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*Book reviews*

GREAT BRITAIN AND IRELAND

Paul D. Moreno, *The American state from the Civil War to the New Deal: the twilight of constitutionalism and the triumph of progressivism* (Cambridge: Cambridge University Press, 2013. Pp. xvi + 349. ISBN 9781107655010 Pbk. £19.99)

Paul Moreno, the Grewcock Chair in Constitutional History at Hillsdale College, sets out to explain how the natural rights constitutionalism of the Founders was replaced by an ‘entitlement-based welfare state of modern liberalism’ by the late 1930s. The book is an ‘analytic narrative’, drawing on both constitutional theory and current ‘public choice’ law and economics, and contributes to recent scholarship by libertarian-minded legal scholars, such as David Bernstein and David Mayer, among others.

The book is divided into four parts, following conventional periodization: old regime, 1870–1900; early progressivism, 1900–13; late progressivism, 1913–33; and New Deal, 1933–40. The first section argues that sectional animosity divided northern labourers and southern agrarians, which limited class demands for redistribution policies, then called ‘class legislation’, but favoured industrial elites by maintaining protective tariffs and the gold standard. Additionally, the Republican Party and the Supreme Court maintained a fidelity to constitutionally limited government that manifested itself in ‘liberty of contract’ and free interstate commerce.

The middle sections explain that both liberals, who supported utilitarianism and developed sociological jurisprudence, and conservatives, like Christopher Langdell who pioneered the case method at Harvard Law, began ‘the work of tearing down the Founders’ view of the law’ (p. 51). Moreno reiterates the work of revisionist legal scholars who have shown that legal formalism of the late nineteenth century resulted from neither laissez-faire economics nor Social Darwinism per se, but rather arose from free labour ideology and a tradition of formal equal rights. The sociological jurisprudence and legal realism that replaced Gilded Age constitutionalism, Moreno shows, led to the expansion of police powers in protective legislation, such as women’s minimum wage and pure food and drug laws. There were also egregious misuses of this new power, such as *Buck v. Bell*, which upheld the forced sterilization of citizens deemed mentally unfit. While this is of course not a new finding, most modern liberals view this case and other atrocities, such as Jim Crow laws, as an embarrassing anomaly; Moreno argues that these and other incidents were predictable outcomes fostered by intellectual elites, entrenched interest groups, and even labour unions.

Moreno is at his best in describing how the progressive notion of the ‘living constitution’ slowly altered US jurisprudence through intellectual movements, judicial appointments, administrative reforms, and the expansion of executive powers. These eventually culminated in the New Deal constitutional revolution of 1937. Watershed moments preceding the New Deal, such as the First World War, which Moreno calls ‘the first New Deal’ (p. 164), radically reshaped the powers of the state—raising the federal income tax, weakening antitrust, strengthening unions, and abridging free speech rights. Despite several postwar rulings striking down protective legislation, such as a women’s minimum wage in Washington DC or the Federal Child Labour Act, the tide of natural rights constitutionalism continued to recede. Even President Herbert Hoover, who has been castigated as too conservative, enacted ‘proto-New Deal policies’ (p. 219). Ultimately, the exigencies of the Great Depression created greater demand for economic intervention and the Court succumbed to these pressures. The constitutional revolution of 1937 solidified this sea change, which Moreno ably explains resulted not from President Franklin Roosevelt’s court-packing plan but rather the external pressures of the Great Depression and the continued ascent of legal realism within the bench and bar. In the end, the Court elevated civil liberties above economic rights in its famous *Carolene Products* case, but, as Moreno argues, this had been a long time coming.

This book provides a sweeping history of US state development, charting the rise of progressive-liberal thought, policy, and law. The admirable breadth of the book, however, limits its depth of analysis. This must be the case for any synthesis history, even those with

such extensive footnotes. Yet, with each advance in progressive law and policy, the author poses natural rights objections that require greater exposition. It would have been helpful to explain more fully 'Madisonian standards of constitutionalism' and natural rights theory upfront. Then, the author might have explored how that vision would have offered different policy responses to social questions ranging from industrial working conditions, unionization, anti-monopoly sentiment, and economic crises. The author frequently cites public choice objections to progressive laws or legal reasoning, either demonstrating interest group rent-seeking or unintended consequences. However, those consequentialist objections could be true without necessarily supporting natural rights constitutionalism. Those same arguments could be used to support better public interest legislation, as scholars in public policy history and American political development have shown. While surely it is true that progressives replaced natural rights constitutionalism, it appears that very few scholars and politicians fought for their preservation.

Much of this book draws from revisionist narratives of American legal and political history; however, the book's lament of the 'progressive abandonment of the government-*protected* natural rights of the Declaration of Independence for a set of government-*provided* rights of economic security' (p. 225) makes it distinct. This is a call to action. The book begins by characterizing the recent passage of the Affordable Care Act of 2009 as provoking 'an unprecedented debate over the nature and purpose of American government' (p. 1). It concludes that 'constitutionalists could still challenge . . . liberal statism' (p. 328). Many historians will take issue with this wide-ranging legal and political history, especially its call for activism to roll back the jurisprudence of modern liberalism.

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Donald K. Stabile and Andrew F. Kozak, *Markets, planning and the moral economy: business cycles in the Progressive Era and the New Deal* (Edward Elgar: Cheltenham, 2012. Pp. 296. ISBN 9781781006764 Hbk. £80)

The global financial crisis spawned an academic industry exploring what went wrong. It also, however, triggered a re-examination of the moral and philosophical debates that ensued after the Great Depression, specifically upon the role of planning and government intervention within the economy. The ideological debate between those who defend the free market economy and those who wanted a moral economy in the form of regulation and planning is, of course, nothing new. In 1988 President George H. W. Bush called for 'a kinder and gentler nation', that is, allowing the market economy to have a more defined moral purpose, and equally, generate a fairer society. That sentiment quickly vanished with the great moderation where market economies seemed to perform well and the business cycle had reportedly died. Another American president, George W. Bush, gave tax cuts geared towards the wealthy on the fable that it would give the economy a supply-side boost. It immediately flung America's public finances into deficit. In the last seven years we have seen, too, the bright return of Keynesian economics quickly followed by its eclipse. Keynesianism, not the bail-out of Wall Street, is now blamed for lumbering economies with monstrous public debt.

Stabile and Kozak, who favour government intervention and extensive planning to temper business cycles, explore the perennial debate between the moral economy and the market economy. The book's primary focus is upon the progressive movement which flowered in early twentieth-century America and whether it had any impact on public policy. Despite having a considerable pedigree in progressive economic thought with its founding father, Edward Bellamy, followed by leading thinkers such as Thorstein Veblen, Theodore Roosevelt, and John Maurice Clark, most American economists have always entertained a sceptical view of government involvement within their economy. This was the case even after