal thought is the observation by Oliver Wendell Holmes, Jr., that “[t]he life of the law has not been logic: it has been experience.”¹⁵ And throughout the twentieth century, the notion that law changes, or should change, in light of “experience” was commonplace.¹⁶ One even sees it in some of our most famous constitutional decisions, in which one hears justices talk of an “emerging awareness”¹⁷ of what liberty requires or how the Court has learned from “experience” what equality demands.¹⁸

More generally, a belief in progress is implicit in much political thinking and practice today. Not only do many liberals identify as “progressives,” but the reality of tangible progress in certain domains seems hard to deny.¹⁹ To cite the classic examples: the abolition of slavery, expanded opportunities for women, and changed attitudes about homosexuality all seem to be clear instances of social or moral progress.²⁰ Thus, when someone talks of being on the “right side

¹³ *Id.* at 142-43.

¹⁴ GIENAPP, *supra* note 1, at 81.

¹⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (HARVARD UNIV. PRESS, 2009) (1881).

¹⁶ *See, e.g.*, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (“[The Common Law’s] method is inductive, and it draws its generalizations from particulars. . . . Every new case is an experiment. . . .”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 187-88 (1992) (observing that diverse array of legal realists in 1930s believed “the law had come to be out of touch with reality,” and their battle cry was “Holmes’s statement that ‘the life of the law has not been logic, it has been experience’”).

¹⁷ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003) (“[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”).

¹⁸ *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 402 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (observing that, by time *Brown* was decided, “both experience and ‘modern authority’ showed the ‘detrimental effect[s]’ of state-sanctioned segregation” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954))).

¹⁹ Danielle Kurtzleben, *More and More Democrats Embrace the ‘Progressive’ Label. Here’s Why*, NPR (Sept. 13, 2021, 5:01 AM), <https://www.npr.org/2021/09/13/1035971261/more-and-more-democrats-embrace-the-progressive-label-heres-why> [<https://perma.cc/9CBM-2NYY>].

²⁰ *See, e.g.*, Hanno Sauer, Charlie Blunden, Cecilie Eriksen & Paul Rehren, *Moral Progress: Recent Developments*, 16 PHIL. COMPASS 1, 1 (2021),

of history” or observes that a political position “will not age well,” we know what they’re getting at. The suggestion is that history will be the judge—and properly so.

Yet there’s a problem. The Founders believed in moral progress because they believed it would follow a path ordained by God.²¹ Progress was Divine Providence.²² But God does not seem to play a role in the modern conception of progress. Can one still make sense of moral progress in the absence of a divine author and judge? The answer is not obvious, which is why some remain skeptical of the very idea of progress. Before succumbing to such skepticism, though, it is worth looking more carefully into what making judgments of progress does and does not entail.

II. THE MODERN CONCEPTION OF PROGRESS

What follows is an effort to identify some core features of the modern conception of progress and to trace out their implications. This effort may be quixotic. For one thing, there may well be multiple modern notions of progress, not all of them consistent. Moreover, my analysis will resort at crucial junctures to brute intuitions as to what I think other people think. That looks like little more than speculative sociology from the armchair. My only response to these concerns is to say that the proof of the pudding lies in the eating. Whether the distinctions and implications drawn are plausible can only be judged by considering the analysis itself.

That analysis takes as a starting point a definition of progress offered by Philip Kitcher, a philosopher of science and theorist of moral and social progress. “To make a judgment of progress,” Kitcher explains, “is to compare two temporal states of a system, and to assert that the replacement of the earlier with the later constitutes an advance.”²³ We might think of this formulation as an articulation of the *concept* of progress. What follows is an effort to fill out that concept with a particular *conception* of progress that puts flesh on this skeletal concept.²⁴ It does so by considering (A) what the relevant “states of the system” are for this conception; (B) in virtue of what does a change in those states constitute an “advance” or improvement; and (C) the nature of the “replacement” of one state by another—i.e., *how* that change comes about.²⁵ To foreshadow somewhat, my hope is to show that even a fairly modest or thin conception of moral progress depends on philosophically controversial assumptions.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9285954/pdf/PHC3-16-0.pdf>
[<https://perma.cc/GZW2-WVMS>].

²¹ WILSON, *supra* note 2, at 142.

²² *Id.*

²³ Philip Kitcher, *Social Progress*, 34 SOC. PHIL. & POL’Y 46, 47 (2017).

²⁴ For an analogous use of the distinction between concepts and conceptions, see RONALD DWORKIN, *LAW’S EMPIRE* 70-71 (1986).

²⁵ *Id.*

A. *What Are the Relevant “States of the System”?*

Let us first clarify the scope and subject matter of the analysis. We invoke the concept of progress in all sorts of activities, from cleaning out a closet to combating climate change. The conception of progress under scrutiny here is *moral* progress. But even the notion of moral progress requires clarification, so let’s start by drawing two distinctions.

1. Thoughts vs. Actions

The first distinction is roughly that between thought and action. When making some judgment of progress between time one (“T1”) and time two (“T2”), we might compare the understandings, beliefs, or attitudes of some group between those two times.²⁶ If those understandings are about our obligations to others, we might class them as *moral* understandings. A positive change in those beliefs invites the label “moral progress.” We could also compare the social conditions or physical behaviors of some group, such as infant mortality rates or poverty rates. It might be more natural to refer to declines of each as “social” progress. But both internal attitudes and external behaviors are often relevant to commonsense moral judgments, so a conception of moral progress should be able to include both.²⁷ Fewer babies dying and more people having enough food to eat seem like moral achievements.

This ecumenical approach seems even more warranted given that in practice, it will often be hard to separate the two. Can you abolish Jim Crow laws without *any* changes to understandings of racial equality as either a cause or consequences of that change? What about women’s greater participation in public life: Is that a change in understanding or behavior? Surely, it’s both. Of course, how important each factor is as a causal matter may vary depending on the particular context. But both are almost always present to some degree. I will thus use the term *social practices* to refer to some combination of beliefs and behaviors that constitute the “state of the system” under examination.

2. Global vs. Local Judgments

The other distinction goes to scale. In taking stock of a social practice, we might distinguish between global and local judgments of progress along a few different dimensions.²⁸ A *global* judgment of progress makes a sweeping judgment either across all places, all times, or all aspects of a practice. People sometimes talk of the rise of civilization itself as a form of moral progress, stretching over thousands of years. But I don’t think the modern conception

²⁶ I refer to “beliefs” and “attitudes” to allow for both cognitive and noncognitive understandings of moral judgments.

²⁷ See PHILIP KITCHER, *MORAL PROGRESS* 16 (Jan-Christoph Heilinger ed., 2021) (criticizing a view of progress on the ground that it only requires psychological change, not changes in behavior).

²⁸ I take these labels from Professor Kitcher, though I may not be following his usage precisely. See Kitcher, *supra* note 23, at 47-48.

requires such grand claims, in part because we understand now better than we once did the considerable costs that such “civilizing” imposed on human (and nonhuman) populations.

Instead, the modern conception of progress (I will baldly assert) requires only progress that is *local* in the following same three respects. It can be *temporally* local by making a comparison between two points of time separated by centuries, decades, or even a few years. It can be *geographically* local in referring only to the social practices of one country or region—one populated by those who constitute the “we” in any claim that “we have achieved progress.”²⁹

Finally, it can be local with respect to *subject matter*. We might limit a judgment of moral progress to the improved treatment of (or attitudes about) some particular social group, while acknowledging that there has been stagnation or even decline in other aspects of life. Expansions of political rights may be accompanied by losses in certain forms of communal solidarity.

In short, the modern conception of moral progress has relatively weak requirements when it comes to the targets of comparison. A claim of progress involves a moral judgment about social practices, but those practices may include either attitudes or behaviors, and the comparison need only be across a limited period of time, within a limited geographical region, or within a single dimension of social life.

B. *In Virtue of What Does a Change Count as an “Advance”?*

The hard question is how we determine whether some change in social practice qualifies as an “advance,” morally speaking. We could offer a superficial answer by pointing to some measurable sociological facts, such as the number of women or minorities in some profession or an opinion survey measuring the attitudes of some groups about other groups, and then declare that a positive change along one of these dimensions qualifies as an “advance.” But that answer does not really meet the difficulty because it just prompts the retort, “Yes, but why are those the right metrics to employ?” This is where things start to get tricky.

²⁹ At this point, it may be objected that today there is no American “we.” American society is, and has long been, in the throes of a culture war with no end in sight in which the opposing sides are divided precisely over issues of race, gender roles, and sexual identity. I do not deny that. Even so, I think there has been a dramatic change in attitudes about race, sex, and sexual orientation over the last five to ten decades years across the board, even among those who would themselves deny that their moral views are the product of the sort of progress described in this Essay. I admittedly offer no empirical support for this claim.

1. The Teleological Model

The traditional way of answering this harder question is to assume a *teleological* model of progress.³⁰ Under this view, to judge a change progressive is to determine that it involves a move closer to, or a more accurate understanding of, moral truth, whether that truth is framed in terms of the satisfaction of human needs, compliance with the dictates of Reason, or obedience to God's Will.³¹ The analogy drawn here is to (simplistic versions of) scientific progress. Just as scientific progress is constituted by the discovery of new truths about matter in the universe, so, too, is moral progress constituted by the discovery of new truths about human social life and our obligations to each other. Wilson assumed a teleological understanding of progress in both the scientific and the moral domains.³² He believed that human beings were capable of discovering, through their senses (including their "moral sense"), God's plan for humanity.

But the teleological model of progress faces deep difficulties. For one thing, at least since Thomas Kuhn's writing, it has no longer even seemed like an adequate description of *scientific* progress, let alone moral progress.³³ Moreover, without the ability to refer to a set of timeless truths laid down by God, the worry is that any assertion of a relevant standard for moral truth amounts to begging the question of moral progress. "Of course, *you* think that's the appropriate moral criterion," the skeptic alleges, "because that's *your* (present-day) view—but whether your view counts as an improvement over the beliefs of those who lived a century ago is precisely the issue in dispute!"³⁴ So, for instance, Richard Posner observes that although "we like to describe the disappearance of the bad

³⁰ I take this term from Professor Kitcher. See Kitcher, *supra* note 23, at 48. Examples of works that articulate something like the teleological model of progress include THOMAS NAGEL, *MORAL FEELINGS, MORAL REALITY, AND MORAL PROGRESS* (2023); and Joshua Cohen, *The Arc of the Moral Universe*, 26 PHIL. & PUB. AFFS. 91 (1997); CRISPIN WRIGHT, *TRUTH AND OBJECTIVITY* (1992).

³¹ Kitcher, *supra* note 23, at 48.

³² WILSON, *supra* note 2, at 143-44.

³³ See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); Philip Kitcher, *Pragmatism and Progress*, 51 TRANSACTIONS CHARLES S. PEIRCE SOC'Y 475 (2015); LARRY LAUDAN, *PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH* (1977).

³⁴ See Adam James Tebble, *Liberty Against Progress*, 34 SOC. PHIL. & POL'Y 237, 255 (2017). If the comparison relies on some general moral criterion offered at or before T1 (e.g., "that which increases utility counts as progress"), then the claim at T2 that progress has been made does not literally beg the question as to the moral criterion, but the same objection could be reframed as a presentist bias in *applying* the criterion: "Of course, *you* think that utility has been increased by that change, because those practices are the ones you think have greater utility."

old codes as tokens of moral progress,” in fact, “there is no moral progress in any sense flattering to the residents of wealthy modern nations.”³⁵

2. The Pragmatic Model

There is an alternative model of progress. Professor Kitcher defends what he calls a “pragmatic” model of progress due to its roots in the tradition of John Dewey, William James, and (less so) Charles S. Peirce.³⁶ Rather than thinking of progress as making progress *toward* some antecedent goal (as the teleological conception does), pragmatic progress is defined by its moves *from* felt limitations or “confinements.”³⁷ It involves solving present problems, rather than seeking a moral truth. This idea is familiar in the context of technological progress. To use Professor Kitcher’s example, even though there is no Platonic “smartphone,” we can still recognize progress in the development of such phones because later versions solve problems earlier ones could not.³⁸ So, too, with ethics: we can judge changes in social practices as instances of progress because they solved problems—such as the exclusion or oppression of particular groups—caused by earlier practices. In short, moral progress is achieved not by discovering moral facts but by solving social problems.

In many ways, Kitcher’s pragmatic model of progress seems to fit the modern conception better than does the teleological model. That is in part true because of the objections to the latter just mentioned, and in part because of the pragmatic model’s affinity with modern understandings of common law development—a point discussed below. But sophisticated versions of the teleological model still have their defenders.³⁹ It also seems possible that, at bottom, the two models cannot be entirely separated from one another.⁴⁰ So, for now, let us assume that the modern conception of progress allows for *either* the teleological or pragmatic model. The points made in the next section apply to both.

C. How Did the “Replacement of the Earlier with the Later” Come About?

Professor Kitcher’s definition refers to the “replacement” of an earlier state of the system with a later state.⁴¹ But a lot hangs on *how* the replacement came

³⁵ Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1653-54 (1998).

³⁶ Kitcher, *supra* note 23, at 49, 57; KITCHER, *supra* note 27, at 25, 158. Professor Kitcher does not use the word “model,” but I do so in order to distinguish it from the modern “conception” of progress that I’m concerned to elaborate.

³⁷ KITCHER, *supra* note 27, at 25.

³⁸ Kitcher, *supra* note 23, at 48.

³⁹ See, e.g., NAGEL, *supra* note 30, at 23 (discussing development of moral knowledge throughout history); Cohen, *supra* note 30, at 93 (stating “the injustice of a social arrangement limits its viability”).

⁴⁰ Or that the best model incorporates elements of both.

⁴¹ Kitcher, *supra* note 23, at 47.

about. I argue below that to count some change as “progress,” under either the teleological or pragmatic model, depends on a judgment that the relevant change in social practice came about, at least in part, as the product of (i) free human actions, taken on the basis of (ii) genuine learning of morally relevant facts (e.g., about human nature or social life).

1. Agency and Action

It is sometimes alleged that those who talk of progress assume that progress is inevitable.⁴² That may have been true on some theological understandings (such as Wilson’s), but it does not seem to fit the modern conception. True, people often quote Martin Luther King Jr. (or President Obama quoting Martin Luther King Jr.), saying “the arc of the moral universe is long, but it bends toward justice.”⁴³ But my sense is that people use this phrase more as a motivational moral appeal than as a claim of metaphysical truth about the nature of the universe or of human history.⁴⁴

Reflection on linguistic usage supports this otherwise bald empirical conjecture. Would we describe a change in states of affairs that was *guaranteed* to happen by the laws of nature (or the Will of God) as “progress”? Consider an example: if human beings, through private and public initiatives, were to reduce global average temperature increases by reducing carbon dioxide emissions, we would rightly say that we have made “progress” with respect to climate change. But if it turned out that the same temperature change was destined to occur according to the various physical laws that drive long-term climate patterns, would we still describe the change as “progress”? I suspect not. We would just be grateful for our luck, like when it rains after a drought. This suggests that implicit in the modern conception of progress is that the change it describes could have turned out differently—and likely *would* have turned out differently but for human intervention.

⁴² See, e.g., Adrian Vermeule, *Liturgy of Liberalism*, 2017 FIRST THINGS 57, 60 (Jan. 2017) (reviewing RYSZARD LEGUTKO, *THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES* (2016)) (suggesting that according to “the fundamental eschatology of liberalism . . . the movement of History may only go in one direction”); cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40-41 (Amy Gutmann ed., 2018) (criticizing living constitutionalism on grounds that a bill of rights is premised on skepticism that “‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot”).

⁴³ See Cohen, *supra* note 30, at 93 (citing MARTIN LUTHER KING, *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 141, 207, 230, 277, 438 (James M. Washington ed., 1986)).

⁴⁴ Cf. *id.* at 133-34.

Many of us do not share Lowell’s faith—or King’s—in a God who keeps watch above His own. But even if we do not, we can find some support for the hopefulness of Lowell, King, and William Williams in the human aspirations and powers that shape the arc of our part of the moral universe. *Id.*

But it's not just that human *behavior* is involved; there must also be deliberate *action*. Consider the COVID-19 pandemic. To the extent that the invention and distribution of vaccines led to increased rates of immunity to the disease in some region, it would make sense to say that those in the region had "made progress" in reducing its spread and (therefore) its harms. But insofar as that immunity developed simply as a result of a natural process whereby people got the disease and survived, then describing it as "progress" seems inapt. It is just nature running its course.⁴⁵ Both causal explanations involve the behavior of human beings, but only the first necessarily involves deliberate human action.

My suggestion, then, is that it only makes sense to describe some change as progress if human agency played some important role in bringing it about. This suggestion should hardly be surprising given the embrace and development of the idea of progress by the political Progressives of the early twentieth century. For them, the whole point of talking in terms of "progress" was to stress the capacity of human beings to improve social conditions by exerting control over nature.⁴⁶ They were opposed by those who thought such efforts futile in light of God's Plan, evolutionary forces, or both.⁴⁷

Drawing the connection to the Progressive political movement, however, risks making this requirement seem more demanding than it is. To say that progress requires the exercise of human agency does not mean that the actions taken were necessarily directed toward the goal whose achievement justifies our judgment that progress was made. People can make progress unwittingly. For instance, the expansion of trade and commerce may have played an important role in shaping people's attitudes about what they owe to other human beings, even though traders did not buy and sell goods for the purpose of changing those attitudes. They did so to make money. In a quite different context, "consciousness-raising" sessions may well have played a significant causal role in the political victories achieved by the (predominately White) women's movement of the 1960s and 1970s,⁴⁸ even if some women participating in such sessions had only vague—or even no—public policy goals in mind.

⁴⁵ Of course, which account better describes what actually happened remains a source of scientific (and political) debate, which goes to the points made at the end of Part III about the difficulty of making judgments of progress—even in an area with huge amounts of empirical evidence.

⁴⁶ See, e.g., John Dewey, *Progress*, 26 INT'L J. ETHICS 311, 314 (1916) ("While the modern man was deceived about the amount of progress he had made, and especially deceived about the automatic certainty of progress, he was right in thinking that for the first time in history mankind is in command of the possibility of progress."); see also LEONARD T. HOBHOUSE, *SOCIAL EVOLUTION AND POLITICAL THEORY* 163 (1911) ("The distinguishing characteristics of our time are that civilization for the first time has the upper hand, that the physical conditions of life have come and are rapidly coming more and more within human control. . . .").

⁴⁷ Dewey, *supra* note 46, at 315.

⁴⁸ CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 84 (1989).

In short, to judge some social change to be “progress” assumes both that humans possess free will and that the exercise of their agency played some causal-explanatory role in producing the relevant social change. And that is true even if many of those whose actions produced the change did not act with the explicit goal of effecting change at all.

2. Learning from Experience

It is not enough, however, that some change is brought about through the exercise of human agency. For if it were *purely* a product of human will or choice, then there would be no basis for concluding that the change was a *progressive* one. To judge a change in social practice to be progress necessarily entails the judgment that the change came about as a result not only of human beings taking actions (the point just made), but also of human beings taking actions *in light of what they have learned through experience* about other human beings or themselves.⁴⁹

Now this requirement is obvious on the *teleological* model of progress. On that view, moral progress involves the discovery of new truths about human nature or social life. Therefore, acts of discovery or learning form a crucial part of the explanation of the change in social practices. Slavery was abolished at least in part because enough people came to *recognize* the depravity and injustice of the practice of treating other human beings as property.⁵⁰

But even the pragmatic model of progress requires a notion of learning. Because, on this view, progress involves solving social problems, in order to know that a problem exists, one must be attentive to other members of the community whose voices may be excluded. So, for instance, as Professor Kitcher puts it (quoting William James), progress requires listening to the “cries of the wounded.”⁵¹ Each of the three paradigmatic examples of moral progress with which we began can be understood in these terms: through a variety of social, political, economic, and legal means, the cries of those wounded by racist, patriarchal, and heteronormative regimes were made, amplified, heard,

⁴⁹ Gains in self-knowledge occur, for instance, when one escapes false consciousness. On false consciousness and ideology, see Tommie Shelby, *Ideology, Racism, and Critical Social Theory*, 34 PHIL. F. 153, 170-72 (2003).

⁵⁰ See Cohen, *supra* note 30, at 122-24 (making just this argument). Cohen also offers an alternative, “conflicting interests view” of the demise of slavery, which he says does *not* require that people came to recognize the injustice of slavery as part of the explanation. See *id.* at 125. But while this explanation does not require that *non*-enslaved people recognized the injustice of slavery, the conflicting interests account does require that those who were enslaved recognized their *own* interests. Because Cohen’s conflicting interests explanation depends on the absence of false consciousness in this way, it, too, involves a degree of learning.

⁵¹ KITCHER, *supra* note 27, at 30 (quoting WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, in *THE WILL TO BELIEVE* 158 (Floating Press 2010) (1896)).

and—eventually, far later than they should have been—acted upon. In that way, the change came about as a result of a form of *social learning*.⁵²

In fact, the process by which social practices were transformed is even more important under the pragmatic model of progress. The reason is that there is no independent moral criterion by which to judge some change as progressive. Rather, it is *in virtue of* how the change came about that we judge it to be progress. As Professor Kitcher explains, “Our judgments—of the wrongness of slavery, for example—are counted as true because we take them to have emerged from *processes of proper moral inquiry*: or, more exactly, from bloody struggles that hew close enough to the contours of proper moral inquiry.”⁵³ So, for instance, our judgment that slavery is unjust, on the pragmatic view, is true because people’s attitudes about the practice changed through a process of learning—one that involved exposure to, and free reflection upon, human experience—rather than, say, a process of physical coercion or psychological manipulation.

As Professor Kitcher’s reference to “bloody struggles” indicates, however, to say that these instances of progressive change involved learning does not mean that contingency, accident, and luck played *no* role in producing them. Of course they did. If General Lee had won at the Battle of Gettysburg in 1863, then the South may have won the war and perpetuated slavery for decades longer.⁵⁴ If the United States had not entered World War I, then perhaps the Nineteenth Amendment would not have been passed.⁵⁵ Many instances of progress would not have occurred as they did (or perhaps at all), had certain seemingly arbitrary events not occurred.

Still, to judge a change in social practices to be moral progress is to say that at least *part* of the explanation for that change involved people (1) learning morally relevant facts about the world (and those in it) and (2) acting on their new beliefs.⁵⁶ The difference between the teleological and pragmatic models of

⁵² I take Rahel Jaeggi to be making essentially the same point at the end of her comment on Kitcher’s lectures. See Rahel Jaeggi, *Progress as the Dynamics of Crisis*, in *MORAL PROGRESS*, *supra* note 27, at 136.

⁵³ Emphasis added. Philip Kitcher, *Response to the Commentaries*, in *MORAL PROGRESS*, *supra* note 27, at 145 [hereinafter Kitcher, *Response*]; Jaeggi, *supra* note 52, at 135 (“If I understand Philip’s program correctly, there is no way to come up with standards for moral progress by referring to the *content* of the change in question. It is the *method* that does the job.”).

⁵⁴ *What the Confederates Might Have Done if They Won at Gettysburg*, WE ARE THE MIGHTY, <https://www.wearethemighty.com/mighty-history/what-the-confederates-might-have-done-if-they-won-at-gettysburg/> [<https://perma.cc/ZU6Z-ZDXU>] (last updated June 27, 2023, 6:29 AM PDT).

⁵⁵ Abigail Higgins, *American Women Fought for Suffrage for 70 Years. It Took WWI to Finally Achieve It*, HISTORY, <https://www.history.com/news/wwi-women-suffrage-connection> [<https://perma.cc/5L9U-ADB5>] (last updated Jan. 12, 2023).

⁵⁶ See Kitcher, *Response*, *supra* note 53, at 162.

Although it may be achieved through amplification of empathy, reliable moral progress

progress lies in how these two components relate to each other. Under the teleological model, what is “morally relevant” is ultimately determined by features of the world, whether understood in terms of human needs (or interests), the Will of God, or the requirements of Reason.⁵⁷ On this view, then, progress simply involves more and more people taking actions on the basis of what they have learned about those features of the world.

Under the pragmatic model, however, which facts count as “morally relevant” is itself in part determined by previous actions taken.⁵⁸ Previous actions create the “problems” that require solving. So progress, on this model, involves not only taking actions in light of learning morally relevant facts, but also learning about what counts as morally relevant (and what does not) from previous actions taken. For example, progress not only involves expanding employment opportunities for women in light of better recognition of their capacities; it also involves the ongoing awareness of how workplace conditions could be improved for all (in the form of parental leave, for example), even though that recognition may have only arisen because of the presence of women in the workplace.⁵⁹

In short, a conviction that some change in social practice qualifies as progress imposes a limit on the degree to which one can chalk that change up to fate, chance, or brute battles of wills. It must involve actions taken on the basis of moral learning.

III. PROGRESS AND PROCESS

So what? Why does this matter? Two reasons: one about politics, the other about law. First to the political point. Since around 2016, a recurring theme of political discourse on the left has been the insistence that progress is achieved primarily as a result of struggle and conflict, rather than discourse and dialogue.⁶⁰ Calls for “civil discourse” are sometimes derided as at best naive and

is bound to have a cognitive dimension. The changes that relieve human confinement, where not lucky accidents of history, occur because individual agents recognize suffering or confinement they have failed to see before, and then act on the basis of their new understanding. *Id.*

⁵⁷ See Olaf Stapledon, *Ethics and Teleological Activity*, 38 INT’L J. ETHICS 241, 244 (1928) (describing teleology as system with purpose).

⁵⁸ Juan Pablo Serra, *What Is and What Should Pragmatic Ethics Be?*, II EUROPEAN J. PRAGMATISM & AM. PHIL. 1, 7 (2010) (“Our life experiences determine our concepts and, as a result, we eventually arrive at our beliefs concerning reality, since the ‘course of life’ or totality of our experience is more or less homogenous.”).

⁵⁹ See Meredith Wolf Schizer, *‘Workplaces Good for Women Are Good for Everyone’ Say Harvard Gender Experts Ammerman and Groysberg*, NEWSWEEK (Apr. 7, 2021, 6:00 AM), <https://www.newsweek.com/2021/04/16/workplaces-good-women-are-good-everyone-say-harvard-gender-experts-ammerman-groysberg-1581456.html> [https://perma.cc/7FVA-WRB2].

⁶⁰ Cf. Amia Srinivasan, *The Limits of Conversation*, in MORAL PROGRESS, *supra* note 27, at 110 (criticizing Kitcher’s account on the ground that it “risks obscuring . . . a long history of resistance among the powerful toward such conversations—and with it, the various

at worst reactionary.⁶¹ Nothing I've said above necessarily proves that such derision is unwarranted. After all, violence and conflict have surely played a large role in achieving many of the social changes considered progress today, from abolishing Jim Crow to securing gay rights.⁶²

But the analysis in Part II indicates the outer limits of such tough talk. For although it is a contingent question, based on the particular facts, whether violence and conflict are necessary to achieve progress in any given political context, social learning is virtually *always* required. It is *necessarily* required on the pragmatic model of progress because under that view progress is ratified (or made true) by that process. And it is all but necessary on the teleological model because it is what best justifies our belief that progress has been made.⁶³ In either case, making a judgment of progress requires the ability to distinguish between genuine learning and ideological indoctrination. How else could one tell the difference between the cries of the wounded and those crying wolf?⁶⁴

When I've raised this point in the past, I have sometimes been told that this is a very White Male way of looking at things. After all, Black Americans living under Jim Crow knew perfectly well that they were the moral equal to Whites; women have long known that their true capacities were denied by patriarchal laws and customs; and gay people knew they were not immoral or mentally ill. So *these* groups have not had to "learn" anything. It is only the prejudice and bigotry of White, heterosexual men and other dominant groups that has had to be overcome for progress to result.

strategies that the relatively powerless have developed to force change in the absence of such conversations").

⁶¹ Nicole Hemmer, *In MLK's Day, Conservatives Didn't Think He Was So "Civil,"* VOX (June 26, 2018, 7:00 AM), <https://www.vox.com/the-big-idea/2018/6/26/17503088/sanders-civility-red-hen-restaurant-trump-mlk-martin-luther-king-protests> [<https://perma.cc/6GMG-7AQT>].

⁶² See *Documenting Reconstruction Violence*, EQUAL JUST. INITIATIVE, <https://eji.org/report/reconstruction-in-america/documenting-reconstruction-violence/> [<https://perma.cc/7AFK-H7JT>] (last visited Aug. 29, 2024) (highlighting mass lynchings during Reconstruction era and providing state-by-state descriptions of racial violence in order to demonstrate pervasive and varied nature of racial violence); Sascha Cohen, *How Gay Activists Challenged the Politics of Civility*, SMITHSONIAN MAG. (July 10, 2018), <https://www.smithsonianmag.com/history/how-gay-activists-challenged-politics-civility-180969579/> [<https://perma.cc/4DES-UCYU>] (describing gay rights activists' response to violence as "confrontational direct action" when "threats of homophobic violence, media vilification, or repressive laws reached a tipping point").

⁶³ The analogy to science helps make this point: that various experiments yield results that confirm a scientific theory does not mean that those experiments metaphysically determined those results; however, we would have no good reason to believe the theory if it were not confirmed by experiments that we thought were properly conducted (i.e., if it had not been validated by some process we might call "the scientific method").

⁶⁴ Srinivasan well recognizes this point, highlighting the importance of the "most faithful articulation of moral truth." Srinivasan, *supra* note 60, at 106-07.

Now it is true that I am a White, heterosexual man, so the charge of perspectival bias may be fair. But it is false to say that the social and moral progress that has taken place in our society has not involved learning among those in the groups just mentioned. It most certainly has. Many women opposed the Nineteenth Amendment. Many gay men and women in the past have worried they were morally deviant or mentally ill. And in just the last few years, we have heard women talk openly about how they've come to view their own past sexual experiences differently in the wake of #MeToo.⁶⁵ False consciousness is real, hard to detect, and comes in degrees.⁶⁶

Of course, one could escape the constraint that the demand for learning imposes by avoiding talk of "progress" entirely when characterizing past political achievements or future political goals. But given the centrality of the idea of progress to the liberal left political tradition in the United States (and elsewhere), the impulse to abandon it should at least prompt reflection as to why it has been so central to that tradition and what it would mean to proceed without it.

None of this is to say that progressives must accept, on pain of contradiction, that progress has actually been achieved in any particular domain. True, as I said at the outset, it seems to me difficult to deny that there has been progress in the areas of race, gender, and sexual orientation. But one might marshal facts and arguments to deny that claim, showing how apparent gains have turned out to be illusory.⁶⁷ In that way, whether some change counts as progress is always an open question. Because our own sense of which facts are morally relevant to evaluating social practices today may itself be revised in light of future changes to those practices, our firm conviction that some earlier process of social change involved genuine learning—as opposed to ideological indoctrination—is always vulnerable to being (justifiably) shaken.

This leads to the point about law. Part I concluded by asking whether, and if so, how, the Founders' faith in the capacity of "legal science" to produce social and moral progress could endure even in the absence of a theological metaphysics. Part II suggests an answer: perhaps the Founders operated on a teleological model of progress, whereas modern conceptions of the common law—and the idea of a "living constitution"—assume a pragmatic model of progress.

⁶⁵ See, e.g., Rebecca Traister, *Your Reckoning. And Mine. As Stories About Abuse, Assault, and Complicity Come Flooding Out, How Do We Think About the Culprits in Our Lives? Including, Sometimes, Ourselves.*, CUT (Nov. 13, 2017), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html> [<https://perma.cc/9TFX-4Z86>].

⁶⁶ This is the same point I made in two footnotes above. See *supra* notes 49-50.

⁶⁷ See, e.g., Susan Neiman, *Progress, Regress, and Power*, in *MORAL PROGRESS*, *supra* note 27, at 113 (recounting her daughters' doubts that changes in social expectations of women have constituted progress: "#MeToo very much notwithstanding, they are expected to be competent professionals and look like porn stars at the same time"). For a full argument along these lines, see MARY HARRINGTON, *FEMINISM AGAINST PROGRESS* (2023).

For there does seem to be an affinity between the two. Ever since (and probably before) Oliver Wendell Holmes, Jr. wrote that “[i]t is the merit of the common law that it decides the case first and determines the principle afterwards,”⁶⁸ it has been a familiar idea that the common law “works itself pure” over time by resolving discrete legal conflicts (or “problems”) as they arise, in a “bottom up” fashion.⁶⁹ This similarity to the pragmatic model of progress should not be surprising given the influence of philosophical pragmatism on common-law theory (and vice versa) in the early decades of the twentieth century.⁷⁰ Those influences continued into the postwar period when some of the best-known exponents of the “Legal Process” school (whose very name indicates the centrality of *process*) interpreted the vast array of legal institutions in the modern administrative state in light of Deweyan notions of democracy and social change.⁷¹

A full defense of the claim that modern law incorporates something like a pragmatic model of progress requires more than merely pointing to these cursory connections.⁷² But let me close by suggesting that such a claim, if established, would carry two implications for “living constitutionalism,” which in some ways cut in opposite directions.

First, it would reconcile Professor Gienapp’s claim that there is an important difference between the Founders’ understandings of law and constitutionalism and modern notions with my earlier suggestion that there is nonetheless considerable continuity between the two. Under this view, what changed was not the understanding of the common law as a progressive “science” of “man and society.” That has continued up to the present day (even if many today recoil at the use of the label “science”). What has changed is the understanding of the nature of social and moral progress. The Founders assumed a (divinely authorized) teleological model of progress, but that was eventually abandoned in favor of a more open-ended, pragmatic model.

Here, the analogy to the natural sciences is apt: since the eighteenth century or so, there has been a more-or-less continuous and commonly held belief that

⁶⁸ Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870).

⁶⁹ LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940); C-Span, *Former Justice Souter on the Constitution*, at 19:00-21:00 (Sept. 17, 2009), <http://www.c-span.org/video/?288993-2/former-justice-souter-constitution> (describing his approach to adjudication as “pragmatic” and based on “bottom up” approach).

⁷⁰ Richard A. Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147, 147-48 (2004).

⁷¹ See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). On the connections between the Hart and Sacks teaching materials and philosophical pragmatism, see Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 5-7 (2013); and Gary Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REFORM 561, 589 (1988).

⁷² I am currently working on a book that develops this suggestion (or something like it) in a more sustained way.

the natural sciences have advanced our understanding of the physical world; what has changed is our understanding of the nature of scientific progress.⁷³ The same is true of understandings of law (whether common or constitutional). The idea that the law should change over time to reflect and even facilitate social and moral progress has endured, but our understandings of *how* it does so have changed.

But if the first implication of the analysis above promises an originalist validation of the modern common-law tradition out of which ideas of “living constitutionalism” emerged, the second implication suggests that validating any particular constitutional change may entail a more demanding inquiry than is sometimes assumed. It would not be enough to simply observe that society has changed and that the constitution should “adapt” or “evolve” to keep up with changing times. For on the pragmatic model of progress, it is always an open question whether some given change in social (or political or economic) practice amounts to progress or not. So when the Court is faced with deciding whether its interpretation of the Constitution should be revised to take account of a given change in social practice, its task would be to discern whether that change in practice was a product of genuine social learning. That means that, as Professor Balkin encourages in his new book, a lot more history than just evidence of original understanding would be relevant to resolving the constitutional issue.⁷⁴ It would include any social, political, or economic history that helps explain constitutional change. Such history goes to the heart of the issue requiring resolution. For on this view, the question of whether or not a change in social practice warrants a revision in constitutional interpretation requires figuring out *how* that practice came to be—including the Court’s own role in the process.⁷⁵

And that is no simple task; to the contrary, it is one fraught with conceptual, empirical, and normative difficulties. Determining whether some change in a social practice was the result of freely taken actions based on genuine learning often requires not only ascribing beliefs and intentions to historical actors, but also making sociological assumptions about how power in society was distributed, psychological assumptions about how people form beliefs in general, and substantive normative evaluations of the practice itself.⁷⁶

The difficulty of that inquiry may explain an otherwise strange fact. Despite the philosophical and historical connections among the common-law tradition, philosophical pragmatism, and the idea of social and moral progress (which I’ve

⁷³ See KUHN, *supra* note 33, at 35-42; Kitcher, *supra* note 33, at 475; LAUDAN, *supra* note 33, at 12.

⁷⁴ JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* (2024).

⁷⁵ The Supreme Court has done this occasionally. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁷⁶ The analogy to scientific experiments is again helpful here. The outcome of an experiment testing a theory may be relevant to one’s judgment as to whether the experiment was set up properly.

only touched on here), two of the leading modern theorists of the American common-law tradition, Richard Posner and Ronald Dworkin, despite disagreeing bitterly about how judges should decide cases, nevertheless agree in denying that the concept of progress plays any useful role in practical (and hence, judicial) reasoning.⁷⁷ In so doing, they both mark a decisive break in that tradition. But the reason is not hard to spot: discarding the notion of progress makes the judge's task a lot simpler when deciding constitutional questions because it avoids entirely the need to answer these difficult questions about the process of social change.

It may be telling, though, that both Posner and Dworkin advocate for a fairly expansive role for judges (even if they have very different understandings of how judges should perform that role). This fact suggests a different lesson to be drawn from the complexity involved in making judgments of progress. Perhaps the lesson is not that we should find ways of making it easier for judges to decide questions of constitutional change; rather, the lesson is that we should reconsider *who* should be making those decisions in the first place. The original Progressives certainly had something to say about that.

⁷⁷ See Posner, *supra* note 35, at 1679; RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 87 (2011) (arguing that the assertion that the abolition of slavery amounted to moral progress “rests entirely on our conviction that slavery is wrong, and we assume rather than support the conviction when we describe past influences as distorting” or when we offer some explanation as to why those distortions were overcome).